

## TERRORISM TRIALS IN ARTICLE III COURTS

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Some individuals reject Article III courts as a forum for bringing terrorist suspects to justice on the grounds that the ordinary judicial system cannot handle such cases.<sup>1</sup> As an empirical matter, this claim is simply false. Since 2001, myriad terrorism trials have progressed through the criminal system.<sup>2</sup> The U.S. Department of Justice (DOJ) reports that between 2001 and 2010, there were 998 defendants indicted in terrorism prosecutions.<sup>3</sup> Eighty-seven percent of the defendants were convicted on at least one charge.<sup>4</sup> According to the Executive Office for the U.S. Attorneys, from FY 2004 to FY 2009, there were 3,010 terrorism prosecutions.<sup>5</sup> It reported 2,663 terrorism convictions during the same time period.<sup>6</sup> What these numbers demonstrate (reporting inconsistencies not-

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1. Benjamin Weiser, *Holder, in New York City, Calls Terror Trials Safe*, N.Y. TIMES, Apr. 1, 2014, <http://www.nytimes.com/2014/04/02/nyregion/terror-trial-proves-civilian-courts-are-safe-holder-says-in-visit-to-manhattan.html> [<http://perma.cc/N5P6-BDIT>] (noting dissension, particularly among members of Congress, about Attorney General Holder's decision to prosecute several terrorism trials in civilian court in New York City).

2. See generally CTR. ON LAW & SEC., N.Y.U. SCH. L., TERRORIST TRIAL REPORT CARD: September 11, 2001–September 11, 2010 (2010), available at [http://www.lawandsecurity.org/Portals/0/documents/01\\_TTRC2010Final1.pdf](http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf) [<http://perma.cc/KXM9-TS87>] (describing the increasing number of terrorism indictments and trials progressing through the civilian criminal law system).

3. *Id.* at 4.

4. *Id.* But note that the U.S. Department of Justice Office of the Inspector General has repeatedly found that DOJ overstates terrorism convictions.

5. See *Who Is a Terrorist?: Government Failure to Define Terrorism Undermines Enforcement, Puts Civil Liberties at Risk*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://trac.syr.edu/tracreports/terrorism/215/> [<http://perma.cc/5D8T-HYB5>] [hereinafter *Who Is a Terrorist?*].

6. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS, FY 2011 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION (2011), available at <http://www.justice.gov/jmd/2011justification/pdf/fy11-usa-justification.pdf> [<http://perma.cc/W6HF-W69F>].

withstanding<sup>7</sup>) is that Article III courts have routinely, and successfully, managed international and domestic terrorist cases.<sup>8</sup> Nevertheless, there are important concerns driving such critiques that deserve further scrutiny.

Today, I will first consider the most common objections to pursuing terrorist cases in the ordinary judicial system. The arguments fall into five categories: rules of evidence, the problems created by classification, the right to call and confront witnesses, the right to a speedy and public trial by an impartial jury, and the right to self-representation. Critics look to these areas to suggest that either detention or military commissions

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7. In 2009 the Transactional Records Access Clearinghouse (TRAC) issued a report stating that the criteria used by different federal entities to determine what constitutes a terrorism prosecution appears to differ. See *Who Is a Terrorist?*, *supra* note 5. Comparing the terrorism cases listed by three separate and independent agencies (the courts, the U.S. Attorney's Office, and DOJ's National Security Division), TRAC found that there were only 4% of the defendants in common. *Id.* The discrepancy was not explained by emphasis on international versus domestic terrorism: when limited to just international terrorism or terrorist-related finance (which is tied to international terrorism), TRAC still only found an 8% overlap between the lists. *Id.* DOJ subsequently critiqued the study, suggesting that TRAC omitted important information. TRAC responded by refuting DOJ's claims. See *TRAC Seeks Retraction From DOJ*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://trac.syr.edu/tracreports/terrorism/219/> [<http://perma.cc/37FN-EJXY>] (last updated Oct. 19, 2009). In 2013 the Office of the Inspector General issued a report on the reporting of terrorism statistics, finding that the Executive Office of the U.S. Attorneys was continuing to overreport the numbers. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, FOLLOW-UP AUDIT OF THE DEPARTMENT OF JUSTICE'S INTERNAL CONTROLS OVER REPORTING OF TERRORISM-RELATED STATISTICS: THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS ii (2013) ("We found that although EOUSA revised its procedures for gathering, classifying, and reporting terrorism-related statistics based on the recommendations from our 2007 audit, EOUSA's implementation of the revised procedures was not effective to ensure that terrorism-related statistics were reported accurately."). For additional analysis of the patterns of prosecution in terrorism cases, see CTR. ON LAW AND SECURITY, N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2009 (2010), available at [http://www.lawandsecurity.org/Portals/0/documents/02\\_TTRCFinalJan142.pdf](http://www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan142.pdf) [<http://perma.cc/L5XG-KPKJ>].

8. *The Criminal Justice System as a Counterterrorism Tool: Fact Sheet*, U.S. DEP'T OF JUSTICE (Jan. 26, 2010), <http://blogs.justice.gov/main/archives/541> [<http://perma.cc/UML8-V5WZ>]. For purposes of this Article, I include both foreign and domestic terrorism in the general category of terrorist prosecutions. For discussion of the distinction and particular emphasis on domestic terrorist organizations and prosecutions see JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42536, THE DOMESTIC TERRORIST THREAT: BACKGROUND AND ISSUES FOR CONGRESS (2013), available at <http://fas.org/sgp/crs/terror/R42536.pdf> [<http://perma.cc/YC2K-NV96>].

would be a more appropriate way to handle individuals suspected of terrorist activity.

Second, I would like to suggest that there are risks in sidestepping Article III courts. Lowered standards that mark the alternative realms impact due process, public perception, and conviction. Transferring cases out of the civilian system undermines citizens' rights: namely, the right to participate in the administration of justice. The creation of alternative venues creates forum competition, which may lead to an abrogation of justice. Pursuing cases through the military system may also undermine judicial authority and contribute to a perception of incompetence with regard to the criminal system.

Third, as an empirical matter, many of the claims about the incompetence of Article III courts do not play out in practice. Here, by way of illustration, I will focus on a case currently underway in Manhattan, *United States v. Abu Ghayth*.<sup>9</sup> Some procedures (not used in this case) offer further ways to address the difficulties endemic to terrorist prosecution. While many of the objections can be overcome, one—the right to self-representation—proves more troublesome. Although it occurs in only a small fraction of cases and there are a handful of ways to address it, each of the solutions carries consequences. The problem, nevertheless, is not unique to the Article III context and thus vitiates not in favor of moving to a system of military commissions, but instead a re-examination of the issues associated with denying a defendant a right to appear *pro se* and appointment of standby counsel to address the underlying purpose of the right itself.

#### I. CRITIQUES OF THE ORDINARY CRIMINAL JUSTICE SYSTEM

Let us begin with the five critiques most commonly articulated as to why the ordinary criminal justice system is ineffective as a means of pursuing terrorist prosecutions. First is the failure of the criminal rules of evidence to allow for certain kinds of information, collected under conditions that differ from

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9. No. S14 98 Crim. 1023, 2014 WL 1613197 (S.D.N.Y. Apr. 22, 2014). Court records and the public record all differ at times on the spelling of the defendant in this case. For purposes of this Article, I adopt one spelling "Abu Ghayth," recognizing that at times this means that the spelling will depart from the sources cited, which occasionally use the spelling "Abu Ghaith."

those that generally accompany criminal investigations, to be allowed. Second is the risk that classified information may become public and endanger U.S. national security. Third is the difficulty that attends providing access to witnesses and incorporating their testimony in the trial. Fourth is the concern that the requirement of a speedy and public trial by an impartial jury cannot be met in cases involving terrorist threats. And fifth is the difficulty of guaranteeing self-representation to individuals posing a national security threat. Due process concerns permeate many of the procedural objections.

#### A. *Rules of Evidence*

The first set of objections centers on rules of evidence. Two principal concerns tend to arise in this area: rules preventing the introduction of hearsay, and the doctrine regarding the voluntariness of confessions and information obtained through interrogation.<sup>10</sup> These barriers may be difficult to overcome, limiting the type of information that can be presented to establish a defendant's guilt.

##### 1. *Inadmissibility of Hearsay*

Hearsay is defined under the Federal Rules of Evidence (FRE) as a statement that (a) "the declarant does not make while testifying at the current trial or hearing" and (b) "a party offers in evidence to prove the truth of the matter asserted in the statement."<sup>11</sup> Rule 801 addresses what is (and is not) hearsay for the purpose of

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10. The rule against hearsay and the right to confront one's accusers, although derived from a common origin, have become distinct areas of the law. *See* *Giles v. California*, 554 U.S. 353, 365 (2008) ("[i]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots." (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)); *Ashker v. Leapley*, 5 F.3d 1178, 1180 (8th Cir. 1993) ("Confrontation-clause analysis is a separate and distinct inquiry that does not necessarily overlap with hearsay analysis."). *See also* John C. O'Brien, *The Hearsay Within Confrontation*, 29 ST. LOUIS U. PUB. L. REV. 501. For purposes of this Article, I thus treat them as separate considerations, with hearsay falling under critiques related to evidence and Confrontation Clause constituting a separate category. In addition to hearsay and interrogation-related concerns, objections about using foreign intelligence-derived information, obtained in a manner that departs from the Fourth Amendment standards governing criminal law, may also give cause for concern. For further discussion, see Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117 (2015).

