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DUE PROCESS AND TERRORISM SERIES



TRYING TERRORISTS  
IN ARTICLE III COURTS  
CHALLENGES AND LESSONS LEARNED



A POST-WORKSHOP REPORT  
JULY 2009

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AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON  
LAW AND NATIONAL SECURITY

NATIONAL STRATEGY FORUM

MCCORMICK FOUNDATION

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*The "Trying Terrorists in Article III Courts" Workshop was not for attribution.*

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TRYING TERRORISTS IN ARTICLE III COURTS:  
CHALLENGES AND LESSONS LEARNED  
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# I. FOREWORD

As the new Administration works to develop a sustainable approach to counterterrorism detention policy, at least one conclusion is already apparent: the criminal justice system will remain a critical means for the foreseeable future for detaining individuals who have engaged in terrorist conduct. The use of the federal courts for prosecuting suspected terrorists is hardly new. According to the Department of Justice, U.S. federal prisons today house more than 200 inmates with a connection to international terrorism. The “terrorism” chapter of the federal criminal code now identifies some dozen different offenses, many criminalizing conduct occurring outside the United States. The number of other federal crimes that are charged in terrorism prosecutions is much larger still. And the American bar, given the number of criminal terrorism trials during the past two decades, has a growing community of prosecutors, defense attorneys, and federal judges with deep experience in handling terrorism trials.

Yet while terrorism cases may not be new to the federal courts, neither are they conducted without challenges. Criminal defendants have a constitutional right not only to confront the evidence against them, but also to discover from the government any material information that may tend to prove their innocence. When information has been properly classified by the government in accord with national security interests, will a summary of the information suffice to protect the rights of the accused? Likewise, an individual taken into custody on suspicion of criminal activity is typically entitled to be advised promptly, of his rights, including his right to remain silent and to be represented by counsel – rights that help ensure due process. Nevertheless, when military or intelligence officials seize a suspect overseas, and for purposes other than domestic law enforcement, such warnings may seem irrelevant at best. If it later becomes clear that criminal prosecution might be an appropriate course, is it possible to cure the initial failure to warn? And even in the most practical terms, where cases involve large volumes of classified information, how can Article III judges, their clerks and staff, function to protect the security of that information?

Whether or not the law already has prescribed uniform answers to these questions, the lawyers and judges who have faced them have accumulated a range of practical insights worth sharing. The workshop notes that follow reflect the wisdom of those experienced professionals, and highlight many of the issues that go to the heart of debates about what aspects of the fight against terrorism the criminal law is capable of addressing. The participants unsurprisingly did not agree in every respect on the limits of the criminal law in countering terrorism; their differences as well as their points of agreement are recorded in the report. The report is most valuable, not for its conclusions, but for its description of the

nuanced workshop discussions. The goal was to illuminate the issues rather than derive agreed-upon recommendations. The report presents the insights and views of the relevant experts, informed by their respective experiences, knowledge, and interactions at the workshop itself. Hopefully, these reports will in turn inform the discussions of policymakers and the public on these vital issues.

Differences among the group notwithstanding, one of the most oft-repeated observations of the workshop was one on which there was broad consensus: the challenges that may surround terrorism prosecutions vary enormously case by case. Some cases can be handled readily within existing rules; others may require painstaking negotiations between law enforcement and intelligence professionals, and novel solutions by judges, to proceed to conclusion. As in other complex criminal settings, the federal courts have stretched to meet these varied tests with enormous institutional skill, creativity and flexibility – characteristics that are among the courts’ greatest assets. Approaches to handling terrorism cases going forward would do well to build on the strengths of our judicial system.

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## II. REPORTERS' NOTE

The following report was prepared by Ashley Inderfurth and Wayne Massey ("the reporters") based on their notes of the workshop discussion and the editorial comments of the workshop discussants. The reporters attempted in good faith to set forth an accurate record of the discussion, including its more nuanced details and general tenor. The report distinguishes between points of consensus, substantial agreement, some agreement, and disagreement or contrast. However, even points characterized as consensus or substantial agreement are not generally points on which there was complete or uniform agreement.

In order to report the discussion accurately and to ensure that the report is factually accurate, the reporters added background and introductory information, primarily in footnotes or at the beginning of report sections. The reporters intended that the additional information would help to clarify the discussion for the reader.

### III. OVERVIEW

On April 24, 2009, a group of thirty-three legal experts, scholars, and practitioners in the field of national security law gathered at Bingham McCutchen, LLP in Washington, D.C. for a day-long workshop entitled “Trying Terrorists in Article III Courts.” The participants were drawn from the government, the judiciary, the private sector, and academia, and were encouraged to express their diverse interests and viewpoints during the discussion. The participants spoke under Chatham House Rule, meaning that their remarks were recorded without attribution. Sixteen observers, including members of the Obama Administration Task Force on Detention Policy, also were present for the discussion.

The workshop, the second in a series on related topics,<sup>1</sup> focused on major challenges associated with prosecuting, defending, and managing terrorism cases in the Article III criminal court system. The discussion points of the workshop were somewhat foreshadowed by the Standing Committee’s previous report, *Due Process and Terrorism*.<sup>2</sup> The discussants were asked to consider two questions: what are the challenges to trying terrorist suspects in Article III courts, and is it possible to address those challenges within existing legal constraints? The participants were asked to consider in particular: (1) issues concerning classified and sensitive evidence, (2) challenges arising from the application of constitutional procedural and federal evidentiary rules to terrorism trials, and (3) problems of trial management and security. These topics will be addressed in detail in the following report.

In framing the day’s discussion, the moderators requested that the discussants consider *only* the relative merits and demerits of the Article III court system, and refrain from debating other potential forums for terrorist prosecutions. The discussants generally stayed within the articulated framework; it was anticipated that the workshop discussion would provide a baseline for broader debates regarding the appropriate forum for terrorism trials.

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<sup>1</sup>The first workshop in the series was entitled “Due Process and Terrorism.” See AMERICAN BAR ASSOCIATION (ABA) STANDING COMMITTEE ON LAW AND NATIONAL SECURITY ET AL., *DUE PROCESS AND TERRORISM* (2007) (discussing, primarily, cases pending at that time in which the Supreme Court considered what, if any, process was due to terrorist suspects detained by the U.S. Government), available at [http://www.abanet.org/natsecurity/publications/due\\_process\\_and\\_aba\\_stcolns\\_nsf\\_mtf.pdf](http://www.abanet.org/natsecurity/publications/due_process_and_aba_stcolns_nsf_mtf.pdf) [hereinafter Standing Committee Report on Due Process & Terrorism].

<sup>2</sup>See *id.* at 17–18 (discussing, briefly, some of the problems associated with trying terrorists in regularly-constituted Article III courts).

## OVERVIEW

The goal of the workshop was not to reach definitive solutions to the problems confronting the Article III system in trying suspected terrorists, but rather, to determine where the real challenges lie and which issues have been exaggerated or already resolved. However, throughout the workshop discussion, a few conclusions and principles emerged. The following list of conclusions and principles, while accurate, necessarily glosses over some of the more nuanced points in the discussion that are accounted for in more detail in the following sections. Thus, the following points should be considered in the context of the report as a whole because the context is vital to understanding the issues surrounding each point.

