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Washington Focus: Marquette University history professor Athan Theoharis, one of the first scholars to use the Freedom of Information Act to effectively uncover the abuses of FBI Director J. Edgar Hoover, died July 10 at the age of 84. In his obituary of Theoharis in the New York Times, Richard Sandomir observed that Theoharis's strategic use of FOIA "enabled him to find pathways to documents through a purposefully evasive filing system that Hoover had hoped no one would ever divine." Professor Beverly Gage, a history professor at Yale University who is writing a biography of Hoover, told Sandomir that Theoharis identified the importance of requesting Hoover's "special agent in charge" orders. Gage explained that "for me, these records gave me an institutional sense of the inner workings of the FBI. He figured out the key words to file the right FOIA requests."

D.C. Circuit Provides Guidance On Foreseeable Harm Standard

While finding that certain email exchanges, such as a defense of its policy of impersonating journalists as part of undercover operations written by former FBI Director James Comey, the D.C. Circuit has rejected many of the FBI's claims that Exemption 5 (privileges) protects the disputed documents. The court also provided further guidance on the level of explanation required from agencies to satisfy the foreseeable harm standard added to FOIA by the 2016 FOIA Improvement Act.

In 2014, an ACLU technologist, while reviewing documents disclosed in response to a FOIA request, discovered evidence that in 2007, while the FBI was investigating a series of bomb threats at Timberline High School in Seattle, the agency had tricked the student bomber into clicking a link disguised as part of a draft article by the Associated Press that was to appear on the website of the *Seattle Times*. By clicking the link, the student installed a spyware program on his computer, which was then used to identify him. Revelation of the incident caused outrage and criticism by media organizations and the Reporters Committee for Freedom of the Press submitted two FOIA requests for records about the agency's policy on impersonating journalists.

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Criticism of the FBI's actions also came from Congress. On November 6, 2014, the *New York Times* published a letter to the editor from then FBI Director James Comey defending the policy. In 2016, the Department of Justice's Inspector General released a report on the policy of impersonating a journalist indicating the FBI had adopted a new interim policy prohibiting the use of such a policy without approval from high-ranking officials.

In response to the RCFP's original FOIA requests, the agency told RCFP that it could find no records. RCFP then filed suit, claiming the agency had failed to conduct an adequate search. During the litigation, the agency located 267 pages, releasing 83 pages in full and withholding the remainder in full or in part. RCFP appealed the decision to the D.C. Circuit. While that case was pending, RCFP also filed two new FOIA requests seeking updated records since the search date of the previous requests. After the FBI failed to respond within the statutory time limit, RCFP filed a related suit in district court.

Meanwhile, the D.C. Circuit ruled in RCFP's first appeal, finding that the FBI had failed to show that it conducted an adequate search. As a result of the D.C. Circuit's decision, the FBI began releasing additional records responsive to both the 2014 and 2017 requests. The FBI disclosed 328 pages in full and withheld 283 pages in full, including 201 pages the FBI determined were duplicates of already released records. RCFP argued that the agency had improperly claimed the deliberative process privilege for various emails and memos. The district court ruled in favor of both the FBI and the Department of Justice and RCFP again appealed to the D.C. Circuit.

Writing for the D.C. Circuit, Circuit Court Judge Patricia Millett found that the agency had properly claimed the deliberative process privilege for the contested emails but not for Factual Accuracy Comments or draft PowerPoint slides. Turning to the Comey email exchange, Millett pointed out that "the emails were part of an internal dialogue about critical judgment calls aimed at advancing the agency's interests in the midst of a vigorous public debate about an FBI undercover policy with a decidedly uncertain future at the time. And while we do not determine whether materials are predecisional based on what decision (if any) was later made, the proof is in the pudding here: The FBI ultimately did change its policies to prohibit agents from impersonating members of the media unless such activity had been expressly approved by high-level Bureau officials." Millett rejected RCFP's claim that the Comey emails focused primarily on interactions with high-level officials rather than the more traditional dynamic of subordinate to supervisor. Millett pointed out that "at the end of the day, key to whether a document is deliberative is whether it is part of the 'give-and-take' of the 'consultative process.' And when such an internal agency dialogue is underway, communications by both the giver and the taker can fall within the privilege."