11. FED. R. EVID. 801.

admitting a prior statement as substantive evidence.<sup>12</sup> Hearsay is not admissible unless specifically allowed by federal statute, rules prescribed by the Supreme Court, or the FRE,<sup>13</sup> though myriad exceptions exist.<sup>14</sup>

The argument, for purposes of terrorism prosecution, is that in the murky world of intelligence gathering, information that may be material to apprehending a terrorist suspect may not rise to the level of assuredness required for exceptions to the hearsay rule. One exception, for instance, is that information relating to an individual's reputation with regard to character may be admitted, as may judgments involving personal, family, or general history.<sup>15</sup> What may not be admitted is a statement that an individual is rumored to be a member of a gang or engaged in criminal activity. Such allegations would have to be offered as evidence of a material fact, substantiated or made under oath, and subject to challenge or cross-examination.<sup>16</sup> But in the case of international terrorism, the collection of intelligence leading to apprehension of a suspected terrorist may be based solely on allegations from unnamed informants—none of which may be admitted as evidence against the accused at trial.

To some extent, the distinction between the types of information obtained in the world of national security versus the realm

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12. S.R. NO. 93-1277, at 16–17 (1974), available at [http://www.law.cornell.edu/rules/fre/rule\\_801](http://www.law.cornell.edu/rules/fre/rule_801) [<http://perma.cc/4DJE-BRVZ>]. Prior statements of a witness that are inconsistent with their testimony is always admissible for the purpose of impeaching the witness' credibility. More specifically, where the declarant-witness has testified and has been subject to cross-examination about a prior statement, and the statement (which is inconsistent with the declarant's testimony) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition, or (where consistent with the declarant's testimony) is offered to rebut or express an implied charge, to rehabilitate the declarant's credibility, or to identify a person, the statement is not hearsay. Nor is a statement hearsay when it is offered against an opposing party and it was made by the party in an individual or representative capacity, is one the party manifested that it adopted or believed to be true, was made by an individual authorized by the party to make a statement on the subject, was made by the party's agent or employee within the scope of that relationship, or was made by the party's coconspirator during and in furtherance of the conspiracy. *Id.*

13. FED. R. EVID. 802.

14. See, e.g., FED. R. EVID. 803 (allowing, *inter alia*, for present sense impressions; excited utterances; then-existing mental, emotional, or physical conditions; statements made for medical diagnosis or treatment; and recorded recollections).

15. FED. R. EVID. 803(21) & (23).

16. See, e.g., FED. R. EVID. 807 (residual exception).

of law enforcement is related to the systems' underlying orientations. For military matters, associational status may be more important than actual conduct; the type of information establishing the former may be subject to more lenient conditions. In criminal law, emphasis on individual action is more important than general status (e.g., one acting in the capacity of a terrorist). So there is a specificity required, backed by evidence of engagement in the activity, that differs from the standards employed in the military realm.<sup>17</sup> This undergirds the requirement that the prosecution, in a criminal trial, establish proof beyond a reasonable doubt of engagement in illegal activity. With these different goals in mind, it could be argued, the former provides a more appropriate venue to try terrorist offenses than the latter.

## 2. Requirement of Voluntariness

Like the general prohibition against the admission of hearsay, methods of interrogation in counter-terrorist operations may undermine the use of evidence in the ordinary criminal system. Once again, the underlying goals of the institutions in question matters.

In police investigations, the goal of interrogation is to figure out what happened in relation to a particular crime. In contrast, in the world of international terrorist threats, the aim of interrogation conducted by the intelligence community or the military is to obtain information that may be useful to prevent acts of terrorism, or to provide the United States with a strategic or tactical advantage. Different rules apply for the questioning of suspects and the recording of information obtained. Compounding the distinction, in the aftermath of the attacks of September 11, 2001, the United States departed from previous norms, engaging in coercive interrogation methods.

What this means is that information obtained from the custodial interrogation of prisoners in the intelligence or military context may not be admissible in civilian courts. Since the Founding, the Supreme Court has rejected confessions obtained through police

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17. For thoughtful discussion of the distinction between conduct and status in the military and criminal justice realms, see Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STANFORD L. REV. 1079 (2008).

brutality or torture.<sup>18</sup> Starting in 1936, a series of cases found that tactics resulting in involuntary statements violate the Fifth and Fourteenth Amendments guarantee to due process of law. The Court gradually incorporated more subtle means of eliciting statements, such as denial of food or sleep, holding suspects incommunicado, and exerting psychological pressure as evidence of the (in)voluntariness of confessions—all methods employed by the military in the aftermath of the September 11, 2001 attacks.<sup>19</sup> As a domestic, civilian matter, whether or not a criminal suspect conveys accurate information in the statement thereby obtained matters little; the point of the prohibition is the nature of the interrogation itself.<sup>20</sup>

To limit the potential for involuntary confessions, in 1966, the Supreme Court introduced a requirement that law enforcement inform suspects of their rights prior to questioning. In *Miranda v. Arizona*,<sup>21</sup> the Court considered four different cases involving custodial interrogations, where the defendants had been sequestered and no full warning of rights administered prior to interrogation.<sup>22</sup> The Court placed special emphasis on the potentially coercive nature of custodial detention, noting that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”<sup>23</sup> A criminal defendant, therefore, “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 for him prior to any questioning if he so desires.”<sup>24</sup>

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18. See, e.g., *Hopt v. Utah*, 110 U.S. 574, 584–85 (1884); *Bram v. United States*, 168 U.S. 532, 542 (1897).

19. See GEORGE W. BUSH, DECISION POINTS 168–171, 178–79, 180 (2010); Obama Statement on Release of Torture Memos, WALL ST. J., Apr. 16, 2009, available at <http://blogs.wsj.com/washwire/2009/04/16/obama-statement-on-release-of-torture-memos/> [<http://perma.cc/VU28-M9PT>].

20. *Rogers v. Richmond*, 365 U.S. 534, 543 (1960).

21. 384 U.S. 436 (1966).

22. *Id.* at 440.

23. *Id.* at 444. By custodial interrogation, the Court meant any “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.*

24. *Id.*

The argument against using ordinary criminal courts notes that individuals suspected of terrorist activity, who are apprehended abroad by the intelligence agencies or by the military, are typically not informed of their rights prior to the initiation of questioning. The situations in which individuals are being held may be chaotic, the questions put may relate to immediate threats, and those who are conducting the interviews are not police officers.

While there is a “public safety” exception to *Miranda* that is triggered when the police have an objectively reasonable belief that extraordinary steps are required to protect the police or the public from immediate danger,<sup>25</sup> a prior awareness of particular facts or circumstances giving rise to the imminent concern provides a baseline.<sup>26</sup> It may not always be the case, however, at the time at which a terrorism suspect is apprehended abroad, that the officers interrogating the individual have enough information to meet this standard. In 1984 the Supreme Court further made it clear that the only questions that could be put to an individual in custodial detention under the public safety exception were those necessary for law enforcement “to secure their own safety or the safety of the public.”<sup>27</sup>

In some terrorist cases, of course, this standard may be met. In *United States v. Khalil*, for instance, the New York Police Department raided an apartment after obtaining information that individuals living inside had built, and were planning to detonate, a bomb.<sup>28</sup> When police entered the apartment, one of the suspects grabbed a police officer’s gun while another tried to reach a black bag believed to be holding an explosive device.<sup>29</sup> Having subdued the occupants, the police opened the bag and saw pipe bombs, one of which had the detonator switch flipped.<sup>30</sup> The police went to the hospital to question one of the suspects, who told officers, *inter alia*, how many bombs there were, how many switches were on each bomb, and which wires should be cut to disarm them.<sup>31</sup> Both the District Court and the Court of Appeals rejected the de-

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25. *New York v. Quarles*, 467 U.S. 659 (1984).

26. *See, e.g., United States v. Talley*, 275 F.3d 560 (6th Cir. 2001).

27. *Quarles*, 467 U.S. at 659.

28. *United States v. Khalil*, 214 F.3d 111 (2d Cir. 2000).

29. *Id.* at 115–16.

30. *Id.* at 116.

31. *Id.*

fendant's efforts to suppress his statements on the grounds that the queries put to the suspect clearly fell within the public safety exception.<sup>32</sup>

Not all questions put by the intelligence community to terrorist suspects, however, may fall within the public safety exception. Information that may be germane to U.S. national security may lead to information that ultimately results in criminal prosecution. One argument against using civilian trials therefore focuses on the limits that would otherwise be placed on the intelligence community's ability to identify threats to the country, should terrorism prosecution be limited to the criminal realm.