- Some of the problems that exist in terrorism trials are substantially similar to those presented in other criminal contexts, such as trials of mob-related crimes. Some of the procedures and practices developed for trying such cases are adaptable to terrorism trials.
- Many of the *ad hoc* procedures developed by the courts to manage terrorism trials have been effective. There is, however, a steep learning curve for judges and courthouses when it comes to trying terrorist suspects. In addition and as pointed out in more detail to follow, several discussants were concerned with the cases never pursued in Article III courts and the potential problems that will arise if those types of cases are pursued in regular Article III courts in the future.
- *Pro se* defendants in terrorism trials have posed challenges to the Article III courts in both time and resources. There are mechanisms already available to address this issue, including the revocation of the *pro se* right for consistently disruptive defendants.
- Some of the challenges associated with terrorism trials are posed by constitutionally mandated safeguards, and thus, the use of an alternative forum to the regular Article III courts (such as a national security court) may not alleviate some of the challenges.
- Not all of the issues facing Article III courts in terrorism trials can or should be solved by Congress, because some issues are constitutional in nature and others are too particular and technical to be remedied by statute.
- The death penalty increases the government's discovery burden in some



terrorism cases. Thus, the government would mitigate some practical and foreign relations challenges by not seeking the death penalty. Generally, however, the discussants did not assert that the government should forgo the death penalty in terrorism cases as a matter of policy.

- Despite the fact that the “wall” between the intelligence and law enforcement communities ostensibly has come down, there remains some distrust between these groups with regard to both reliable evidence collection and protection of classified and sensitive information.
- Active participation by the Department of Justice’s court security officers is imperative to the effective management of terrorism trials, and the government should allocate additional resources to assist them in their work.
- The Law of Armed Conflict governs the treatment of terrorist suspects captured on the battlefield. However, the discussants did not consider a precise definition for the nature and scope of the “battlefield” in the context of the present conflict.

Several participants cautioned that most of these points are based only on those terrorism cases that have been tried in Article III courts to date, and that such cases do not afford a complete database for assessing the sufficiency of the Article III system. They noted that the success of the Article III criminal system may be overstated because there is no record of the terrorism prosecutions that the government never pursued as a result of challenges associated with the Article III courts. Several discussants suggested that the government, for reasons they felt they could not publicly disclose, came very close to withdrawing past terrorism cases because of challenges associated with the Article III system, and may have made compromises to pursue those cases in the Article III courts. Partly as a consequence of this reasoning, some of the discussants suggested that while it is generally desirable to prosecute terrorism cases in Article III criminal courts, there may be some class of cases that require a backstop to the Article III framework to deal with terrorist suspects who may pose a threat to national security but who cannot be prosecuted successfully. The dearth of empirical information on terrorism cases never pursued led several discussants to the following conclusion:

- It should be possible, and would be helpful for future debate and decision-making regarding the sufficiency of Article III terrorism trials, to gather empirical information to characterize the subset of terrorism cases not prosecuted due to challenges in the Article III system.

While the workshop participants did not reach substantial agreement that the Article III system is capable of handling all terrorism trials, they did note generally that the courts have resolved past cases in a satisfactory manner. Some discussants remarked that many of the challenges facing the courts have been considered and managed in other contexts, implying that the courts need not create an entirely new procedural framework for most terrorism trials. Looking ahead, the discussants noted that legislation may not be appropriate to resolve all of the known issues and that the Article III courts may be better suited to resolve some of the issues without legislative intervention.

## IV. CLASSIFIED AND SENSITIVE EVIDENCE

### A. Background and Introduction

Central to the challenge of trying terrorist suspects in the Article III courts are the issues associated with the use of classified and sensitive information.<sup>3</sup> Congress enacted the Classified Information Procedures Act (CIPA) in 1980 to respond to the problem of “greymail,” a defense tactic that often forced the government either to disclose classified evidence or to dismiss its case altogether.<sup>4</sup> In modern cases, CIPA is used to protect classified information in criminal trials generally by permitting the trial court to make pretrial judgments regarding the relevance, use, and admissibility of such information *in camera* and *ex parte*.<sup>5</sup> Where the classified information is relevant to a criminal prosecution, the judge can permit the government to disclose summaries of or substitutions for the evidence in lieu of the actual evidence.<sup>6</sup> Some of the most complex decisions arise when classified information is so central to a defense that a summary or substitution would be inadequate.<sup>7</sup> In such situations, trial courts might preclude

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<sup>3</sup>For the purposes of this report, the terms “sensitive evidence” and “sensitive information” refer to unclassified evidence the use of which remains sensitive for various reasons, including evidence obtained through cooperation with foreign governments or their intelligence and security agencies and evidence that reveals intelligence gathering priorities, methods, or sources in the aggregate. See *infra* note 9 for a short discussion regarding the protection of sensitive information at trial.

<sup>4</sup>In cases arising prior to the Classified Information Procedures Act (CIPA), defendants would sometimes threaten to use classified information already in their possession or to discover classified information as evidence in a criminal case. This action would force the government to evaluate whether the criminal prosecution was actually worth the disclosure. Thus, the government was forced to confront the dilemma of disclosing or withdrawing its case. The term “greymail” refers to the actions of a defendant who places classified information at issue in this manner. Though similar to the term “blackmail,” “greymail” is not always the product of unscrupulous or nefarious conduct by the defense. See S. Rep. No. 96-823, at 3 (1980) (quoting Former Assistant Attorney General Philip Heymann as noting that “wholly proper defense attempts to obtain or disclose classified information may present the government with the same [dilemma].” Whether CIPA has eliminated all instances of “greymail” is unclear. See STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 863 (4th ed. 2007) (noting an instance in which, reportedly, the defense team admitted to “greymailing the government” in *United States v. Lee*, 90 F. Supp. 2d 1324 (D.N.M. 2000), over a decade after Congress enacted CIPA). In modern cases, CIPA is invoked chiefly in cases where a defendant does not already have access to classified information, but seeks access to it under criminal discovery rules or the *Brady* doctrine. The *Brady* doctrine will receive additional consideration *infra* Part IV. B.

<sup>5</sup>See CIPA, 18 U.S.C. app. III § 6 (2006).

<sup>6</sup>See *id.* at § 6(c).

<sup>7</sup>See *id.* (stating that the court shall only grant summaries or substitutions where it “will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information”).

certain evidence from being introduced or simply dismiss certain counts of an indictment. At worst, the government may be forced to decide between either disclosing the evidence to the defense or simply withdrawing its case altogether to prevent disclosure. Thus, even where CIPA applies, the government may still face a “greymail”-like situation in some cases if the classified information is highly relevant to the defense and a summary or substitution would prove inadequate.

While CIPA has been instrumental in limiting “greymail” in criminal trials, it is inapplicable by its terms to other relevant proceedings, such as habeas challenges and civil cases,<sup>8</sup> and does nothing to safeguard sensitive but unclassified information.<sup>9</sup> While these limitations do not hinder criminal trials generally, they create some challenges for handling terrorism cases in the Article III courts.

Thus far, the Article III courts have remained flexible in handling these issues. For example, the courts have exercised their inherent trial management authority to craft CIPA-type rules to safeguard classified evidence in habeas proceedings.<sup>10</sup> However, questions remain regarding whether it is desirable or appropriate for the courts to craft these rules on their own.

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<sup>8</sup> See CIPA, Pub. L. No. 96-456, 94 Stat. 2025, 2025 (1980) (“An Act to provide certain pretrial, trial, and appellate procedures for *criminal cases* involving classified information.”) (emphasis added).

<sup>9</sup> See CIPA, *supra* note 5, at § 1(a) (defining “Classified information” as “any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security”). While CIPA does not deal directly with sensitive but unclassified information, Article III courts have at least some discretionary authority to protect such information. See Fed. R. Crim. Pro. 16(d)(1) (“[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party’s statement under seal”).

<sup>10</sup> See, e.g., *Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009) (directing, on remand, that the district court apply CIPA-type procedures in a habeas proceeding). In addition, courts have applied the CIPA framework in the criminal context in cases where CIPA itself is inapplicable to the type of evidence at issue. See, e.g., *United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 21263699, \*2–3 (E.D. Va. Mar. 10, 2003) (applying the CIPA framework despite noting that CIPA does not apply by its terms), *appeal dismissed* 333 F.3d 509 (4th Cir. 2003), *reh’g & reh’g en banc denied* 336 F.3d 279 (4th Cir. 2003).