For the Factual Accuracy Comments, the FBI contended that draft comments it made to the draft OIG report were privileged. But Millett pointed out that "but the FBI did not submit these comments for the purpose of exercising 'editorial judgment,'. . .And the FBI was not the agency authoring the report, it was the subject of the report. So the fact-checking exercise in which the FBI was asked to engage did not call for judgment or the candid exchange of ideas." Millett also found the draft PowerPoint slides were not privileged. She noted that "the government has failed to identify any deliberative component to the draft PowerPoints. They simply describe already-made and in-place policy choices."

Millett added more guidance on what level of explanation was required to meet the foreseeable harm standard for the deliberative process privilege. She noted that "in the context of withholdings made under the deliberative process privilege, the foreseeability requirement means that agencies must concretely explain how disclosure 'would' – not 'could' – adversely impact internal deliberations." She pointed out that "what is needed is a focused and concrete determination of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations

going forward. Naturally, this inquiry is context specific." She indicated that the government had failed to show that the disclosure of the draft OIG report, the Factual Accuracy Comments, or the draft PowerPoint slides would cause foreseeable harm, but that disclosure of the two groups of email exchanges would cause such harm. Noting that the FBI's primary declaration on foreseeable harm "may generously be described as scanty," Millett indicated that the two paragraphs containing its claims "is wholly generalized and conclusory, just mouthing the generic rationale for the deliberative process privilege itself." Millett explained that "we are, in fact, hard pressed to imagine how these assertions differ in any material way from the routine assertions of deliberative process privilege that pre-dated the FOIA Improvement Act. It seems that very little about the FBI's declarations has changed despite the passage of the FOIA Improvement Act and its foreseeability requirement."

The FBI argued that its declarations satisfied the foreseeability test articulated in *Machado Amadis v. Dept of State*, 971 F.3d 364 (D.C. Cir. 2020), the only other D.C. Circuit opinion addressing the foreseeable harm standard. Millett disagreed, pointing out that "unlike the declaration in *Machado Amadis*, [the FBI declaration] did not explain the particular sensitivity of the types of information at issue, or the role that they play in the relevant agency decisional processes." Here, she noted that "both declarations ignore that the agency must specifically and thoughtfully determine whether it 'reasonably foresees that disclosure' of each particular record 'would harm an interest protected by [the] exemption.'" (*Reporters Committee for Freedom of the Press and Associated Press v. Federal Bureau of Investigation and United States Department of Justice*, No. 20-5091, U.S. Court of Appeals for the District of Columbia Circuit, July 2)

Views from the States…

The following is a summary of recent developments in state open government litigation and information policy.

Kansas

The supreme court has ruled that Linus Baker's suit against the Tenth Judicial District for access to audio transcripts taken during a judicial proceeding involving his adult daughter became moot when the court administrator provided the transcripts as part of discovery. Baker made several requests under the Kansas Open Records Act for the transcripts, which were denied each time because the court administrator contended that the transcripts, while available for a fee from the court reporter, were not agency records subject to KORA. Baker filed suit and both the trial court, and the court of appeals ruled against him. When the suit reached the supreme court, the supreme court ruled that while Baker had standing to challenge the denial, once the court administrator provided the transcripts, the case became moot since Baker had received the relief he sought. Rejecting Baker's reliance on *Hajro v. U.S. Citizenship and Immigration Services*, 811 F.3d 1086 (9th Cir. 2016), in which the Ninth Circuit recognized a pattern and practice claim as an exception to the mootness doctrine, the Kansas supreme court indicated that *Hajro* did not apply here, noting that "the constitutional requirement of standing can coexist with a prudential view of mootness that makes room for hearing some cases even when a plaintiff's specific case becomes moot because of a change in circumstances." The dissent argued that dismissing Baker's claim would allow agencies to simply provide records when a plaintiff was near success to moot the case. But the majority pointed out that "such actions are exactly why the pattern and practice doctrine was developed in FOIA cases. Moreover, those actions could support a claim under KORA in an appropriately pled case. Baker's simply is not such a case." (*Linus Baker v. Calvin Hayden, et al.*, No. 117,989, Kansas Supreme Court, July 2)