### *B. Role of Classification*

The second major objection to Article III trials has to do with the role of classification, and particularly the damage to national security that would be caused if classified materials were to enter the public domain. The objection has two aspects: what is seen and who sees it.

In 1980 Congress addressed the first aspect through the Classified Information Procedures Act (CIPA).<sup>33</sup> The statute sought to address the problem of "graymail," where criminal defendants threatened to disclose classified information during the course of a trial, forcing the government to abandon prosecution altogether. The statute is purely procedural: it outlines steps to be taken to prevent the unnecessary or inadvertent disclosure of classified information, while making the impact of continuing the trial transparent. It provides for pretrial conference, the use of protective orders, the manner in which the defendant may discover classified information, and notice of the intent to use classified information. I will return to CIPA and how it works in practice in a moment.

The second aspect of classified material that generates concern about using the ordinary judicial system is who has access to the information. This issue does not affect the courts directly. Article III judges automatically have security clearances.<sup>34</sup> The federal

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32. *Id.* at 115.

33. Classified Information Procedures Act (CIPA), Pub. L. 96-456, 94 Stat. 2025, (Oct. 15, 1980).

34. ROBERT TIMOTHY REAGAN, FEDERAL JUDICIAL CENTER, NATIONAL SECURITY CASE MANAGEMENT: AN ANNOTATED GUIDE 7 (2011). Magistrate judges, in con-

judiciary, moreover, has a Litigation Security Group to facilitate security clearances for court staff (judges who deal with a great number of classified cases usually require clerks to obtain a security clearance).<sup>35</sup> Prosecutors often have clearances as well.<sup>36</sup>

The real question is how to make the necessary information available to the defense to ensure a fair trial. Regular criminal defense attorneys rarely, if ever, have security clearances. The dangers associated with granting them clearances may be significant. Civilian defense attorneys may be unfamiliar with the threats that result from information being revealed. They (and their families) may be put at great personal risk by being given access. Beyond this, attorneys may themselves be linked to organizations seeking access to classified information. So even if the court allows the defense team to see information that is not made public, there is an additional national security risk in expanding the number of people who have access to the information.

Relatedly, there is concern about *not* being able to make use of classified materials and the impact that this would have on the United States' ability to pursue justice. Where the government may be prevented from revealing information material to the defense, the only alternative may be to drop prosecution altogether. This is not dissimilar to the situation that gave rise to CIPA in the first place. In the realm of national security, the costs of allowing an individual engaged in terrorist activity to be released, however, may be particularly high, with devastating consequences for the life and property of U.S. citizens and the governance of the country itself.

Between these bookends are myriad questions relating to particular pieces of information and the extent to which they can be revealed without, in mosaic fashion, providing enough detail to create new vulnerabilities for the United States and its citizens.

### C. *Right to Call and Confront Witnesses*

The third set of objections relate to the constitutional right to call and confront witnesses. The Sixth Amendment provides that

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trast, do not automatically have a clearance, although the process to obtain a clearance usually takes a matter of days due to the rigors involved in becoming a magistrate judge in the first place.

35. *Id.* at 8.

36. *Id.*

"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."<sup>37</sup>

The Supreme Court understands the Confrontation Clause, derived from the same origin as the common law rule against the admission of hearsay, to ensure that the defendant has an opportunity to challenge the credibility of anyone testifying in opposition, and to cross-examine the individual making the statements. While exceptions to hearsay exist, in 2004 the Supreme Court recognized that *testimonial* statements made outside the courtroom are inadmissible where the accused has not had the opportunity to cross-examine the individual and the person is not available at trial.<sup>38</sup>

In the terrorism context, one concern centers on access to detainees. That is, the government may have an individual in custody who has provided information material to the prosecution. In order to use this information at trial, the defendant must be provided with an opportunity to challenge the information through cross-examination. The government, however, may be concerned about allowing the defendant to contact individuals being held for terrorist offenses. Detainees may use the opportunity to send messages to others in their organization. They may take the opportunity to manipulate the media. They may use it to develop strategies with others similarly situated.

To the extent that the government refuses access to a detainee, the Compulsory Process Clause, which gives every criminal defendant the right to call witnesses in their favor, may also come into play. That is, the defendant may want to contact a detainee held by the government to obtain exculpatory statements.<sup>39</sup> The defendant may want the individual to testify in their defense at trial. The same concerns, however, that mark giving a defendant direct access to a detainee—and to the media and the public through the civilian judicial system—may accompany allowing a detainee to testify in court. Information

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37. U.S. CONST. amend VI.

38. *Crawford v. Washington*, 541 U.S. 36 (2004).

39. See, e.g., Jerry Markon, *Lawyers Want Detainees to Testify in Terror Trial*, WASH. POST, July 15, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/14/AR2008071401446.html> [<http://perma.cc/RRV4-FVXU>].

may be conveyed in the process to individuals who present a threat to the United States and its people.

The Confrontation Clause extends to physical evidence as well. The jury must have an opportunity to view the physical evidence, and the defense must have an opportunity to cross-examine the meaning and validity of the evidence presented. For evidence obtained overseas, held overseas, or destroyed in the conduct of military operations conducted outside domestic borders, this requirement may be difficult (or impossible) to meet. It may be dangerous to bring the evidence into a domestic courtroom. It may also create a different type of security risk to do so, providing in the process information about weapons and vulnerabilities.

Additionally, there is a practical consideration: geography. Since terrorism is often global and many trials are international, proceedings may be complicated by efforts to incorporate the testimony, and allow for the cross-examination of, witnesses located outside the United States.<sup>40</sup>

#### *D. Right to a Speedy and Public Trial by an Impartial Jury*

The fourth set of objections relates to the conduct of the trial itself. Specifically, the Sixth Amendment provides criminal defendants with “the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”<sup>41</sup> Speed, transparency, and impartiality, however, may be difficult to guarantee when prosecuting individuals for terrorist offences.

Consider first the swiftness of the trial. Unlike criminal law, where, as a general matter, individuals are apprehended and cases prepared in rapid sequence, individuals prosecuted for terrorist crimes may first be held for intelligence-gathering purposes. Extended detention, once adopted, thus means a lengthy process.

Even if we consider the trial process from the point at which a suspect is charged, a number of characteristics unique to the world of counter-terrorism may draw out the proceedings. Classification, and the steps that must be taken to evaluate and negotiate the type of information that will be provided, present

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40. REAGAN, *supra* note 34, at 53–54.

41. U.S. CONST. amend. VI.

a formidable challenge. Terrorism cases typically involve numerous agencies, which hold different pieces of the puzzle. Information from the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, the National Counterterrorism Center, and the Federal Bureau of Investigation may be relevant, as may military records. The U.S. Attorney's Office prosecuting the case, as well as the National Security Division at the Department of Justice may both be involved, as well as local and state law enforcement agencies. The Treasury may have a role to play with regard to sanctions or charges of material support, even as State Department records designating foreign terrorist organizations and their associates may be of issue. Further records from the Department of Homeland Security may similarly be relevant.

This elaborate network, spanning departments, must be managed in order for information to be secured and produced for the prosecution. This takes time. Added to this are the geographic concerns highlighted in the previous section and the difficulty of procuring witnesses and evidence from overseas. Together, the structure itself of the counter-terrorism bureaucracy may raise Sixth Amendment claims in the ordinary judicial system.<sup>42</sup>

The right to a public trial is not absolute. Where there is "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," a judge may close a trial to public access.<sup>43</sup> There are times when this has been done for cases involving, for instance, organized crime, trade secrets, or sexual assault of a minor. And there are cases in the counterterrorism realm, where courts have sought to prevent public access to at least part of the proceedings. But there are still a number of concerns that arise.

The silent witness rule, for instance, is a little-known evidentiary doctrine, wherein the trial participants have copies of a clas-

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42. See, e.g., Benjamin Weiser, *Former Detainee's Right to Speedy Trial Wasn't Violated, Appeals Panel Rules*, N.Y. TIMES, Oct. 24, 2013, <http://www.nytimes.com/2013/10/25/nyregion/appeals-panel-upholds-conviction-of-ghailani-ex-detainee.html> [<http://perma.cc/U68P-YRXX>]. See also Walter E. Kuhn, *Crime and Punishment: The Modern Development of Homegrown Creative Justice: The Speedy Trial Rights of Military Detainees*, 62 SYRACUSE L. REV. 209 (2012).

43. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1986). See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that the right to a public trial is not absolute).

sified document providing designated code names for places, names, and other information.<sup>44</sup> The public does not have access to the key. During the trial, reference to classified information is made by using the code words or phrases, thus protecting information from public disclosure.<sup>45</sup> In 2007 the silent witness rule (SWR) went into effect for the first time, when Judge T.S. Ellis III presented it as effectively closing a trial from the public by creating two sets of evidence: one available to the public, and the other limited to the trial participants.<sup>46</sup> Ellis suggested that “SWR is not *per se* impermissible because it closes the trial, but use of the procedure is permissible only after a searching analysis.”<sup>47</sup> Ellis proposed a four-part test commensurate with the *Press-Enterprise* standard<sup>48</sup> for partial closure of a trial: the government must establish “(i) an overriding reason for closing the trial, (ii) that the closure is no broader than necessary to protect that interest, (iii) that no reasonable alternatives exist to closure, and (iv) that the use of the SWR provides defendants with substantially the same ability to make their defense as full public disclosure of the evidence, presented without the use of codes.”<sup>49</sup> While the silent witness rule appears to address concerns about classified information entering the public domain, its use is highly controversial,<sup>50</sup> and efforts to employ it have been unsuccessful.<sup>51</sup>

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44. Jonathan M. Lamb, *The Muted Rise of the Silent Witness Rule in National Security Litigation: The Eastern District of Virginia’s Answer to the Fight Over Classified Information at Trial*, 36 PEPP. L. REV. 213, 217 (2009).

45. *Id.*

46. *United States v. Rosen*, 520 F. Supp. 2d 786, 797 (E.D. Va. 2007) (“[U]se of the SWR constitutes a partial closure of the trial or, if used extensively, a complete closure of the trial because it prevents the public from seeing and hearing the complete body of evidence in the case.”). The procedure differs from CIPA in that the information is never be made available to the public. *Id.* See also *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006); Steven Aftergood, *AIPAC Court Considers “Silent Witness” Procedure*, SECURITY NEWS (Mar. 27, 2007), available at [http://fas.org/blogs/secretcy/2007/03/aipac\\_court\\_considers\\_silent\\_w/](http://fas.org/blogs/secretcy/2007/03/aipac_court_considers_silent_w/) [<http://perma.cc/PC4F-KMAK>]; Steven Aftergood, *AIPAC Court Adopts Silent Witness Rule*, SECURITY NEWS (Nov. 7, 2007), available at [http://fas.org/blogs/secretcy/2007/11/aipac\\_court\\_adopts\\_silent\\_witn/](http://fas.org/blogs/secretcy/2007/11/aipac_court_adopts_silent_witn/) [<http://perma.cc/QNF5-7GYS>].

47. *Rosen*, 520 F. Supp. 2d at 797.

48. *Press-Enterprise Co.*, 464 U.S. at 510.

49. *Rosen*, 520 F. Supp. 2d at 799.

50. See, e.g., Jesselyn Radack, *Constitutionally-Questionable “Silent Witness Rule” Approved for Espionage Act Prosecution*, DAILY KOS (Oct. 4, 2011, 8:13 AM), <http://www.dailykos.com/story/2011/10/04/1022669/-Constitutionally->

The final consideration with regard to conduct of the trial relates to the role of the jury. Here, twin issues arise: the potential threat of violence to the jurors, and the risk of partial juror behavior, as linked to the emotive nature of terrorist activity.

On the former, terrorist threats raise concern about the impact of violence—and the threat of violence—on the judicial process. Civilian jurors may be particularly vulnerable to threatening behavior.<sup>52</sup> They typically are drawn from a cross-section of the public and, as such, (unlike soldiers, for instance), are not deeply embedded in a protective sphere. Especially in a digital age, details about their lives (and those of their families and relatives) may be easily discoverable.<sup>53</sup> In contrast, military personnel—and, particularly, judges in the military system—are by nature fewer in number and by circumstance, more protected from and less vulnerable to efforts at intimidation.<sup>54</sup>

The second concern centers on the impartiality requirement and the possibility of juror bias in terrorism cases. Individuals selected for service may exhibit strong leanings either toward or away from the accused, depending on the juror's view of government actions, or perception of potential links between

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Questionable-Silent-Witness-Rule-Approved-For-Espionage-Act-Prosecution# [http://perma.cc/F3KM-8KWN].

51. As of *Rosen*, the government had only attempted to use it in three reported cases. *United States v. Fernandez*, 913 F.2d 148, 161-162 (4th Cir. 1990); *United States v. North*, 1988 WL 148481, at \*3 (D.D.C. Dec. 12, 1988); *United States v. Zettl*, 835 F.2d 1059, 1063 (4th Cir. 1987). In only one did the district court permit its use, although the government never made use of the procedure due to interlocutory appeal. *Zettl*, 835 F.2d at 1063. In *United States v. Lindh*, the government appears to have planned to use the rule; however, the case plead out before trial. Crim. No. 02-37A, E.D. Va. (“In this event, the Government would request that such material be exhibited only to the jury and defense counsel and that the contents of the classified material not be divulged by either party in the questioning of witnesses. . . . This is the so-called ‘silent witness’ rule.”). U.S. District Court Judge Leonie Brinkema later approved the use of the silent witness rule in the case against Jeffrey A. Sterling. *United States v. Jeffrey Alexander Sterling*, 1:10 cr 485-LMB, Order, Doc. 225, Sept. 29, 2011, available at [http://www.politico.com/static/PPM156\\_sterling\\_cia\\_ord.html](http://www.politico.com/static/PPM156_sterling_cia_ord.html) [http://perma.cc/AJ7L-K6L3]. DOJ also attempted to use it in *Drake*, but the case was dismissed prior to a ruling on the motion.

52. Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1324 (2007).

53. Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 611 (2012).

54. In the United Kingdom, the risk of juror intimidation in terrorism trials has been dealt with by suspending the use of juries. See Donohue, *supra* note 52, at 1322.

the individual and illegal organizations.<sup>55</sup> Cognitive bias, i.e., patterns in judgment that derive from individuals' subjective experience of the world, may play a critical role.<sup>56</sup> Juror proclivity may be particularly pronounced in situations involving anger, violence, and injustice and it may lead to perceptual distortion and inaccurate judgments.<sup>57</sup>

#### E. Right to Self-Representation

The fifth and final objection relates to the right to self-representation. In 1975 the Supreme Court recognized the right to appear *pro se* as protected by the Sixth Amendment.<sup>58</sup> The right, once knowingly and intelligently invoked, is guaranteed—even where its exercise may be detrimental to the defendant.<sup>59</sup> In 1984 the Supreme Court established the central elements of this so-called “*Faretta* right” in *McKaskle v. Wiggins*.<sup>60</sup> The trial court appointed counsel over the defendant’s objection, leading the Supreme Court to hold that the appointment of standby counsel did not violate the right to self-representation: the defendant was still “entitled to preserve actual control over the case he chooses to present to the jury.”<sup>61</sup>

In the intervening years, much ink has been spilled over the tension between this right and the basic concepts of fairness that undergird the criminal justice system.<sup>62</sup> Not least is the apparent contradiction between the right to appear *pro se* and the right to the assistance of counsel. Indeed, the *Faretta* Court it-

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55. *Id.* at 1322.

56. *Id.* at 1324.

57. *Id.* at 1324–32.

58. *Faretta v. California*, 422 U.S. 806 (1975); see also *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152 (2000).

59. *Faretta*, 422 U.S. at 834–835. For a discussion of the distinction between federal and state law on the contours of what constitutes knowing waiver of the right to counsel, see Luzan Moore, *Choose Your Own Path: A Defendant’s Constitutional Right to Legal Representation*, 29 *TOURO L. REV.* 1427 (2013).

60. 465 U.S. 168 (1984).

61. *Id.* at 178.

62. See, e.g., Richard H. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 *CAL. L. REV.* 636, 649–51 (1977); Anne Bown Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 *N.Y.U. L. REV.* 676 (2000); John H. Pearson, Comment, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 *CAL. L. REV.* 697, 704–15 (1984).

self acknowledged that its holding ran somewhat counter to the proposition that the assistance of counsel was essential to the conduct of a fair trial.<sup>63</sup>

A unique way in which this tension presents itself in regard to the sufficiency of Article III as a venue for terrorism trials relates to the use of classified evidence. It may be impossible to allow terrorists, or individuals accused of terrorist activities, to represent themselves and, as a consequence, to have access to classified methods, procedures, and information. This information could then be passed to terrorist organizations, with potentially dire national security effects. Even should stand-by counsel be appointed by the trial court, Supreme Court doctrine requires that the defendant preserve control—something that would be exceedingly difficult to do without providing access to sensitive information.

## II. RISKS INHERENT IN SIDESTEPPING ARTICLE III COURTS

Critics frequently look to one or more of the foregoing arguments to suggest that Article III courts are not appropriate venues for the government to prosecute terrorist suspects.<sup>64</sup> Instead, it is argued, suspects should either be detained or charged through military commissions. Before evaluating the arguments, it is worth recognizing that there are a number of risks inherent in *not* pursuing terrorist suspects through the ordinary legal system. Lowered standards impact due process, public perception, and justice. Movement out of the civilian sphere undermines rights of citizenship—particularly the right to participate in the administration of justice. The creation of an alternative system creates forum competition, which may lead to abrogation of justice. Such shifts

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63. *Faretta*, 422 U.S. at 832–833.

