

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	CRIMINAL NO.:
	:	
v.	:	<u>UNDER SEAL</u>
	:	
Ahmed Abu Khatallah,	:	
also known as Ahmed Mukatalah,	:	
	:	
Defendant.	:	

**GOVERNMENT’S MOTION TO SEAL THE CRIMINAL INDICTMENT AND TO
DELAY ENTRY ON THE PUBLIC DOCKET OF THE FILING OF THIS MOTION TO
SEAL AND THE COURT’S ORDER TO SEAL**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this Motion to Seal the accompanying criminal Indictment for Ahmed Abu Khatallah, also known as Ahmed Mukatalah (hereinafter referred to as “the defendant”), in the above-captioned case, as well as the Government’s Motion to Seal and the Court’s Order sealing the aforesaid documents until further order of the Court. The United States also respectfully moves the Court to delay entry of those documents on the public docket. The United States will orally move to unseal the Indictment at the defendant’s initial appearance in this case. In support of its Motion, the Government states as follows:

Today, the United States anticipates that an initial Indictment will be filed against the defendant, charging him with Conspiracy to Provide Material Support and Resources to Terrorists Resulting in Death, in violation of 18 U.S.C. § 2339A. The Indictment in this case stems from the September 11-12, 2012, terrorist attack in Benghazi, Libya, that resulted in the deaths of four United States citizens. This attack was committed, at least in part, by an extremist

group known as Ansar Al-Sharia (“AAS”).

AAS is an Islamist fundamentalist group operating in eastern Libya. It is heavily armed and runs several military-type training camps in eastern Libya. AAS is believed to be responsible for multiple violent attacks against the Libyan government as well as Western institutions in Benghazi, including the British consulate and the International Red Cross. AAS has publically advocated its jihadist views against the West and is known to be associated with other violent fundamentalist groups throughout the world.

On January 14, 2014, the Department of State announced the designation of AAS in Benghazi as a Foreign Terrorist Organization (FTO) under Section 219 of the Immigration and Nationality Act and as a Specially Designated Global Terrorist entity under section 1(b) of Executive Order (E.O.) 13224. In addition, the Department of State designated the defendant, who was described as a senior leader of AAS in Benghazi, as a Specially Designated Global Terrorist under E.O. 13224.

Even though the defendant was captured on June 15, 2014, and is currently in custody outside the United States, the AAS in Benghazi that he led remains intact in Benghazi. His militia, designated as an FTO by the Department of State, has demonstrated a willingness to carry out acts of violence on his behalf and on behalf of the jihadist cause. Indeed, there has been public reporting that AAS in Benghazi has offered a \$10 million reward for the capture of the U.S. Ambassador in Libya, in response to Khatallah’s capture. This is of particular concern because witnesses remain in Libya or within the reach of his militia. The United States seeks to keep this Indictment under seal until the defendant’s initial appearance in this case to maintain operational security in bringing the defendant before the Court and to protect ongoing efforts to

ensure the safety of witnesses. At the defendant's initial appearance, the United States will orally move to unseal the Indictment.

The Supreme Court has noted that “[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” *Nixon v. Warner Communs., Inc.*, 435 U.S. 589, 598 (1978). *See also United States v. Hubbard*, 650 F.2d 293, 315 (D.C. Cir. 1981). For example, as noted by the D.C. Circuit in *United States v. Hubbard*, court documents have been sealed to protect the secrecy of ongoing criminal investigations. *Id.* at 316, n. 84 (citing *In re Sealed Affidavits*, 600 F.2d 1256 (9th Cir. 1979)); *Shea v. Gabriel*, 520 F.2d 879, 880, 882 (1st Cir. 1975); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1141 (D.C. Cir. 2006) (acknowledging the need to seal court documents to avoid interfering with an ongoing investigation by special counsel). Federal courts are empowered to seal documents in appropriate circumstances. *Cf.* Fed. R. Crim. P. 6(e)(4) (sealing of indictments); Fed. R. Civ. P. 26(c)(1) (sealing discovery to avoid embarrassment); Fed. R. Civ. P. 5 (granting federal courts supervisory power over pleadings). The sealing of a case is appropriate where there exists an extraordinary situation and a compelling governmental interest, *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991), such as taking a defendant into custody, *United States v. Michael*, 180 F.2d 55, 57 (3d Cir. 1949); *see also United States v. Sharpe*, 995 F.2d 49 (5th Cir. 1993); *United States v. Southland Corp.*, 760 F.2d 1366, 1379-80 (2d Cir. 1985); *United States v. Lyles*, 593 F.2d 182 (2d Cir. 1979) (a charging document may be sealed for any legitimate prosecutorial reason, including to take the defendant into custody and bring him or her before the court), or protecting an ongoing criminal investigation. *See generally Globe Newspaper v. Superior Court*, 457 U.S.