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Michigan

A trial court has ruled that the University of Michigan improperly redacted information qualifying as "salary records" in response to a request from the Mackinac Center for Public Policy for the total gross salaries for all employees working in the University's Office of Institutional Equity for 2019 and 2020. In response, the University redacted personally identifying information, citing the privacy exemption of the Michigan Freedom of Information Act. The University contended that the term "salary records" was limited to base salary. Rejecting the University's narrow definition of "salary records," the trial court explained that "in common parlance, the phrase 'salary records,' refers to the data maintained by an employer reflecting the amount of money or other compensations disbursed to an employee in exchange for the employee's work." The court added that "an employee's 'salary' is commonly understood to include bonuses, overtime pay, and other forms of compensation, and the employer's salary records incorporate those disbursements as well. Within the FOIA context, a broad construction of 'salary records' comports with the statutory aims." The University also withheld names and salaries under the personal privacy exemption. Indicating that case law did not consider names and salaries as "intimate details" of a "highly personal nature," the trial court noted that "exposure of the University's salary, bonus, and overtime pay decisions allows the taxpayers to learn how the people's money was spent, fulfilling the policy objectives of the FOIA." The University also contended the salary information constituted protected taxpayer information. However, the trial court observed that "plaintiff is not seeking, return information.' This argument is without merit." (*Mackinac Center for Public Policy v. Board of Trustees for the University of Michigan*, No. 21-000026-MZ, Michigan Court of Claims, July 12)

Ohio

The supreme court has ruled that Brian Ames properly stated a claim of action accusing the Portage County Solid Waste Management District Board of Commissioners of failing to hold public meetings. In 2019, the SWMD adopted a consent-agenda procedure, allowing it to approve routine items with a simple "yes" vote. After such a vote, for two meetings in September 2019, the SWMD recessed immediately after the "yes" votes were taken and then resumed its meeting to deal with other county business. Ames requested the meeting minutes and after reviewing them, filed suit, alleging the SWMD was essentially a fictious board conducting no business at its meetings and was in violation of the Open Meetings Act. The court of appeals found that the SWMD was a valid body and that it had not violated the OMA. Ames appealed to the supreme court. The supreme court ruled that the SWMD was a valid body but questioned whether or not Ames had stated a claim on the use of consent-agenda. The court observed that "while the Open Meetings Act does not appear to prevent the board from using consent agendas as a general matter, Ames, has raised a plausible theory – sufficient to survive a motion for summary judgment – that the board's use of a consent agenda in this manner constructively closes its public meetings and is an impermissible end run around the Open Meetings Act." The supreme court also agreed with Ames that the board had failed to disclose an exhibit that was part of its meeting minutes. The supreme court pointed out that "the minutes of the September 17 meeting expressly incorporate an 'Exhibit A' that the board has admitted is not included in the approved minutes and was not produced to Ames in response to his public-records request. The fact that Exhibit A is available from another source is immaterial. The board has a duty to maintain a full and accurate record of its proceedings." (*State ex rel. Brian Ames v. Portage County Board of Commissioners, et al.*, No. 2020-1120, Ohio Supreme Court, July 14)

Wisconsin

A court of appeals has ruled that Susan Meinecke, a trustee of the Village of Grafton, substantially prevailed in her public records litigation against the village for emails of two village employees and is

entitled to attorney's fees. The village withheld some records as privileged and after Meinecke filed suit, the trial court ordered the village to disclose some records. Meinecke then filed for attorney's fees, arguing she had substantially prevailed. The village, however, contended that she had not shown that she had substantially prevailed in the litigation. The trial court denied her fee request and Meinecke appealed. The appeals court explained that "the FOIA definition of 'substantially prevailed' is the functional equivalent of 'prevails. . .in substantial part,' and the analysis employed thereunder, establishes that the inquiry is determining *whether* a party has prevailed, rendering him or her eligible for fees, and not the extent of his or her success in obtaining access to non-exempt records. So, a plaintiff 'substantially prevails' when he or she obtains relief through a judicial order." Applying that standard to Meinecke's litigation, the appeals court noted that "here, the court's order establishes Meinecke prevailed in substantial part. She obtained relief through a judicial order – access to improperly withheld public records, Meinecke has achieved the benefit sought by filing the mandamus action, namely, relief through judicial order requiring access to improperly withheld public records." (*Susan Meinecke v. Jesse Thyes and William Q. Rice*, No. 2020-AP-338, Wisconsin Court of Appeals, July 7)