64. See, e.g., Jennifer Steinhauer and Charlie Savage, *U.S. Defends Prosecuting Benghazi Suspect in Civilian Rather Than Military Court*, N.Y. TIMES, June 17, 2014, <http://www.nytimes.com/2014/06/18/world/middleeast/us-defends-prosecuting-benghazi-suspect-in-civilian-rather-than-military-court.html> [http://perma.cc/3JXB-KXHZ] (reporting on Republican politicians' objections to trial of Abu Khattala in New York); Nick Timiraos and Christopher M. Matthews, *Benghazi Case Revives Terror Trial Debate: Some Argue Such Cases Should be Held in Military Courts*, WALL ST. J., June 29, 2014, <http://online.wsj.com/articles/benghazi-case-revives-terror-trial-debate-1404085425> [http://perma.cc/R2Q7-Z89Z] (reporting the objections of House Intelligence Committee Chairman Mike Rogers and Armed Services Committee member Senator Kelly Ayotte to pursuing civilian trials in lieu of military alternatives).

may also undermine judicial authority and build a perception of incompetence with regard to the judiciary.

Military commissions have lower standards than those that mark the civilian sphere, with significant constitutional and rights-based implications.<sup>65</sup> Others have written and spoken elegantly and at length about these concerns.<sup>66</sup> Beyond the substantive issues, lowered standards affect other countries' perceptions of the United States, and the country's commitment to the rule of law. Selecting a venue based primarily on likelihood of conviction rather undermines the enterprise. The decision to leave the ordinary criminal system may thus reverberate in important ways, affecting the country's foreign relations and, ultimately, national security, as other countries prove reticent to facilitate U.S. interests abroad or to extradite suspects to the United States. Lower standards may have the further effect of leading to the conviction of individuals who are not guilty of the crimes they have been accused of committing. The reason the protections are built into the criminal justice system in the first place is to prevent those innocent of crimes from being found guilty.

Another consideration that gets rather less attention is that, by shifting the trial out of the civilian realm, it prevents U.S. citizens from being able to take part in the judicial process. There is an important right here that often goes unnoticed: the right to see justice done and to participate in the administration of justice as a way of redressing the harms perpetrated by individuals against society. Victims and their families have the right to their day in court, and to be part of, and to bear witness to, the proceedings. Removing trials from Article III courts deprives citizens of their right to seek redress for wrongs inflicted on the United States and her people.

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65. Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamden v. Rumsfeld*, 186 MIL. L. REV. 1, 3–5 (2012).

66. See, e.g., Benjamin V. Madison III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty—An Examination of Principles That Transcend the U.S. Constitution*, 17 U. FLA. J.L. & PUB. POL'Y. 347 (2006); James E. Pfander, *Article I Tribunals, Article II Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004); Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447 (2007).

Moving trials to the military sphere also creates forum competition with Article III venues, with deleterious effects.<sup>67</sup> We have already seen the negative impact of competition in the public accounting of how cases are doing in Article III courts. Success tends to be gauged by the number of convictions, the length of sentences, the harshness of the punishments imposed. Dissatisfaction results from the perception that sentencing is not sufficiently harsh. Instead of having a conversation about whether the Article III venue offered a fairer process, or whether justice was served, the conversation becomes focused on which system yields the most convictions. This is concerning for rule of law.

Constant critique of the ordinary system may also undermine the judiciary's belief in its ability to operate effectively in the criminal and civil realms. Consider state secrets. We have seen, in a number of cases like *Jeppesen* and *El-Masri*, that in order to protect classified information, the Ninth Circuit and the Fourth Circuit have upheld the state secrets claim on the grounds that they are not able to handle this information in their courtrooms.<sup>68</sup> We have seen a similar effect with regard to *Bivens* suits, such as the Rule 12 dismissal on a *Bivens* claim. In the *Arar* case, national security, again, became a special factor.<sup>69</sup> We saw the same thing in *Rasul, Ali v. Rumsfeld*, and other cases.<sup>70</sup> In other words, constant questioning may lead to a sort of disenfranchisement across the board, weakening the role of the courts in cases that could (and should) otherwise be handled by Article III entities.<sup>71</sup>

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67. *But see* Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415 (2012) (discussing the benefits of forum competition for terrorist trials).

68. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010); *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007).

69. *See Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

70. *Rasul v. Bush*, 542 U.S. 466 (2004); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

71. In addition to the risks addressed in this Article, there are additional considerations associated with jurisdictional redundancy. For a thoughtful discussion of the impact of eliminating redundancy *see* Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1427 (2012) (arguing, *inter alia*, "Whatever uncertainty exists about more modest marginal change to jurisdictional specifications . . . the wholesale elimination of redundancy is unlikely to have desirable effects.")

### III. EVALUATING THE ARGUMENTS AGAINST CIVILIAN COURTS

With the risks of not pursuing terrorist cases through the ordinary criminal justice system in mind, how persuasive are the arguments put forward in the first place? One way to approach this question is to look at the arguments in light of actual cases. Let us consider Sulaiman Abu Ghayth, whose trial started in April 2014 in Manhattan.<sup>72</sup>

It would be difficult to imagine a case more germane to the sets of issues raised by post-9/11 prosecutions than that of Abu Ghayth, a 48-year-old man who is married to Osama bin Laden's daughter, Fatima.<sup>73</sup> He was brought to the United States in 2013.<sup>74</sup> The fourteenth superseding indictment, which was issued less than a month before the trial was due to start, alleges that between May of 2001 and 2002, Abu Ghayth served al Qaeda by urging others to take oaths of allegiance to Osama bin Laden, by speaking on behalf of or in support of al Qaeda, and by warning that attacks similar to September 11 would occur.<sup>75</sup> This would be a violation of 18 U.S.C. § 2332, which forbids attempt or conspiracy outside the United States against a U.S. national, with the intent of committing homicide.<sup>76</sup> How have the arguments put forward to militate against Article III courts played out thus far in *Abu Ghayth*?

#### A. Evidentiary Rules

Based on the court records, it does not appear that the rules regarding evidence have presented a particularly insurmountable barrier. Granted, questions related to interrogation—either of Abu Ghayth or others in custodial detention—may still arise; however, the rules against hearsay, as well as the doctrine enforcing the voluntariness of confession and related matters, do not appear to have made it impossible for the trial to continue.

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72. United States v. Abu Ghayth, 2014 WL 1613197 (S.D.N.Y. Apr. 22, 2014).

73. Mark Mazzetti and William K. Rashburn, *Bin Laden Relative With Qaeda Past to Have New York Trial*, N.Y. TIMES, Mar. 7, 2013, <http://www.nytimes.com/2013/03/08/world/middleeast/bin-laden-son-in-law-is-being-held-in-a-new-york-jail.html> [<http://perma.cc/MKY9-ABGA>].

74. *Abu Ghayth*, 2014 WL 1613197, at \*1.

75. *Id.* at \*2–\*3.

76. 18 U.S.C. § 2332 (2012).

Abu Ghayth was apprehended overseas and flown back to the United States.<sup>77</sup> Over the course of the trip, which lasted approximately 14 hours, questioning was conducted over a period of 11 to 12 hours.<sup>78</sup> The defendant made a motion to suppress custodial statements made by him during the flight on the grounds that he was not provided with his *Miranda* warnings, that he did not knowingly waive the rights about which the *Miranda* warnings advise, and that his statements, regardless, were not voluntary.<sup>79</sup>

The Court found the statements admissible. As the Second Circuit previously recognized, the purpose of the *Miranda* warning is “to ensure that the person in custody has sufficient knowledge of his or her constitutional rights relating to the interrogation and that any waiver of such rights is knowing, intelligence, and voluntary.”<sup>80</sup> For a waiver to be freely made, it must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception . . . [and] made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”<sup>81</sup> For this determination, the Court looks to the “totality of the circumstances surrounding the interrogation.”<sup>82</sup> Although pre-*Miranda* custodial statements are generally inadmissible, in the case of *Abu Ghayth*, the Federal Bureau of Investigation separated public safety questions from the rest of the interrogation and then *Mirandized* the prisoner prior to further questioning.<sup>83</sup> All subsequent statements on which the government relies were made *after* Abu Ghayth had been given notice of his rights and responded that he understood them and would answer the agents’ questions.<sup>84</sup> At no point did Abu Ghayth make a “clear and unambiguous request for a lawyer.”<sup>85</sup>

The Court recognized that, *Miranda* aside, the ultimate test is one of voluntariness.<sup>86</sup> The Second Circuit has thus directed that

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77. *Abu Ghayth*, 2014 WL 1613197 at \*1.

78. *United States v. Abu Ghayth*, 945 F. Supp. 2d 511, 513 (S.D.N.Y. 2013)

79. *Id.* at 511.

80. *United States v. Carter*, 489 F.3d 528, 534 (2d Cir. 2007).

81. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

82. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

83. *Abu Ghayth*, 945 F. Supp. 2d at 513.