In approaching the issues associated with classified and sensitive evidence, the workshop discussants attempted to distinguish between issues arising in all complex criminal litigation and those that are unique to terrorism trials.

## **B. The Interaction between CIPA and *Brady***

The workshop participants generally agreed that the use of classified evidence in a terrorism trial poses special problems in prosecuting, defending, and adjudicating terrorism cases in the Article III courts. One such problem arises during pretrial proceedings, in which the defendant is entitled to discover any “material” evidence in the government’s possession that may be favorable to the defense.<sup>11</sup> Under CIPA, the trial judge may conduct *ex parte* hearings to determine the materiality of classified evidence. The relevance of evidence, and whether that evidence is exculpatory and must be disclosed under *Brady v. Maryland*,<sup>12</sup> is not always clear. In addition, the trial judge often makes pretrial determinations without the benefit of the adversarial process and without knowing the defendant’s theory of the case. If a piece of classified evidence is particularly exculpatory under the defendant’s theory of the case but irrelevant under other theories, then the judge inadvertently may deny the defendant access to such information simply because she did not know the defendant’s theory. Alternatively, the court may determine that certain evidence is material and that a substitution or summary is inadequate. In such cases, the government would be required to choose whether to disclose the relevant information, accept a sanction, or in some rare cases, forgo the prosecution.<sup>13</sup> The government would then

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<sup>11</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”). For the purposes of this report, the term “*Brady* determination” means the process by which the government determines whether information is exculpatory or inculpatory and material or immaterial. The term “*Brady* materials” means those materials that that government must produce to the defense upon request under the holding in *Brady*.

<sup>12</sup> See *id.*

<sup>13</sup> See CIPA, *supra* note 5, at § 6(e)(2) (providing, in part, that “when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order other such action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to (A) dismissing specified counts of the indictment or information; (B) finding against the United States on any issue as to which the excluded classified information relates; or (C) striking or precluding all or part of the testimony of a witness.”).

be faced with the choice of either dismissing certain counts of the indictment or revealing classified information that could be of use to terrorist networks.

The discussants generally agreed that making early determinations *ex parte* is difficult enough without weighing such significant consequences in the balance. Some discussants agreed that the better approach under CIPA is to permit defense counsel to participate in the pretrial hearings, noting that CIPA permits but does not require the majority of pretrial hearings to be held *ex parte*.<sup>14</sup> Another discussant suggested that the court should permit defense counsel to explain the defense's theory of the case in an *ex parte* pretrial hearing before making any CIPA determinations, given that the defense theory may change the relevance of certain classified information.

However, even when the courts permit the defense to argue materiality in pretrial hearings, other problems for the defense may still arise. The defense counsel may have to argue without the benefit of having seen the classified evidence directly. Some discussants suggested that a practice bar of security-cleared defense attorneys could mitigate some of these issues. Where a court includes a security-cleared defense counsel in the majority of pretrial materiality hearings, the defendant at least can confront the opposing evidence by proxy. However, the discussants noted that the defendant would still remain foreclosed from contributing fully to his own defense because defense counsel and defendant could not discuss classified evidence directly.<sup>15</sup> Moreover, CIPA includes provisions for some situations where even a security-cleared defense counsel would be precluded from examining evidence submitted *ex parte*, absent the court denying the government's request to keep the information or materials embargoed.<sup>16</sup>

Some discussants speculated that the cumulative effect of these early determinations degrades the quality and fairness of the trials, but there was no consensus on this point. The discussants did generally agree, however, that the

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<sup>14</sup> CIPA only requires *ex parte* pretrial hearings where the U.S. Attorney General certifies by affidavit "that disclosure of classified information would cause *identifiable damage* to the national security of the United States" and provides "the basis for the classification of such information." CIPA, *supra* note 5, at § 6(c)(2) (emphasis added).

<sup>15</sup> Defense counsel is unable to disclose particular classified information to her own client in most cases because terrorist suspects have not received the requisite security clearance.

<sup>16</sup> See CIPA, *supra* note 5, at § 4.

outcomes of many terrorism cases in the Article III courts are decided during pretrial discovery because of the early CIPA (and *Brady*) determinations. This being the case, there was some discussion without conclusion as to whether the judge-crafted solutions should be adopted as uniform Article III court procedures for future terrorism trials, as either statutory amendments to CIPA or judicial procedures for trial management.

### C. Foreign Relations and Intelligence Challenges

There was substantial agreement among the workshop participants that the government faces unique foreign relations and intelligence issues when using classified and sensitive evidence obtained through foreign liaison relations for terrorism trials in a public Article III court. Some discussants agreed that these issues were partly legal and partly political, and that all of these issues have the potential to threaten either successful prosecution or important intelligence relations. The following is a brief account of many discussants' concerns with the foreign relations and intelligence challenges of trying terrorists in Article III courts.

*First*, the disclosure of evidence in some terrorism trials may force a decision about whether to expose important intelligence gathering priorities, methods, and sources. This exposure may lead to conflicting interests between U.S. intelligence and law enforcement agencies; the risk of conflict is no less substantial when using sensitive evidence as opposed to classified evidence.<sup>17</sup> In addition, it is not always clear at the outset which intelligence information will be valuable in the future, meaning that intelligence agencies are resistant to disclosing any intelligence information unless its secrecy can be adequately safeguarded

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<sup>17</sup> When viewed in the aggregate or as a “mosaic,” even unclassified information can reveal important intelligence gathering priorities, methods, and sources. See, for example, *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978), while evaluating a claim of executive privilege: “It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.” See also *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972) (“The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.”).

and its use will result in meaningful benefits to the government.

*Second*, the use of classified and sensitive evidence obtained from the intelligence arm of a foreign government can pose an obstacle to future cooperation between the United States and the foreign government. Intelligence information is often shared between governments with the express understanding that such cooperation will remain secret. In terrorism trials, the prosecution may face the dilemma of either (i) turning over the evidence of foreign cooperation and thereby undermining the trust of the foreign government, (ii) proceeding with litigation on a more restricted set of evidence, or, in some rare cases, (iii) withdrawing some charges against the defendant.

*Third*, where a secret informant only cooperates with U.S. intelligence under assurances that she will never be identified or have to testify in an American courtroom, prosecutors and intelligence officials may be faced with losing a valuable intelligence source for the purpose of prosecuting a single (or a small group of) terrorist suspect(s). The higher value the informant, the less likely the intelligence service will agree to such disclosure, meaning that the prosecution may be forced to proceed on significantly less evidence. This problem also arises where the source is a foreign intelligence agent barred from testifying in an American courtroom by her own government. A few discussants argued, however, that these were merely practical barriers for the prosecution that can be, and in past cases have been, overcome, for example, by renegotiating with an intelligence source or engaging in diplomacy with a foreign government on a case-by-case basis. Some discussants urged that criminal prosecutors often handle issues pertaining to reluctant and secret witnesses, meaning that prosecutors can continue to do so in terrorism trials. However, other discussants disagreed, asserting that the national security, intelligence, and foreign relations implications of handling secret witnesses in terrorism trials are different and more complex than secrecy considerations typically at issue in traditional criminal trials.

*Fourth*, there was general consensus that the government increases its discovery burden in terrorism cases when it seeks the death penalty. Thus, a majority of the discussants agreed that the prosecution would mitigate some of the practical and foreign affairs challenges by not seeking the death penalty in some terrorism cases. Moreover, some discussants intimated that many foreign governments might categorically refuse to cooperate with U.S. intelligence and law enforcement if the government could use the information as evidence in a future capital case. As a result, some workshop participants agreed that removing the death penalty as a potential punishment for terrorists would greatly benefit



the prosecution as well as U.S. intelligence and foreign relations. However, at least one discussant noted that public and political pressures may not permit the government to categorically remove the death penalty as a punishment for terrorists. Ultimately, there was no agreement about whether the United States should remove the death penalty as a punishment in terrorism cases as a matter of policy, merely recognition that seeking the death penalty can intensify some of the discovery and foreign affairs challenges facing the government.