The Federal Courts…

Judge Rudolph Contreras has ruled that the FBI has shown that **Exemption 7(E) (investigative methods or techniques)** protects records about the FBI's use of its policies for impersonating journalists as part of undercover operations, but that the agency has so far failed to show that **Exemption 7(A) (interference with ongoing investigation or proceeding)** allows the agency to withhold some responsive records. The Reporters Committee for Freedom of the Press submitted a multi-part request to the FBI after learning about the FBI's impersonation of a journalist to trap a student bomber at Timberline High School in Seattle. As part of its follow-on request, the Reporters Committee also learned that the FBI had impersonated a documentary filmmaker during its investigation of rancher Cliven Bundy. The FBI initially issued a *Glomar* response neither confirming nor denying the existence of records, but Contreras rejected the claim and ordered the agency to search for responsive records. The agency located 125,000 potentially responsive records, including 200 audio/video files. The FBI disclosed a small portion of these records but withheld most of them under a variety of exemptions. By the time Contreras ruled, the agency claimed that most of the withheld records were protected by Exemption 7(E), while the remainder were covered by Exemption 7(A). Contreras began by considering and rejecting the Reporters Committee's claim that the foreseeable harm standard included in the 2016 FOIA Improvement Act heightened the showing beyond the "low bar" established by the D.C. Circuit's case law on Exemption 7(E). Contreras disagreed, noting that "applying a higher foreseeability bar 'would mean ignoring the D.C. Circuit's precedents defining Exemption 7(E)'s scope." He pointed out that "to the extent the standards of Exemption 7(E) and the FOIA Improvement Act conflict, the one specific to Exemption 7(E) should control." The FBI argued that the mosaic theory – separate disclosure of otherwise innocuous information could be assembled by a requester to reveal exempt information – covered much of the information. Contreras noted that "forcing the agency to disclose even high-level information about the records of its uses of the filmmaker technique would reveal to wrongdoers how often, where, and when the agency uses the technique. There is little question that divulging an overview of the Bureau's use of the technique over the past eleven years would constitute the disclosure of a law enforcement technique or procedure for purposes of Exemption 7(E)." The Reporters Committee argued the agency had failed to meet its burden for showing the exemption's application. However, Contreras pointed out that "this position 'understates just how low the threshold is to satisfy Exemption 7(E)'s "circumvention of the law" requirement.' Remember, the exemption requires only that an agency 'demonstrate logically how the release of the requested information *might* create a risk of circumvention of the law.' The Bureau has satisfied that

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'relatively low bar.'" The Reporters Committee also contended that some information could be disclosed without risking circumvention of the law. But Contreras pointed out that "when coupled with publicly available information such as news reports or press releases, details like names of those involved in an investigation or the addresses of key locations could reveal which Bureau investigations included the use of the filmmaker technique. The same could be true for the date associated with a document if the document's description mentions a public event or investigatory milestone." The FBI withheld 54 pages under Exemption 7(A). Reviewing the sufficiency of the agency's claim, Contreras found its explanation so far fell short because the agency had not divided the records into functional categories. Citing his concern as to whether records had been disclosed in discovery, he noted that "if it did, now would releasing the information here interfere with his ongoing case? The Bureau does not say, so the Court is left to guess. Similar questions arise with respect to other individuals under investigation. More of an explanation is required." Rather than grant summary judgment to the Reporters Committee on the issue, Contreras indicated that the FBI could provide a more detailed explanation if it chose to do so. (*Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation, et al.*, Civil Action No. 17-1701 (RC), U.S. District Court for the District of Columbia, July 12)