84. *Id.*

85. *Id.* at 515.

86. *Id.*

the court take account of “all of the circumstances surrounding the interrogation to see if police overreaching overcame a suspect’s will and led to an involuntary” statement.<sup>87</sup> Relevant circumstances include characteristics of the individual accused, the conditions of the interrogation, and the conduct of the policy.<sup>88</sup>

The Court found that Abu Ghayth was treated humanely aboard the airplane and provided with medical personnel during his interrogation.<sup>89</sup> He was told that he could ask for breaks to pray, eat, drink, or use the restroom and was provided with water, food, prayer time, and an opportunity to stretch, use the restroom, and take a nap.<sup>90</sup>

In March 2013 Abu Ghayth’s defense submitted a motion *in limine* to admit his initial statement to law enforcement in full, without modification, subject to appropriate limiting instructions for the jury. In making this request, defense counsel argued, “The prohibition against hearsay is inoperative. Any potential prejudice to the government is cured through appropriate limiting instructions.”<sup>91</sup>

According to defense counsel, the manner of interrogation did not bar the admission of the information; to the contrary, it required full provision of the defendant’s statement. According to the FBI, Abu Ghayth stated, “I am willing to tell you anything and will not hold back. I will be honest with you. Through your questions, I may have questions.”<sup>92</sup> The interview subsequently covered a wide range of topics, ranging from Abu Ghayth’s awareness of any current or pending threats against the United States, his personal life, family and background, and his custody in Iran, to (*inter alia*) his *Miranda* rights, his views on Osama bin Laden, and speeches he had

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87. *Weaver v. Brenner*, 40 F.3d 527, 536 (2d Cir. 1994).

88. *In re Terrorist Bombings*, 552 F.3d 177, 213 (2d Cir. 2008).

89. *Abu Ghayth*, 945 F. Supp. 2d at 516.

90. *Id.*

91. Government’s Opposition to the Defendant’s Motion in Limine to Admit the Defendant’s Statements to Law Enforcement Without Modification, *United States v. Abu Ghayth*, 17 F. Supp. 3d 289 (S.D.N.Y. 2014) (No. S14 98 Crim. 1023 (LAK)) [hereinafter Government’s Opposition], available at [http://kronosadvisory.com/Kronos\\_US\\_v\\_Sulaiman\\_Abu\\_Ghayth\\_Memorandum\\_of\\_Law\\_12Mar2014.pdf](http://kronosadvisory.com/Kronos_US_v_Sulaiman_Abu_Ghayth_Memorandum_of_Law_12Mar2014.pdf) [<http://perma.cc/6HSY-JWGL>].

92. *Id.* at \*2.

given.<sup>93</sup> Defense counsel noted that Abu Ghayth's statement to law enforcement appeared to be "the only means by which the government can prove certain material evidence."<sup>94</sup> Defense counsel argued that it would be inappropriate to introduce Abu Ghayth's statement in piecemeal fashion; it therefore asked the court to submit his statements in unredacted form.<sup>95</sup>

For the defense, the question was ultimately one of fairness. Abu Ghayth's attorneys argued,

Mr. Abu Ghayth's right to present a defense must include cross-examination on the accuracy, credibility and scope of any statement that the government seeks to introduce in recorded or testimonial form. Any assertion within his statement is material: where, as here, the government's proof hinges on a defendant's statement, the jury must be entitled to deliberate on the statement as it was made to law enforcement, without modification. Fairness requires it. Once the government elects to question a criminal defendant and then introduces his statement against him at trial, the statement becomes an issue of fact for the jury.<sup>96</sup>

The government objected to the motion on the grounds that the request had "absolutely no basis in the Federal Rules of Evidence or any other legal authority, and would fly in the face of firmly-established hearsay rules."<sup>97</sup> The government thus took the position that because of the rules governing hearsay—which were "of course, very much operative at this trial"—information irrelevant to the prosecution should not be allowed.<sup>98</sup> Under the Federal Rule of Evidence, when provided by the Government, Abu Ghayth's prior statements represented non-hearsay admissions of a party opponent.<sup>99</sup> Offered by the defendant, however, his own statements would qualify as inadmissible hearsay.<sup>100</sup> Self-

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93. *Id.* at \*2–6.

94. *Id.* at \*6.

95. *Id.* at \*6–7.

96. *Id.*

97. Government's Opposition, *supra* note 91.

98. *Id.* at 2.

99. FED. R. EVID. 801(d)(2)(A).

100. *Id.* 801(c), 802. *See also* United States v. Kadir, 718 F.3d 115, 124 (2d Cir. 2013) ("A defendant may not introduce his own prior out-of-court statements because they are hearsay, and not admissible.").

servicing statements made by the defendant in the past and offered by the accused are inadmissible.<sup>101</sup>

For the government, the rule of completeness did not change this analysis. Rule 106 of the Federal Rules of Evidence provides, “[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”<sup>102</sup> Resultantly, although a statement may be hearsay, it may be included where necessary to explain the portion admitted to the record, to put it in context, to avoid misleading the jury, or to ensure that the admitted portion is fairly and impartially understood.<sup>103</sup> But the rule of completeness did not compel the Court to admit of otherwise inadmissible hearsay.<sup>104</sup> Nor could it become a device to bypass hearsay rules regarding self-serving testimony.<sup>105</sup>

U.S. District Judge Lewis Kaplan ultimately denied the defendant’s *in limine* request. Thus, far from preventing the government from bringing prosecution, the hearsay rules seem rather to have assisted the government in its prosecution. Nor did the manner of interrogation undermine the voluntariness of the statements thus obtained. The intelligence community, moreover, was able to obtain a wide range of information in the course of the interrogation, much of which was unrelated to the trial itself.<sup>106</sup>

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101. *United States v. Jackson*, 180 F.3d 55, 73 (2d Cir. 1999).

102. FED. R. EVID. 106.

103. *United States v. Coplan*, 703 F.3d 46, 85 (2d Cir. 2012).

104. Government’s Opposition, *supra* note 91.

105. *Id.* (citing *United States v. Gonzalez*, 299 F. App’x 641, 645 (2d Cir. 2010)).

106. Admittedly, in this case, interrogators did not engage in the types of coercive behaviors that mark U.S. actions in the immediate aftermath of September 11. Here, it is worth noting that regardless of which forum provides the backdrop, the exclusion of evidence obtained under coercion or torture, stems from the Constitution. See generally Christopher W. Behan, *Everybody Talks: Evaluating the Admissibility of Coercively Obtained Evidence in Trials by Military Commission*, 48 WASHBURN L.J. 563 (2009). The rules are not a procedural consideration unrelated to underlying rights that can simply be shifted to obtain a higher conviction rate. Instead, the doctrine is grounded in fundamental principles upon which the rule of law in the United States is based. They thus speak to substantive rights, as well as the risk of improper conviction and would be of equal import in either an Article III or a non-Article III context.

B. *Classification*

What about the role of classification? In *Abu Ghayth*, the question of how to handle classified materials has arisen; however, the associated issues do not appear to have impeded the case. As one goes through the public court record, moreover, there is a tremendous amount of information about how it has been handled, suggesting that a certain degree of transparency can still be maintained, even when classified material is involved.

In April 2013, for instance, the judge issued a protective order pertaining to classified information pursuant to the CIPA.<sup>107</sup> The order also drew from the Federal Rules of Criminal Procedure.<sup>108</sup> Under Rule 16, the government is required to disclose certain types of information, including oral statements before or after arrest; written and recorded statements within the government's control; the defendant's prior criminal record; documents and objects material to preparing a defense or that the government intends to use in case-in-chief at trial; reports of examinations and tests; and a written summary of testimony that the government intends to use. Under Rule 16D, the court can introduce special rules for classified materials to regulate discovery.<sup>109</sup> The judge may announce protective and modifying orders and consequences for parties' failure to comply with the orders.<sup>110</sup> Finally, under Rule 57, each district court, after public notice and provision of an opportunity to comment, may make or amend rules governing its practice.<sup>111</sup>

Judge Kaplan determined that the case would involve classified materials, that special security precautions would be required (as mandated by statute, Executive Order 13526, and regulations), and that only those with a need-to-know and the appropriate clearance would have access to this material.<sup>112</sup> The order establishes the process that the defense must follow in order to access

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107. Protective Order at 1, *United States v. Abu Ghayth*, 17 F. Supp. 3d 289 (S.D.N.Y. 2014) (No. S14 98 Crim. 1023 (LAK)) [hereinafter Protective Order]; see also Classified Information Procedures Act, 18 U.S.C. app. 3, §§ 3, 9. (2012).