#### **D. Distrust and Skepticism under CIPA**

A few discussants noted some ongoing distrust between intelligence agencies, law enforcement agencies, and federal judges with regard to CIPA disclosures and classified information. For example, one participant noted that federal judges are becoming more skeptical of the veracity of information contained in CIPA summaries. Another discussant noted that the sheer volume of information involved in the disclosure process could potentially lead to inadvertent disclosures of classified material. A few discussants offered anecdotal evidence of past mistakes, but the discussants pointed out that, in their experience, judges were never the cause of such mistakes and that perhaps assertions of skepticism and distrust are overstated. The majority of discussants agreed that such distrust and skepticism, if left unresolved, would harm the effectiveness of terrorism trials in Article III courts. There was some agreement by the discussants that negotiations between intelligence agents and federal judges on a case-by-case basis could help to mitigate any distrust and skepticism.

## V. ADDITIONAL EVIDENTIARY CONCERNS

### A. Intelligence vs. Law Enforcement

The dichotomy between the procedures used for intelligence gathering and criminal evidence collection has presented major challenges in the Article III system. Several discussants agreed that the dilemmas presented are not entirely novel, but mirror the typical contrast between crime prevention and criminal punishment that domestic law enforcement deal with on a daily basis. Other discussants disagreed, however, asserting that the issues arising in the context of terrorism provide a different wrinkle. The discussants referred to this dilemma as the “intel first / intel only” debate, and it colored the entire discussion about evidentiary issues.

The evidentiary issues arise primarily because the different collection methods suit their respective objectives. In the criminal context, there are highly developed and standardized procedures for the treatment of information that may be used as evidence, as well as for the handling of witnesses, and for assessing the reliability of self-incriminating statements. These procedures have been instituted over time to protect the integrity of the information gathered and to ensure that a fair result is reached in any subsequent trial. In the context of intelligence gathering, however, the primary goal is to collect information only in the hopes of preventing future events from occurring. Given this purpose, the procedures used in intelligence gathering often do not comport with those required to satisfy the demanding evidentiary standards for criminal cases. For example, much of the information collected by the intelligence community would be considered hearsay or inadmissible due to a general lack of reliability.

There have been some efforts in both the intelligence and law enforcement communities to address this problem by developing alternative procedures for collection and management of information. These efforts have met with some success in “proactive” cases – those situations in which agents of the U.S. government actively pursue and plan an investigation, detention, and interrogation scheme before capturing a suspect or class of suspects. In these cases, the capture (and subsequent detention) was anticipated, and thus, the relevant law enforcement, military, and intelligence personnel were able to coordinate the effort in advance. In contrast, “reactive” cases have presented major evidentiary challenges in Article III courts. In such circumstances, U.S. military personnel or intelligence agents stumbled upon suspects, often in areas of armed conflict or during other lawful counterterrorism operations. In this setting, because capture and subsequent detention was unanticipated, the relevant law enforcement, mili-

tary, and intelligence personnel were unable to coordinate the effort in advance.<sup>18</sup>

In their afternoon session, the discussants focused on a number of the challenges in this area. They considered whether and to what extent *Miranda* warnings (of the right to remain silent and the right to have an attorney) could be applied in the context of intelligence interrogations,<sup>19</sup> how to deal with information and materials that likely would be considered inadmissible hearsay in ordinary criminal prosecutions, and how to ensure that information obtained overseas satisfies federal rules for ensuring the authenticity of evidence used in prosecutions. They also discussed the feasibility and potential consequences of designating at the outset certain information as intelligence (and therefore not for use in court) and other information as evidence (for use in subsequent prosecutions). A few discussants also questioned whether the government could resolve some of the challenges by instituting other procedures, such as pairing law enforcement officials with intelligence officials or training intelligence officers some of the basic concepts for handling potential evidence.

Some discussants were hesitant to institute evidence collection procedures and expectations in the intelligence context. In addition, discussants differed significantly in their relative willingness to compromise the high evidentiary standards imposed on the government in criminal prosecutions. A few discussants were concerned that compromising those standards in the terrorism context would inevitably “bleed over,” thereby lessening the standard in other criminal contexts. Ultimately, however, some discussants expressed agreement that, with adequate planning and accompanying training, several of these issues could be resolved in the Article III system. However, there was no agreement on whether the United States should implement such planning and training from a policy standpoint.

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<sup>18</sup> Some discussants believed that, in the “reactive” cases, initial decisions about detainee treatment and information collection may limit subsequent options for criminal prosecution. However, other discussants disagreed, asserting that there would be very few cases where initial “reactive” decisions would limit options for future criminal prosecution. There was substantial disagreement on these points during the workshop.

<sup>19</sup> See *infra* Part V. B and note 20 for a detailed discussion of the *Miranda* warnings, including the origin of the warnings.

**B. Coerced Statements and *Miranda***<sup>20</sup>

The differing procedures between gathering law enforcement evidence and gathering intelligence information have created significant issues when admitting a terrorist suspect's statements in an Article III court. Under normal law enforcement circumstances in the United States, when a criminal suspect is in the government's custody, law enforcement officers must give the *Miranda* warnings before commencing with an interrogation.<sup>21</sup> If the suspect invokes his right to remain silent or to an attorney, then the officers must cease the interrogation immediately until either the suspect reinitiates the conversation or the suspect's attorney arrives.<sup>22</sup> In order for a waiver of *Miranda* rights to be effective, the suspect must knowingly, intelligently, and voluntarily waive those rights after receiving the warnings.<sup>23</sup> Any signs of coercion on the part of law enforcement weigh heavily against the voluntariness requirement for a valid waiver.<sup>24</sup>

The Fifth Amendment protection against self-incrimination is triggered for non-resident aliens with no connection to the United States only when they are subjected to criminal proceedings in U.S. courts.<sup>25</sup> Therefore, some discussants suggested that the initial requirement for *Miranda* warnings should be approached in two different ways depending on the circumstances of capture –

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<sup>20</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (safeguarding the Fifth Amendment privilege against self-incrimination by imposing procedural safeguards on custodial interrogations).

<sup>21</sup> *See id.* at 479 (“[T]he following measures are required. [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed”).

<sup>22</sup> *Id.* at 474 (“If the [suspect] states that he wants an attorney, the interrogation must cease until an attorney is present”). Note that the Supreme Court limited the applicability of the *Miranda* holding to “questioning initiated by law enforcement officers after a person has been taken into custody.” *Id.* at 444. Thus, the holding does not apply to conversations initiated voluntarily by a person in custody. *See, e.g.,* *Edwards v. Arizona*, 451 U.S. 477, 484–85 (“having expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself *initiates* further communication, exchanges, or conversations with the police.”) (emphasis added).

<sup>23</sup> *See id.* at 444 (“The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently.”).

<sup>24</sup> *See id.* at 476 (outlining various coercive tactics that are “inconsistent with any notion of a voluntary relinquishment of the privilege”).