Reconsidering his earlier decision, Judge Randolph Moss has ruled that records identifying individuals who were convicted of a variety of crimes considered by the Justice Department to be terrorism-related are protected by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Based on data published by DOJ that the agency had brought 4,496 terrorism-related prosecutions since 2001 and had obtained 3,772 convictions or guilty pleas, the Brennan Center for Justice requested records from the Executive Office for United States Attorneys' Legal Information Office Network System relating to terrorism, including the docket number associated with the court proceeding in each case. EOUSA withheld all docket numbers under Exemption 6 (invasion of privacy) and Exemption 7(C). In his first decision in the case, Moss relied on *ACLU v. Dept of Justice*, 655 F.3d 1 (D.C. Cir. 2011) and *ACLU v. Dept of Justice*, 750 F.3d 927 (D.C. Cir. 2014), in which the D.C. Circuit ruled that docket numbers in which individuals were acquitted or charges were dismissed were protected under Exemption 7(C), while docket numbers for cases in which individuals were convicted or pled guilty must be disclosed. Based on those two decisions, Moss ordered EOUSA to process the docket numbers requested by the Brennan Center in the manner reflected by the holdings in the *ACLU* cases. DOJ asked Moss to reconsider his decision, arguing that the privacy interests in these docket numbers were greater than previously indicated. However, while reconsidering DOJ's greater privacy interest argument, Moss also concluded that the public interest in disclosure of these docket numbers was also weightier than those present in the *ACLU* cases. After conducting a sampling of cases to determine the extent to which cases may have been miscategorized, DOJ contended that 89 convictions were not publicly linked to terrorism. Moss agreed that because of the uncertainty as to whether some cases did or did not involve terrorism charges, Exemption 7(C) applied. He noted that "disclosure of the LIONS terrorism-related cases, moreover, would not serve the public interest in understanding which *prosecutions* the Department of Justice classifies as terrorism-related and how the Department prosecutes those cases. To be sure, the public might be interested in how the Department handles terrorism-related *investigations*. But specific criminal investigations as opposed to prosecutions, are not generally subject to public disclosure – and for good reason." He added that "the Court concludes that the Department has properly invoked Exemption 7(C) to protect the identities of those individuals who were subject to terrorism-related investigations but were never charged with or convicted of a terrorism-related charge." Moss also found that docket numbers for cases in which the connection to terrorism was only revealed internally and never to the public deserved protection as well. He pointed out that "if the crime of conviction was one that, on its face, bore a connection to terrorism, public disclosure is unlikely to cause serious or unjust harm. But if the crime of conviction bore no obvious connection to terrorism, public disclosure of the Department's internal characterization would not merely open

an old wound but would risk inflicting a new one." (*Brennan Center for Justice v. United States Department of Justice*, Civil Action No. 18-1860 (RDM), U.S. District Court for the District of Columbia, July 1)

Judge Randolph Moss has ruled that the CIA properly issued a *Glomar* response neither confirming nor denying the existence of records in response to a request from the Government Accountability Project for records pertaining to the provision of nuclear technologies to countries in the Middle East. GAP's FOIA request was prompted by reports that former National Security Advisor Michael Flynn and other officials in the Trump administration had proposed plans to increase the use of nuclear power in the Middle East, potentially in contravention of the Atomic Energy Act. GAP's request focused on civil nuclear cooperation with Middle Eastern countries. When the CIA asked for clarification, GAP indicated that it was interested in records regarding civil nuclear cooperation with Egypt, Jordan, and Saudi Arabia. In response, the CIA issued a *Glomar* response citing **Exemption 1 (national security)** and **Exemption 3 (other statutes)**, citing the National Security Act. Moss agreed that the CIA had shown the records were protected under the Executive Order on Classification. He pointed out that "it is not particularly challenging to see how disclosure of whether the CIA possesses records responsive to GAP's FOIA request 'could reasonably be expected to cause identifiable or describable damage to the national security.' The United States depends on its intelligence agencies to carry out their missions and the CIA depends on secrecy to do so. [The agency's affidavit] attests that compelling a non-*Glomar* response here would imperil the CIA's ability to carry out its mission. And it is certainly 'logical' or 'plausible' to view the risks that [the agency's affidavit] identifies as presenting a legitimate threat to national security." GAP argued that it was not seeking any intelligence information. But Moss observed that "but even accepting that construction of GAP's request, whether the CIA retains records about 'civil nuclear agreements' between the United States and the three countries in the Middle East that GAP identified – Egypt, Jordan, and Saudi Arabia – would *itself* reveal the presence or absence of a particular CIA intelligence interest that is protected from disclosure by Executive Order 13526. The question is not, then whether GAP seeks intelligence information – it is whether a non-*Glomar* response would reveal it." Moss also rejected GAP's argument that the existence of records had been officially acknowledged through a report of the House Government Oversight Committee. He noted that "this is a far cry from 'official acknowledgement.'. . .Here, there exists only a congressional report recounting a private businessman's two emails and a reference to efforts made by [the company] 'to promote their plan with high-level stakeholders.' The 'strict' official acknowledgement doctrine requires more." Moss also observed that any official acknowledgement had not come from the CIA itself. He pointed out that "GAP has adduced no evidence that the CIA itself – or any other executive agency or department for that matter – has ever acknowledged the records that GAP now seeks. That too vitiates GAP's reliance on the official acknowledgment doctrine." (*Government Accountability Project v. Central Intelligence Agency*, Civil Action No. 19-449 (RDM), U.S. District Court for the District of Columbia, July 7)