108. FED. R. CRIM. P. 16.

109. *Id.*

110. *Id.*

111. FED. R. CRIM. P. 57.

112. Protective Order, *supra* note 107, at 2.

this information.<sup>113</sup> The order applies to all pretrial, trial, post-trial, and appellate matters.<sup>114</sup> The judge could further modify the order pursuant to the FRCP, CIPA, and the court's "inherent supervisory authority to ensure a fair and expeditious trial."<sup>115</sup>

Classified information, for purposes of the protective order, includes anything classified pursuant to Executive Order 13,526.<sup>116</sup> This incorporates not just secret, top-secret, and Sensitive Compartmented Information, but also confidential information.<sup>117</sup> It includes any document in private hands that is derived from classified information, any document the defense knows or reasonably should know contains classified information, and any foreign government information.<sup>118</sup> (These types of information are defined in Executive Order 13,526.)<sup>119</sup>

There are four elements to the protective order issued by Judge Kaplan that help to illustrate the competence of the court in dealing with sensitive material: access to classified information, treatment of material already in the public domain, granting of security clearances, and special filing procedures where classified information might be involved.<sup>120</sup>

#### 1. Access to Classified Information

According to Judge Kaplan's order, access to classified information at issue in the case can only be done in a Sensitive Compartmented Information Facility (SCIF), as accredited by a Classified Information Security Officer (CISO).<sup>121</sup> (The use of a SCIF is *pro forma*: government employees with the appropriate level clearances are similarly given access to SCIFs when dealing with classified materials.)

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 3; *see also* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) [hereinafter National Security Information Order].

117. Protective Order, *supra* note 107, at 3.

118. *Id.* at 3–4.

119. National Security Information Order, *supra* note 116, at 707–08.

120. Protective Order, *supra* note 107.

121. *Id.* at 7–10.

The order names the primary CISO, as well as the alternates.<sup>122</sup> It requires defense counsel to seek guidance from the CISO regarding the appropriate storage, handling, transmittal, and use of classified information.<sup>123</sup> Any removal of documents from the SCIF requires CISO agreement.<sup>124</sup> In return, the CISO is prohibited from revealing to the government the contents of any conversations, the nature of the documents reviewed, or work generated by defense counsel.<sup>125</sup> All of the defense counsel's notes and documents are retained in the SCIF and prepared on word processing equipment provided by the CISO.<sup>126</sup> Defense counsel is only allowed to discuss classified information in the SCIF—not over the telephone or Internet, or in front of anyone not holding a CISO-granted security clearance.<sup>127</sup>

The CISO oversees the security clearance process for the lawyers engaged in the case.<sup>128</sup> In the order, Judge Kaplan specifically notes that the defendant (as opposed to defense counsel holding a security clearance and having a “need to know”) will not be given access to any information, absent (a) leave of the court, or (b) without the written permission of the government.<sup>129</sup> The judge has thus effectively sequestered the defendant from his lawyers, who are to be provided with clearances in an expedited manner, so as to allow them to assist with Abu Ghayth's defense.

## 2. *Material Already in the Public Domain*

The second element to this order is that the material, if it is already in the public domain but the government has not declassified it, cannot be used, discussed, or otherwise come up in the case, in any form.<sup>130</sup> Any documents must be marked “declassified” by the originating agency or department to remove the ma-

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122. *Id.* at 7 (naming Michael P. Macisso as the CISO and Christine E. Gunning, Jennifer H. Campbell, Branden M. Forsgren, Daniel O. Hartenstine, Joan B. Kennedy, Maura L. Peterson, Carli V. Rodriguez-Feo, Harry J. Rucker, and W. Scooter Slade as alternates).

123. *Id.*

124. *Id.* at 10.

125. *Id.*

126. *Id.* at 14.

127. *Id.* at 14–15.

128. *Id.* at 8.

129. *Id.* at 9–10.

130. *Id.* at 6.

terial from the classification restrictions.<sup>131</sup> The judge further notes, “[i]ndividuals who by virtue of this Order or any other court order are granted access to classified information may not confirm or deny classified information that appears in the public domain.”<sup>132</sup> Any classified information provided to the defense can only be used for preparation of the defense and may not otherwise be disclosed.<sup>133</sup>

### 3. Security Clearance Requirement for Defense Lawyers

Only cleared government officials have access to classified information.<sup>134</sup> Defense counsel are granted access once the CISO gives them a security clearance commensurate with the level of material sought, where defense counsel has a “need to know” the information in question, and where the attorneys have signed a memorandum of understanding agreeing to comply with the terms of the order.<sup>135</sup>

Defense counsel are required to fill out Standard Form 86, the Questionnaire for National Security Positions, as well as attached releases, and to submit their fingerprints to the CISO.<sup>136</sup> The CISO, in turn, is required to “undertake all reasonable steps to process all security clearance applications.”<sup>137</sup> The lawyers for the defendant take part in classified conferences, from which the defendant is excluded.

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131. *Id.* at 6–7.

132. *Id.* at 6.

133. *Id.*

134. *Id.* at 8.

135. *Id.* The memorandum of understanding reads: “Having familiarized myself with the applicable statutes, regulations, and orders . . . (1) I agree that I shall never divulge, publish, or reveal either by word, conduct or any other means, such classified documents and information unless specifically authorized in writing to do so by an authorized representative of the United States Government; or as expressly authorized by the Court pursuant to the Classified Information Procedures Act and the Protective Order entered in the case of United States v. Sulaiman Abu Ghayth, S13 98 Cr. 1023 (LAK) Southern District of New York. (2) I agree that this Memorandum and any other non-disclosure agreement signed by me will remain forever binding on me.” *Id.*

136. Protective Order, *supra* note 107, at 9.

137. *Id.*

#### 4. Special Filing Procedures for Classified Information

There are special filing procedures in place for handling classified documents. The defendant must file them under seal with the CISO, with special markings attached.<sup>138</sup> A “Notice of Filing” is then entered into the CM/ECF system, notifying the Court that the submission has been made.<sup>139</sup> The CISO examines the filing to see whether classified material is included, marks it appropriately, and retains the document under seal.<sup>140</sup> The parts of the record that are not classified are immediately made public and placed in the record.<sup>141</sup> The document is then delivered to the Court and the Government (unless it is an *ex parte* filing) under seal.<sup>142</sup>

The government may file only the portions of pleadings or documents containing classified information under seal—the rest of the document must be made available to the public.<sup>143</sup> The same rules that govern classified materials filed by the defendant apply.<sup>144</sup> The CISO maintains a separate sealed record for classified material.<sup>145</sup> Pretrial conferences involving classified information are conducted *in camera*, with only individuals holding clearances and having a need to know in attendance.<sup>146</sup>

The judge has provided counsel with an opportunity to file a Notice of Intent to Request Redaction for the transcripts (which remain under seal).<sup>147</sup> For Section 4 CIPA summaries, the judge has supplemented the ordinary written record with oral argument, of which a transcript is kept, sealed, put in a classified environment, and kept for appellate review.<sup>148</sup>

In addition to the above precautions and procedures, under CIPA, the Court, upon a sufficient showing, may authorize the government to delete information from documents that are going to

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138. *Id.* at 10.

139. *Id.* at 10–11.

140. *Id.* at 11.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 11–12.

145. *Id.* at 12.

146. *Id.* at 13.

147. *Id.* at 11, 13. See also Notice of Intent to Request Redaction (form used for such purposes), available at <http://www.nysd.uscourts.gov/file/forms/notice-of-intent-to-request-redaction> [<http://perma.cc/FR9F-QQX3>].

148. Protective Order, *supra* note 107, at 12.

be made available to the defendant, to substitute a summary of the information, or to substitute a statement admitting the relevant facts that classified information would tend to prove.<sup>149</sup> Such a showing may be made *in camera* and *ex parte*.<sup>150</sup> If the District Court nevertheless orders the disclosure to the defendant of the classified information, the order is subject to an immediate and expedited interlocutory appeal.<sup>151</sup> Together, these procedures have given the court the ability to deal with classified information, making claims to the contrary somewhat obsolete.<sup>152</sup>

### C. Compulsory Process and Confrontation

*Abu Ghayth* also sheds light on arguments related to compulsory process and the right to confront one's accusers.<sup>153</sup> Once again, these challenges do not appear to be insurmountable in the Article III context.

Sahim Alwan, who is one of the Lackawanna Six, testified at trial. (The Lackawanna Six was a group of six Yemenis from Buffalo, New York, who went to training camps in Afghanistan and came back.<sup>154</sup> Alwan pled guilty in 2003 to providing material support to a terrorist organization.<sup>155</sup> He then testified at a military commission hearing and was released from prison early.<sup>156</sup>) In *Abu Ghayth*, Alwan stated, for the record, that he saw the defendant in a guest house in Afghanistan discussing *bayah* (which is an Islamic concept of an oath) with Bin Laden, and trying to impress upon people what that meant.<sup>157</sup> The prosecution played

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149. CIPA § 4; 2054 *Synopsis of Classified Information Procedures Act (CIPA)*, DEPT. JUST. CRIM. RESOURCE MANUAL, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02054.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm) [<http://perma.cc/LSS2-9DKK>] (last visited Aug. 13, 2014).