596, 606-07 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1985); Christopher K. Descherer & David L. Fogel, *Criminal Procedure Project*, 84 Geo. L. J. 1115, 1226 (1996) (courts have found the protection of ongoing government investigations a sufficiently compelling interest to justify sealing).

Although the defendant is in United States custody, sensitive operational considerations remain regarding the timing, circumstances, and methods of how and when the defendant will be brought to the United States. By revealing the timing of the filing of formal charges, any unsealing of the Indictment at this time, prior to the defendant's initial appearance, could potentially jeopardize sensitive operations designed to bring the defendant to the United States and before this Court.¹ Further, the United States is taking steps at this time to ensure the safety of foreign witnesses. At this time, any information about the timing of the Indictment and nature and scope of the initial charge may pose a threat to those witnesses.

In this matter, there is ample reason for the Court to exercise its authority to seal the Indictment. Each of these factors is particularly important in this instance because of the violent propensity and capability of the AAS, a designated FTO. The D.C. Circuit in *Hubbard* identified six factors as relevant in assessing the propriety of sealing court records: (1) the need for public access to the documents; (2) whether the public had prior access to the documents; (3) whether any objections have been raised to sealing or unsealing the documents and the identity of those objecting; (4) the strength of the generalized property and privacy interests asserted in the documents; (5) the possibility of prejudice; and (6) the purpose for which the documents were

¹ The defendant was charged by complaint on July 15, 2013, nearly a year before his capture. That complaint (but not the affidavit filed with it) was unsealed on June 17, 2014. The public filing of an Indictment before the defendant's initial appearance would likely be interpreted – rightly or wrongly – to mean that the defendant's appearance before the Court is imminent.

introduced. *Hubbard*, 650 F.2d at 317-22. An analysis of the *Hubbard* factors weighs strongly in favor of granting the Motion to Seal.

First, there is no demonstrable need for the public to access the criminal Indictment and related documents at the present time. A sufficient justification for the sealing of court documents exists when the Government is trying to avoid compromising a sensitive operation to bring the defendant to the United States and to take steps to ensure witness safety. *Cf. Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (recognizing that a valid justification for sealing a plea agreement may be that its release could threaten an ongoing criminal investigation).

The second *Hubbard* factor is not implicated in this matter, as the public has not had prior access to these documents. It should be noted that the public has generally been apprised of charges against the defendant through the unsealing of the existing criminal complaint. Similarly, the third *Hubbard* factor is not affected because no objections have been raised by any member of the public.

Consideration of the fourth *Hubbard* factor strongly favors granting the Motion to Seal. The documents sought to be sealed constitute the filings of the United States, which has a strong interest in safeguarding sensitive operational considerations until the defendant's initial appearance before the Court.

Fifth, public disclosure of these documents would have a significant prejudicial effect on the case, as discussed above. Although the defendant is in United States custody, sensitive operational considerations remain regarding the timing, circumstances and methods of how and when the defendant will be brought to the United States. Further, several of the defendant's co-

conspirators are armed members of AAS and remain at large in Libya. The public disclosure of the Indictment at this time would potentially threaten the safety of witnesses and their families. Each of these factors is especially important in this instance because of the violent propensity and capability of the AAS, a designated FTO.

Sixth, the purpose of the criminal Indictment is to prosecute the defendant for the charge set forth therein. Premature public disclosure of the Indictment and related documents would undermine that purpose, given the concerns related to sensitive operational considerations and ensuring the safety of witnesses if the Indictment were disclosed at this time.

The United States submits that these factors present an extraordinary situation and a compelling governmental interest which justify the sealing of the Indictment and related documents and which similarly justify the delayed entry of those documents on the public docket. Accordingly, the United States requests that the Court issue an Order sealing the Indictment, this Motion to Seal, and the Order to Seal, until further Order of the Court. The United States will orally move to unseal the Indictment at the defendant's initial appearance in this case.

In addition, the United States requests that the Order to Seal permit disclosure of the Indictment and the Order to Seal to appropriate law enforcement, diplomatic, intelligence, military, INTERPOL or other personnel, both in the United States and internationally, to the extent that such disclosure is in furtherance of national security, or discussions related to the defendant's transportation or detention.

WHEREFORE, for all the foregoing reasons, the United States respectfully requests that the Court issue an Order sealing (except to the limited extent specified herein) the Indictment, this Motion to Seal, and the Court's Order to Seal until further Order of this Court, and further requests the delayed entry of those documents on the public docket. The United States will orally move to unseal the Indictment at the defendant's initial appearance in this case. A proposed Order is submitted herewith.

Respectfully submitted,

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