<sup>25</sup> *See In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 199 (2d Cir. 2008); *See also* U.S. CONST. amend. V.

namely, whether they were captured on or off the battlefield.<sup>26</sup> Where a suspect is apprehended on the battlefield or under other exigent circumstances, it may be unclear whether at some point in the future they might be subjected to criminal proceedings in Article III courts. In such cases, discussants seemed to concur that the initial *Miranda* requirements should be less stringent than where a suspect is investigated and apprehended away from the battlefield. The discussants proffered at least two justifications for treating battlefield confessions differently than non-battlefield or post-battlefield confessions. *First*, in *New York v. Quarles*, the Supreme Court crafted a narrow exception to the *Miranda* requirements where law enforcement faces grave dangers to public or officer safety.<sup>27</sup> Some discussants posited that the rationale for the *Quarles* exception in law enforcement circumstances would apply equally to battlefield situations because such hostilities threaten the safety of soldiers and noncombatants. *Second*, the exigencies of the battlefield make the administration of *Miranda* warnings highly impracticable for U.S. military units. Many discussants agreed that the government should not force military units to comply with *Miranda*-type procedures while engaging in open hostilities on the battlefield, as such a requirement would likely be both ineffective and counter-productive for intelligence-gathering operations. However, some discussants questioned whether a suspect apprehended off the battlefield should receive some form of the *Miranda* warnings, though there was also a sense that the content of the warnings might be adjusted to accommodate the circumstances in a foreign country.<sup>28</sup> Specifically, while the privilege against self-incrimination remains, the right to counsel may not be applicable in the context of a foreign interrogation, as many countries do not provide counsel

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<sup>26</sup> For the purposes of this report, the term “battlefield” remains undefined. The discussants reached no agreement regarding the scope or nature of the “battlefield” in the context of fighting modern terrorism. At least one discussant referred to the circumstances surrounding battlefield captures as “reactive cases,” in which U.S. military personnel or intelligence agents stumble upon suspects on the battlefield. In these cases, the capture (and subsequent detention) was unanticipated, and thus, the relevant law enforcement, military, and intelligence personnel were unable to coordinate the effort in advance.

<sup>27</sup> See *New York v. Quarles*, 467 U.S. 649, 657 (1984) (“We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”).

<sup>28</sup> See, e.g., *In re Terrorist Bombings*, 522 F.3d at 198 — 99 (stating that while the exact content and phrasing of the warning may be adjusted to affect the practical realities of the circumstances in an international setting, an explanation of the privilege against self-incrimination must be provided and a waiver must be obtained prior to the confession in order for the self-inculpatory statements to be used at trial).

## ADDITIONAL EVIDENTIARY CONCERNS

for defendants as a matter of right.<sup>29</sup> However, no discussant stated that the military should be responsible for *Miranda*-type warnings of any kind, meaning that the concept of *adjusted* warnings were applicable only to intelligence and law enforcement personnel operating abroad.

The discussants also noted that a major *Miranda* problem may arise when the government seeks to introduce a terrorist suspect's self-incriminating statements at trial if the statements were made during or after a lengthy period of military detention and interrogation. This problem may arise even where the *Miranda* warnings were given at some point during the interrogation process. In such situations, questions arise regarding whether the suspect's statements were the product of government coercion, as this would probably render such statements inadmissible.<sup>30</sup> In addition, this *Miranda* problem may arise even when a suspect is captured on the battlefield if the suspect makes statements years after his capture during his detention. The circumstances of wartime detention and interrogation over the course of several years may constitute sufficient coercion to render a suspect's self-incriminating statements involuntary, whether or not he eventually received and waived his *Miranda* rights. Some discussants also noted that shorter periods of military detention and interrogation could pose obstacles to prosecution, though these obstacles were not seen as insurmountable.

Considering the propriety of post-military-detention *Miranda* waivers, the discussants generally agreed that the voluntariness requirement for waiver poses a substantial obstacle to introducing self-incriminating statements against terrorist suspects unless the waiver and subsequent statements are sufficiently attenuated from the tainted circumstances surrounding any previous confessions.<sup>31</sup> There was no consensus on whether attenuation in the traditional sense is possible; however, several discussants agreed that the use of so-called "clean teams"

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<sup>29</sup> *Id.* at 199.

<sup>30</sup> *See, e.g.,* United States v. Karake, 443 F. Supp. 2d 8, 49—50 (D.D.C. 2006) (finding, despite U.S. agents administering the *Miranda* warnings when they took over the interrogations from the Rwandan officials, that the defendants' statements were involuntary and therefore inadmissible in U.S. courts because the Rwandan officials' coercive interrogations and conditions of confinement persisted after the warnings were given).

<sup>31</sup> *See id.* at 87 (quoting *Clewis v. Texas*, 386 U.S. 707, 710 (1967) and explaining that the dispositive question is whether there is a break in the chain of events sufficient to attenuate the prior, unwarned self-inculpatory statements from the subsequent, *Mirandized* confessions).

may not be sufficient in some circumstances to overcome the earlier coercion under traditional rules of criminal procedure.<sup>32</sup>

### C. Hearsay

Hearsay evidence can present a major challenge to the prosecution of suspected terrorists in Article III courts. Under federal law, “hearsay” is “a statement [either a verbal assertion or nonverbal assertive conduct], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>33</sup> The hearsay rules are derived from the common law, and the Federal Rules of Evidence were promulgated in 1975 to codify them. The Federal Rules contain a great number of exceptions that overcome many non-testimonial hearsay objections.<sup>34</sup> However, the Supreme Court held in *Crawford v. Washington* that admitting testimonial hearsay evidence violates the Confrontation Clause of the Sixth Amendment unless the declarant is available for cross-examination at the trial or the defendant has had a prior opportunity to cross-examine the declarant.<sup>35</sup>

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<sup>32</sup> For the purposes of this report, the term “clean team” refers to a group of government officials (likely law enforcement) that has had no previous exposure to the accused, can provide the accused with constitutional rights from the inception of its investigation, and begin interviewing the accused anew. Legally, law enforcement seems motivated to use “clean teams” in order to attenuate its criminal evidence from any alleged taint.

<sup>33</sup> FED. R. EVID. 801(a), (c). The following is a more traditional definition of the term “hearsay” taken from Black’s Law Dictionary: “Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness.” BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>34</sup> See, e.g., FED. R. EVID. 803—04.

<sup>35</sup> See 541 U.S. 36, 68 (2004). Though the Supreme Court explicitly refrained from deciding the issue, it appears that testimonial hearsay statements also are admissible under the dying declaration exception. See *id.* at 56 n.6 (“The existence of [the dying declarations] exception as a general rule of criminal hearsay law cannot be disputed . . . [w]e need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.”) (internal citations omitted); see also FED. R. EVID. 804(b)(2). While the Supreme Court did not explicitly define “testimonial,” Justice Scalia, writing for the Court, provided examples of statements that are testimonial in nature: “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.” *Crawford*, 541 U.S. at 68. In *Davis v. Washington*, the Court held that references to police interrogations are non-testimonial when the circumstances “objectively indicate that [the interrogation’s] primary purpose was to enable police assistance to meet an ongoing emergency.” 547 U.S. 813, 822 (2006). Conversely, if the statements were made when there was no emergency and the primary purpose of the interrogation was to establish past events for potential use in a future prosecution, then such statements would be considered testimonial. See *id.*

## ADDITIONAL EVIDENTIARY CONCERNS

The discussants generally agreed that the exceptions enumerated in the Federal Rules allow for the admission of a good deal of non-testimonial hearsay evidence in Article III terrorism trials. Non-testimonial hearsay that is not admissible under any of the particularized exceptions still may be admissible under the residual exception of Rule 807, which provides that the judge may, in some circumstances, exercise her discretion to admit evidence if she determines that its admission is in the interests of justice.<sup>36</sup> While obviously still constrained by other rules of relevancy and reliability, the residual exception may provide a solution for some of the more prosaic issues involved in the introduction of hearsay evidence. The issue of reliability understandably was of major importance to the discussants, and several expressed concern that softening the requirements of the Federal Rules would allow the use of unreliable evidence to convict people of the most serious of crimes. They generally agreed that there were some situations in which the Federal Rules as they are currently applied would not allow for the introduction of certain information.