Judge Randolph Moss has ruled that Alexander Matthews, who was convicted of bank fraud and wire fraud in 2011 in the Eastern District of Virginia pursuant to a plea agreement and sentenced to 120 months in prison, failed to show the existence of an alleged draft plea agreement he believed would help to substantiate his claims of ineffective assistance of counsel, resulting in a new trial. In 2012, Matthews filed a motion under 28 U.S.C. § 2255, arguing that his sentence should be reconsidered because of ineffective counsel on the theory that his attorney had failed to inform him of a more favorable early plea offer. During the § 2255 proceedings, Assistant U.S. Attorney Ryan Faulconer, who originally prosecuted Matthews, denied the existence of any plea offer other than the one Matthews ultimately accepted. In 2013, Matthews submitted a FOIA request to the FBI for all records pertaining to him. The agency located 651 pages, disclosing 265 pages in full or in part, and withholding 386 pages pursuant to various FOIA exemptions. Matthews filed suit *pro se*. During the litigation, he became aware of a draft plea agreement mentioned by the FBI in a memorandum in support of its initial motion for summary judgment. In 2020, Matthews filed a motion arguing that the FBI's

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reference to a daft plea agreement proved that Faulconer had lied by saying no other plea agreement existed and that, as a result, Moss should use his inherent equity power to right the alleged wrong. Rejecting the motion, Moss indicated that "because this Court is not Matthews's sentencing courts, it is without jurisdiction to hear any § 2255 motion Matthews may raise." Matthews argued that Moss had jurisdiction through his FOIA litigation. But Moss pointed out that "courts in this district have consistently held that a plaintiff cannot convert a cause of action arising under FOIA into a collateral attack on his conviction." He observed that "neither inherent nor equitable powers allow the Court to. . .vacate the judgment of another district court." (*Alexander Otis Matthews v. Federal Bureau of Investigation*, Civil Action No. 15-569 (RDM), U.S. District Court for the District of Columbia, July 7)

A federal court in New York has ruled that that FBI properly issued a *Glomar* response neither confirming nor denying the existence of records in response to Henry Platsky's FOIA request for records pertaining to whether he had been placed on a terrorist watchlist in the run-up to the 1990 Gulf War. The FBI initially referred him to the National Archives because its computer search showed records on Platsky had been archived there. Platsky then contacted NARA and found those files did not contain any of the records he was seeking. He then reframed his FOIA request to ask if he had been placed on the terrorist watchlist in 1990. In response to that request, the FBI issued a *Glomar* response on the basis of Exemption 7(E) investigative methods or techniques). Platsky filed an appeal, which was denied. He then filed suit. The court agreed with the agency, noting that "accordingly, and in line with several courts in this Circuit who have considered Platsky's past FOIA claims, the Court concludes that the FBI established that it properly responded to Platsky's FOIA request for information about whether his name appeared on a watch list in 1990 or 1991 by refusing to confirm or deny such information pursuant to Exemption 7(E)." (*Henry Platsky v. Federal Bureau of Investigation*, Civil Acton No. 20-573 (JPC), U.S. District Court for the Southern District of New York, July 2)