The constitutional limitation on the admissibility of testimonial hearsay is more problematic in conducting terrorism trials. *First*, as articulated above, a good deal of the evidence that is sought to be introduced in criminal prosecutions of terrorists is obtained for intelligence purposes, and therefore lacks the procedural safeguards that normally ensure that the evidence is reliable. *Second*, the government may have obtained information from foreign intelligence sources that are either unable or unwilling to testify at trial. Without such testimony, the statements of these foreign intelligence sources would fail to meet the standards articulated in *Crawford*. *Furthermore*, a majority of foreign nations have more flexible evidentiary systems, and therefore their procedures for collection and admission of testimonial evidence may not meet the standards required in U.S. courtrooms. This issue has come up in the context of international criminal

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<sup>36</sup>The Federal Rules of Evidence state:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 807.



tribunals, where the court must reconcile the common law adversarial system with civil systems that are much more amenable to the use of written testimony.

Several possible answers to these issues were posited by the discussants. In some international tribunals for example, statements that would likely be considered to be testimonial hearsay have been introduced as background material in the form of a report or other document. As a safeguard in these cases, attorneys were permitted to ask the court to require interrogatories to authenticate certain disputed information. Alternatively, some of the discussants suggested that statements made during a military interrogation for intelligence-gathering purposes might qualify as non-testimonial in nature, as they arguably would not meet the standard for testimonial evidence as articulated in *Crawford*, which defined evidence as “testimonial” when it is intended for use in a subsequent criminal prosecution. While these alternatives imply that there are some methods to manage testimonial evidence in the Article III court system, the participants concurred that ultimately a cost-benefit analysis might have to be conducted to determine whether convicting these individuals is worth compromising some of the procedural requirements of criminal trial.

#### **D. Chain of Custody**

The Federal Rules also prescribe specific requirements to ensure the authenticity of evidence for use in prosecutions, known as “chain of custody” requirements. In terrorism cases, it often proves difficult, if not impossible, to observe the mandated level of protection of evidence. For example, one discussant recalled circumstances in which soldiers were required to collect evidence for a prosecution, noting that the requirement resulted in a significant increase in paperwork that strained already-limited battlefield resources. Another discussant noted a government fear that soldiers will be required to return to the United States to testify in order to authenticate evidence retrieved in far-off locations, further depleting the finite number of troops and resources in the field. Moreover, information that the government seeks to use against accused terrorists may have been obtained by the intelligence community without any sense that the information might later be used in a criminal prosecution. This evidence, therefore, has not been subjected to the chain of custody requirements that are imposed on evidence collected for use in court. Discussants were unable to reach a conclusion on whether such information could lawfully be used in terrorism trials. One discussant noted that in at least one international criminal tribunal, the court removed all chain of custody requirements. It was suggested, without consensus, that Article III courts should similarly permit the parties to a terrorism trial to

admit all plausible and relevant evidence without regard for chain of custody.

**E. Reconciling Intelligence with Law Enforcement**

In all of these evidentiary contexts, the challenge of reconciling the needs of the intelligence community with the requirements of law enforcement was pervasive. Despite the fact that the “wall” limiting information exchange between these groups was ostensibly removed, it was apparent from the discussion that the tension between the missions, authorities, and practices of these two communities remains a challenge to effectively prosecuting terrorists in Article III courts.

## VI. TRIAL MANAGEMENT

### A. Introduction

In addition to evidentiary challenges, terrorism trials conducted in Article III courts pose a number of practical challenges in managing the courtroom, the defendant, and the jury. While there are no codified methods for managing terrorism trials, judges and other court officials have created a variety of successful *ad hoc* procedures. The *ad hoc* procedures include methods for protecting juries and the courtroom, protecting the security of classified information, and controlling public disclosures. However, a number of major dilemmas remain. For example, terrorism trials continue to require huge commitments of both time and resources. There are also serious issues associated with the conditions of detention of terrorist suspects that are largely unresolved. Furthermore, managing individual and courthouse security remains a problematic endeavor because the cases may be highly publicized.

The logistical problems a judge faces in managing terrorism trials can be divided generally into three categories, though there is substantial overlap between them. *First*, the court must manage its own ability to fairly adjudicate the trial, a responsibility made more difficult due to non-security-cleared clerks and large amounts of classified and sensitive evidence. *Second*, the court must manage the defendant, including the defendant's isolated conditions of detention, cultural and language barriers, and right to proceed *pro se*. *Third*, the court must manage the jury, including its selection, security, and its needs and perceptions during the trial.

In beginning the discussion, the participants generally agreed that trial management issues in the Article III framework have been either exaggerated or resolved successfully on an *ad hoc* basis, at least for the cases actually pursued in the regular Article III courts (several discussants asserted that the government has forgone criminal prosecutions at times because of insurmountable, or at least very difficult, issues not handled by an Article III court to date). Discussants repeatedly emphasized that the need for flexibility is paramount because often the best results have been reached in Article III terrorism trials through cooperation and compromise on the part of the government, the defense, and the court. The most significant practical challenges to the viability of Article III courts in conducting terrorism trials are the extreme trial lengths and the high costs. Some terrorism trials last a period of months, placing great strain on the court's resources and the

jurors' lives.<sup>37</sup> While significant challenges remain, the discussants generally agreed that with sufficient allocation of resources, most of the logistical and practical challenges posed by terrorism trials could be handled in Article III courts.

### **B. The Judge: Non-Cleared Clerks and Protecting Classified Evidence**

Some of the discussants speculated that practical barriers to a judge's usual procedural aids in an Article III court may diminish the quality of decisions in terrorism trials. The judge has to evaluate a massive amount of classified and sensitive evidence for relevance and admissibility. However, a judge's law clerks and staff often face challenges in obtaining the necessary clearances in a timely manner. The delay in clearances prevents clerks from assisting the judge in reviewing the evidence, greatly expanding the pretrial timeframe for terrorism cases. In addition, rules for the protection of classified evidence may prevent the judges from keeping notes taken during the review of classified evidence in chambers or in Secure Compartmented Informational Facilities (SCIFs). While these practical barriers could degrade the quality of judicial decision-making, several participants noted that judges often push the executive agencies to clear clerks and staff when necessary to conduct a trial effectively. If nothing else, however, the process of getting security clearances for clerks and staff significantly increases the time and expense of a terrorism trial.

The mere presence of highly classified materials in the courthouse also poses serious security and management problems for the judge. There was overwhelming consensus among the discussants that the Department of Justice's Court Security Officers (CSOs) are imperative to this process, as they have established detailed procedures for courtroom monitoring, protection and transportation of sensitive information and evidence, and ensuring the jury's safety. Yet a number of problems remain. The discussants noted that judges often face challenges in providing a secure location for storage of classified and sensitive evidence. Though SCIFs have been erected in most major courthouses, in some cases, the lack of appropriate secure facilities has forced the CSOs to transport classified and sensitive evidence to and from the courthouse on a regular basis. In other cases, CSOs have provided safes to store documents. Occasionally,

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<sup>37</sup> For example, the trial for the 1998 Embassy Bombings in Kenya and Tanzania lasted five months, from February 5, 2001 until July 10, 2001. *See* Trial Tr. vol. 1 (Feb. 5, 2001); Trial Tr. vol. 76 (Jul. 10, 2001).

judges have devised creative solutions for the protection of these materials, including transforming their own private bathrooms or closets into secure areas for the duration of a trial. While many of these *ad hoc* procedures have proven effective, the question remains whether it would be more effective to codify and standardize processes for protecting classified and sensitive information. On this point, the discussants reached no consensus.

### C. The Defendant: Isolation, Proceeding *Pro Se*, and Cultural Barriers

The defendants themselves pose major management challenges in Article III terrorism trials. In cases involving highly secure conditions of detention and significant cultural barriers, Article III courts have had difficulty managing the competing interests of the government and the defendant. Terrorist suspects are often held in solitary confinement, both for their own protection and to limit their communications with others. In order to prevent communication with other terrorists and the media, as well as the inadvertent dissemination of classified information, pretrial detention facilities have implemented Special Administrative Measures (SAMs) that restrict a terrorist suspect's correspondence and visitation privileges.<sup>38</sup> The SAMs also permit prison officials to isolate terrorist suspects in solitary confinement when necessary to protect the defendant or to prevent communication.<sup>39</sup>

Some discussants considered the stringent restrictions established by SAMs vital to protect intelligence information, since there is no way to know what information, if revealed, would be useful to terrorist organizations. Furthermore, there is some evidence that terrorist organizations compile information about American criminal procedures and practices to craft strategies for abusing and manipulating the system.<sup>40</sup> These strategies are widely available on the

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<sup>38</sup> See 28 C.F.R. § 501.2 (2008). These procedures were first employed for terrorism-related crimes in the Ramzi Yousef prosecution in connection with the 1993 World Trade Center Bombings. See *United States v. Yousef*, 925 F. Supp. 1063 (S.D.N.Y. 1996). The procedures were refined in the prosecutions following the 1998 Embassy Bombings. See *United States v. Bin Laden*, 91 F.Supp.2d 600 (S.D.N.Y. 2000). In 2008, the Second Circuit affirmed the district court's opinion in *Bin Laden*, 91 F.S. Supp. 2d 600, and specifically upheld the legality of the SAMs. See *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 127—30 (2nd Cir. 2008).

<sup>39</sup> See 28 C.F.R. § 501.3.

<sup>40</sup> In the Embassy Bombings case, the government presented as evidence an al-Qaeda training manual that included detailed information on various manipulative techniques. See <http://www.fas.org/irp/world/para/aqmanual.pdf>.

internet and may cause problems in some criminal prosecutions. Moreover, even with the SAMs in place, terrorist suspects still have found methods to communicate with their terrorist organizations.<sup>41</sup>

While the SAMs may be necessary for preserving the safety and security of the prison, public, and sensitive information, they result in serious problems of access for defense counsel. Defense attorneys are often unable to maintain consistent contact with their clients. They are also prevented from sharing information with their clients, which makes it difficult for counsel to develop a trial strategy and for defendants to contribute to their own defense. Defense attorneys face a significant challenge in balancing the competing interests of providing a vigorous defense for their clients with the need to protect the national security. The SAMs may also have the unintended consequence of depriving a terrorist defendant of access to materials that he would need to prepare for trial, particularly in cases where the defendant chooses to proceed *pro se*.

Moreover, the long-term isolation which the SAMs may require can have serious implications for the defendant's physical and mental health. Some discussants noted that a suspected terrorist's preconceived notions about American justice, combined with the draconian security measures of the SAMs, have fostered such distrust that it has severely damaged attorney-client relations. Judges and prison officials are aware that prolonged isolation can result in mental deterioration and increased distrust of the system, but as of yet there are no alternative methods for ensuring safety and security in the prison. One discussant recalled at least one instance in which prison officials permitted terrorist suspects to have cellmates to reduce the isolation. The experiment was short-lived, however, due to violence in which a prison guard was seriously injured. Some discussants suggested that the judge could help to mend the distrust between attorney and client created by the SAMs by instructing the client about the procedures. Other discussants argued that as a member of the distrusted justice system, the judge's explanation would have little or no effect on the defendant's perceptions.

The isolation of solitary confinement (and resultant distrust of American

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<sup>41</sup> This problem was brought to the nation's attention by Lynne Stewart who, while serving as defense counsel for Sheik Omar Abdel-Rahman, infamously issued a press release that allowed her client to communicate with his terrorist network. *See United States v. Sattar*, 272 F. Supp. 2d 348, 354-55 (2003) (Stewart was convicted of conspiring to provide material support and resources to a foreign terrorist organization, among other charges).

counsel) also increases the likelihood that a terrorist defendant will decide to proceed *pro se*, a decision that poses a number of additional management challenges for an Article III court. Some discussants noted that it would be inappropriate to permit a potentially dangerous defendant to cross-examine witnesses, especially if such cross-examination would intimidate the witnesses. Moreover, at least one discussant asserted that some rules of law are too complex or technical for a non-English-speaking alien defendant in solitary detention to comprehend adequately for the purposes of a fair trial.

In articulating the problems in this area, the discussants focused on the wisdom of the “absolutist” right to represent oneself *pro se* articulated in *Faretta v. California*.<sup>42</sup> The challenges posed by the *pro se* litigant in terrorism trials parallel those in international criminal tribunals where defendants have refused counsel and attempted to represent themselves.<sup>43</sup> In international cases, judges have attempted to accommodate the scope of the right to self-representation to the demands of a fair and efficient trial.<sup>44</sup> Alternatively, some judges have disallowed defendants from proceeding *pro se* when doing so would not serve the interests of justice.<sup>45</sup> In other cases, judges have allowed a defendant to proceed *pro se*, but have exercised their discretion to have standby counsel to assist the

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<sup>42</sup> 422 U.S. 806 (1975) (holding that “a defendant in a state criminal trial has a constitutional right to proceed without counsel [*pro se*] when he voluntarily and intelligently elects to do so, and that the state may not force an attorney upon him when he insists on conducting his own defense”).

<sup>43</sup> Both Milosevic and Karadzic employed this tactic in their trials at the International Criminal Tribunal for Former Yugoslavia (ICTY). See GIDEON BOAS, THE MILOSEVIC TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 205—17 (2007); Marlise Simons & Dan Bilefsky, *Bluff Called, Karadzic Awaits Trial in U.N. Cell*, N.Y. TIMES, Jul. 31, 2008, at A8 (“Mr. Karadzic . . . has said through a lawyer that he intends to represent himself in the international tribunal”).

<sup>44</sup> In the Seslj prosecution, the judge revoked the defendant’s *pro se* status for misbehavior, but the appellate court returned him to *pro se* status after, and seemingly in response to, Seslj’s hunger strike. See BOAS, *supra* note 43, at 228-236; Prosecutor v. Seslj, No. IT-03-67-PT (Decision on Assignment of Counsel) 21 Aug. 2006.

<sup>45</sup> This approach was used in the trial of the Chicago Seven in 1970. See *United States v. Dellinger*, 472 F.2d. 340 (1972).

defendant in preparing his case.<sup>46</sup> The efficacy of this option is debatable, however, as a suspected terrorist defendant often chooses to represent himself at least in part because of his distrust of the American justice system. It seems unlikely that such an individual would trust his court-appointed counsel to assist him in preparing his defense. No consensus was reached on how to handle *pro se* defendants in terrorism trials, as some of the discussants advocated restricting *Faretta* rights in this context while others asserted that such a restriction would be unconstitutional. However, the discussants reached some consensus that permitting terrorist suspects to proceed *pro se* without restrictions on disruptive behavior or compliance with court rules and procedures has caused significant challenges to the judiciary and to counsel (“standby counsel” and dismissed and reacquired defense counsel).

There are also significant cultural differences and language barriers present in many terrorism trials between defendants, defense counsel, judges, and juries. In general, this problem has been mitigated by obtaining bilingual co-counsel, but the process of locating and engaging a security-cleared bilingual attorney strains the already limited linguistic resources of the court and may require additional delays and expense. Furthermore, translations pose additional management obstacles for the court due to differences of opinion between translators and the existence of different dialects. One discussant suggested that convincing the prosecution and defense to agree on a translator at the beginning can help to avoid later disputes over translations. The discussants suggested that another way to mitigate language issues could be the creation of a centralized pool of personnel, including trained and security-cleared translators, who would gain experience handling terrorism cases. Another discussant believed that creating a cleared pool of personnel, either defense attorneys or translators, would have minimal value when terrorism trials are spread out all over the country, as is

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<sup>46</sup> For example, Judge Brinkema appointed “standby counsel” to assist Zacarias Moussaoui at trial. See *United States v. Moussaoui*, 282 F. Supp. 2d 480 (2003) (listing Moussaoui as a *pro se* litigant, but referring throughout the opinion to “standby defense counsel”); see also Order, *United States v. Moussaoui*, No. 01-455-A, (E.D.V.A. Jul. 11, 2002), available at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/moussaoui/usmouss71102psord.pdf>. When a defendant invokes his right to proceed *pro se*, the judge has discretion to appoint standby counsel “to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant’s achievement of his own clearly indicated goals.” See *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984); see also *Faretta*, 406 U.S. at 834 n.46 (stating that “a State *may* – even over objection by the accused – appoint a ‘standby counsel’ to aid the accused if and when the accused requests help...” (emphasis added)).



currently the case. While the ability to communicate effectively with defendants in terrorism trials is a major challenge, many discussants agreed that the problem could at least be minimized with the allocation of more resources and skilled personnel.

#### **D. The Jury: Selection, Security, and Juror Perception**

Jury selection, security, and perception also pose major management challenges in Article III terrorism trials. While it is axiomatic that a criminal defendant has the right to a jury trial, the mere presence of a jury in a terrorism trial requires additional procedures and safeguards to protect the jury and to preserve the presumption of innocence. In addressing jury management issues, flexibility and inventiveness are critical tools for the attorneys and the court because new difficulties constantly arise during the course of trial.

Several discussants agreed that a judge's flexibility in working with the prosecution and defense is often essential to successfully managing the jury in terrorism trials. While judges typically exclude attorneys from some practical aspects of the trial process, discussants asserted that collaboration has minimized the burden on the judge and increased the likelihood of a fair jury in past terrorism trials. The need for cooperation is especially evident during the *voir dire* phase. In terrorism trials, a jury must sometimes contend with provocative or disturbing evidence. Several discussants recalled instances in which a court revealed as much evidence as possible during jury selection to gauge juror reactions, and thus, to mitigate the jury's emotional reaction to such evidence at trial. Some discussants felt strongly that counsel-prepared questionnaires for potential jurors were vital in some cases to the selection of a fair and impartial jury. Furthermore, a few discussants recalled a particular jury selection in which the judge and attorneys evaluated juror responses together, dividing the potential jurors into three categories: jurors that could be excused for cause, jurors that were acceptable, and jurors that required further questioning. Several discussants agreed that Article III courts should evaluate jurors on an individualized basis in collaboration with the opposing counsel. Though individualized evaluations appear more time-consuming, they prevent singular jurors from contaminating entire panels of potential jurors, which would ultimately waste resources and time. Similarly, securing a large jury pool mitigates the risk that a single biased juror can dictate the outcome of a trial.

Preserving a defendant's presumption of innocence in the minds of the jury presents a major challenge in the management of terrorism trials. For

example, particularly dangerous defendants are often shackled during trial for the safety and security of the courtroom. To mitigate the potential for biasing the jury, courts have confined defendants with leg-shackles and concealed the restraints with a simple table skirt. However, this device has failed in the past; the discussants noted that at least one jury determined that the defendant was restrained despite attempts to hide the suspect's leg shackles. In addition, many terrorist suspects must be supervised by the U.S. Marshal Service. Discussants commented that the presence of officials in paramilitary regalia and vans labeled "Homeland Security" can project a bunker-like mentality to jurors arriving at the courthouse. These security measures may compromise the jury's ability to presume innocence, especially when the security measures demonstrate military or paramilitary involvement. If security measures include street blockades and the visible presence of armed guards and security personnel, then the measures run a significant risk of prejudicing the jury's perceptions of the case, and steps should be taken to mitigate jurors' exposure to such measures.

Recognizing that many terrorist suspects are, in fact, dangerous, the courts must also provide adequate protection for jurors. Anonymous juries and soft sequestration are common techniques to preserve juror safety.<sup>47</sup> In some terrorism trials, the court instructed jurors to assemble at a site several miles from the courthouse to meet shuttles managed by court security.<sup>48</sup> In order to avoid alarming the jury, judges have suggested to the jury that the additional security measures were imposed merely to avoid the media, though some of the discussants were skeptical that the jurors actually believed this explanation. Again, the discussants noted that a large jury pool is essential, in this case to empanel new jurors in the event that someone threatens an empanelled juror. In cases where someone threatens the safety of the judge, the courts have been cautious in deciding whether to divulge those threats to the jury.

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<sup>47</sup> The term "soft sequestration" refers to a practice whereby the court permits jurors to reside at home, but rather than arriving for jury duty at the courthouse each morning, the jurors meet at a secret alternative location from which they are transported to the courthouse by court security officers or some other group of law enforcement officers. See ROBERT TIMOTHY REAGAN, FEDERAL JUDICIAL CENTER (FJC), TERRORISM-RELATED CASES: SPECIAL CASE-MANAGEMENT CHALLENGES 29 (Mar. 26, 2008) (noting that the Eastern District of Michigan used the practice of "soft sequestration" in *United States v. Koubriti*, 252 F. Supp. 2d 418 (E.D. Mich. 2003)).

<sup>48</sup> See *id.*

## E. Judicial Cooperation and Flexibility

The discussants uniformly noted that judges play a critical role in all aspects of the management of terrorism trials. Those who have tried terrorism cases know first-hand which management techniques work. By sharing their experiences with judges who have been newly tasked with trying such cases, experienced judges can help to reduce significantly the learning costs of trial management. Some discussants therefore suggested that a uniform procedure for judicial collaboration and the promotion of “best practices” could enhance the management of Article III terrorism trials. To this end, the Federal Judicial Center (FJC) has worked to develop some basic standards and practice tips to improve the administration of terrorism cases.<sup>49</sup> The discussants expressed a sense that these efforts to provide a management framework are useful, though they did not agree on whether the codification of practices and procedures for managing these cases would be of much benefit.

Managing terrorism trials presents unique challenges for the judicial system. During the workshop, the discussants generally concurred that if Article III courts are to continue conducting terrorism trials, flexibility and cooperation are of paramount importance. While some discussants expressed skepticism regarding the ability of Article III courts to manage these trials effectively, the majority agreed that with sufficient allocation of resources, Article III courts can meet the pre-trial and trial management challenges posed by the majority of terrorism cases.

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<sup>49</sup> See, e.g., *id.*

## VII. CONCLUSION

Despite the workshop's general points of agreement,<sup>50</sup> it was also clear that some overarching questions still remain regarding the feasibility, and even the advisability, of conducting terrorism trials in Article III courts. *First*, how comprehensive is the current data set for drawing conclusions about the sufficiency of the Article III system? Are there cases that never reached the public eye because they were dismissed, withdrawn, or abandoned before charges as a result of current limitations in the Article III system? *Second*, how can the Article III system evolve to accommodate terrorism-related issues while maintaining constitutional and evidentiary rules that ensure a fair trial? *Third*, should the Article III system evolve to encompass all potential terrorism trials, or should there be a backstop system in the interests of national security for the detention or alternative prosecution of suspected terrorists when certain individuals cannot be tried in Article III courts? While the workshop participants did not offer uniform answers to these questions, they did help to inform the debate about what Article III terrorism trials can accomplish. By shedding light on the challenges, successes, and failures of the Article III system, workshop participants hoped to contribute a significant piece to the ongoing puzzle of counterterrorism policy.

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<sup>50</sup> See *supra* Part III for a list of broad principles and conclusions that emerged from the workshop discussion.

# APPENDIX I

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# APPENDIX II

## RECOMMENDED READINGS

### STATUTES

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TRYING TERRORISTS IN ARTICLE III COURTS:  
CHALLENGES AND LESSONS LEARNED



A POST-WORKSHOP REPORT

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW  
AND NATIONAL SECURITY

NATIONAL STRATEGY FORUM

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