150. *Id.*

151. *Id.*

152. The defendant must also comply with CIPA § 5. *Id.*

153. *See supra* Part I.

154. DINA TEMPLE-RASTON, *THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR*, xiii–xiv, 45 (2007).

155. *Id.* at 201.

156. Christopher M. Matthews, *Al Qaeda Trainee Describes Training Camp During Terror Trial*, WALL ST. J., Mar. 6, 2014, <http://online.wsj.com/news/articles/SB10001424052702303824204579423753034928002> [<http://perma.cc/ALM8-M76A>].

157. *Id.*

al Qaeda videos for the jurors, and Alwan testified that he saw Abu Ghayth in one of these videos, talking about the U.S.S. *Cole*.<sup>158</sup>

Not all of the testimony has been so straightforward; nevertheless, the Article III court has been able to construct procedures to ensure that the defendant's right to confront witnesses has been met. As part of his defense, for instance, Abu Ghayth requested access to perhaps the most notorious detainee in U.S. custody: Khalid Sheikh Mohammed. Despite government objections, Judge Kaplan allowed the defendant to depose him while he was still being held in Guantánamo Bay.<sup>159</sup> He did this by allowing defense counsel to draft questions and then requiring that the defense team meet with the government and the judge in conference.<sup>160</sup> Once agreed to, the questions were submitted to the witness, who responded, with answers returned to defense counsel.<sup>161</sup> This process avoided some of the key objections offered by the government, such as interrupting ongoing interrogation programs, or sending messages.<sup>162</sup>

As for the problem of geography, for overseas witnesses, Judge Kaplan allowed CCTV to be used, and the court devised a system for using technology to allow for witnesses located elsewhere to be questioned during the course of the trial.<sup>163</sup>

There are other solutions to witness concerns that were not used in this case that also offer a way forward. For potential witness intimidation, for instance, courts may permit individuals to testify under pseudonyms, or to use special entrances or exits. Light disguises may be worn to ensure that the jurors may still assess the witness's demeanor or indicia of credibility. Court sketches may be suppressed. Witnesses may be shielded from public view, seen only by the jurors and judge, or remote video deposition may occur. Together, these procedures suggest that the difficulties presented by Constitutional requirements related to compulsory process and confrontation can be accommodated in an Article III context.

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158. *Id.*

159. *See United States v. Abu Ghayth*, S14 98 Crim. 1023 (LAK), 2014 WL 1613197, at \*14 (S.D.N.Y. Apr. 22, 2014).

160. *Abu Ghayth*, 2014 WL 1613197 at \*14.

161. *Id.* at \*16–17.

162. *See id.* at \*14–15.

163. *Abu Ghayth*, 2014 WL 144653, at \*11 (S.D.N.Y. Jan. 15, 2014).

D. *Swift and Impartial Trial by a Jury*

In regard to the Constitutional guarantee to a speedy trial, in *Abu Ghayth*, there were, admittedly, some delays.<sup>164</sup> It took a year to bring the defendant to trial.<sup>165</sup> Some of those delays were defense-based.<sup>166</sup> Some were government-initiated.<sup>167</sup> One year, however, is not an inordinate amount of time—particularly in light of the elaborate negotiations with regard to classified materials involved.

With regard to juror selection—and juror intimidation in particular, selection in the case was anonymous.<sup>168</sup> This approach helps to protect jurors from coercive behavior, as well as media attention. Another way this could be done might be to close the *voir dire* to the public. To accommodate a public right of access, judges can release redacted transcripts or allow select media representatives to attend. Partial sequester and gag orders may help to address juror bias. As for one’s peers, as the court acknowledged in *Abu Ghayth*, under 18 U.S.C. § 3238, wherever a defendant is brought into the United States, under federal rules, that is where they can be tried. Other steps may be taken by the court to protect jurors, such as juror disguise, placing jurors behind screens, or having only remote viewing of the proceedings.

E. *Self-Representation*

We are left, then, with the final point, which is the right to self-representation. As I mentioned at the beginning, this area deserves further scrutiny. Abu Ghayth did not appear *pro se*; however, were he to do so, many of the solutions forged by the judge to deal with classified materials would flounder, because the procedures have relied in large measure on granting clearances to Abu Ghayth’s defense attorneys and on ensuring a certain distance between the attorneys and their client. For suspects linked to terrorist organization, revealing information

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164. See generally *United States v. Abu Ghayth*, S14 98 Crim. 1023 (LAK), 2014 WL 144653 (S.D.N.Y. Jan. 15, 2014).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Jury Selection Continues In Terrorism Trial Of Bin Laden’s Son-In-Law*, CBS N.Y. (Mar. 4, 2014), <http://newyork.cbslocal.com/2014/03/04/jury-selection-continues-in-terrorism-trial-of-bin-ladens-son-in-law/> [<http://perma.cc/75A2-YF7Q>].

that details vulnerabilities, or sources and methods, can be met with significant risks to U.S. persons and property, as well as U.S. national security.

As a matter of criminal law, as aforementioned, there is tension between the right to appear *pro se* and the Sixth Amendment right to assistance of counsel.<sup>169</sup> That is, if access to counsel is crucial to ensuring fairness, then recognizing a right to deny counsel may undermine the fairness of the subsequent proceedings. Why, then, recognize the underlying right to appear *pro se*?

In 1942 Justice Frankfurter addressed the correlation between these rights, understanding them as both stemming, in similar fashion, from the position of the accused.<sup>170</sup> The question was thus one of fundamental fairness *as informed by the position of the defendant*, who must be provided with the ability to present his best defense: "To deny an accused a choice of procedure in circumstances in which he, though a layman, is capable . . . of making an intelligent choice" was to treat Constitutional safeguards as "empty verbalisms."<sup>171</sup> The Constitution did not require that defendants accept an attorney; it merely provided one, allowing the individual to decide whether or not to avail himself of someone trained in the law.

Frankfurter's reasoning in *Adams v. United States* was *dicta*; it nevertheless remains central to the underlying rationale of why the ability to appear *pro se* is integral to the Constitutional design. The Supreme Court has thus repeatedly referred to this right in support of related holdings. In *Carter v. Illinois*, for instance, the Supreme Court noted, "Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself . . ." <sup>172</sup> In *Price v. Johnson*, Justice Murphy referred to the defendant's "recognized privilege of conducting his own defense at trial" as a concomitant of the defendant's right at the trial stage

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169. See, e.g., Maurice M. Garcia, *Defense Pro Se*, 23 U. MIAMI L. REV. 551 (1969); Joseph D. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Mike Riddle, Comment, *The Right to Defend Pro Se*, 3 TEX. TECH. L. REV. 89 (1971).

170. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942).

171. *Id.* at 279–80.

172. *Carter v. Illinois*, 329 U.S. 173, 174 (1946).

(albeit distinct from the rights that attach on appeal).<sup>173</sup> Later, in *Moore v. Michigan*, the Court noted that while a defendant had a constitutional right to counsel at the time of the pleadings, such a right could not be used to justify “forcing counsel upon an accused who wants none.”<sup>174</sup> The courts have thus repeatedly, over time, recognized the right to one’s self defense, even as it relates to broader questions of due process and fairness.

In *McKaskle*, the Court came back to Frankfurter’s rationale, noting that “[t]he right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense.”<sup>175</sup> Although the Court also noted the importance of allowing a *pro se* defendant “to control the organization and content of his own defense, to make motions, to argue points of law, to participate in the voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial,”<sup>176</sup> the purpose of requiring participation at these stages was to help to build the best defense possible.<sup>177</sup> Assuming that the rationale provided by Justice Frankfurter is the correct reading of the right to appear *pro se*, then the questions regarding classification may not be as daunting as first appear.

The right itself is not absolute. This has been recognized by numerous Courts, which, even before *Faretta*, recognized the right to one’s own self defense.<sup>178</sup> And there are a number of ways in which the right to appear *pro se* can be augmented by

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173. *Price v. Johnston*, 334 U.S. 266, 285 (1948).

174. *Moore v. Michigan*, 355 U.S. 155, 161 (1957); see also Comment, *The Right to Appear Pro Se: The Constitution and the Courts*, 64 J. CRIM. L. & CRIMINOLOGY 240 (1973).

175. *McKaskle v. Wiggins*, 465 U.S. 168, 176–177 (1984). The Court continued: “In determining whether a defendant’s *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way. *Faretta* itself dealt with the defendant’s affirmative right to participate, not with the limits on standby counsel’s additional involvement.” *Id.* at 177.

176. *Id.*

177. Discussion continues as to how to further assist pro se defendants in their ability to present the best defense. See, e.g., Jona Goldschmidt, *Ensuring Fairness or Just Cluttering Up the Colloquy? Toward Recognition of Pro se Defendants’ Right to Be Informed of Available Defenses*, 61 DRAKE L. REV. 667 (2013).

178. See, e.g., *Haslam v. United States*, 431 F.2d 362, 365 (9th Cir. 1970), cert. denied, 402 U.S. 976 (1971); *United States v. Warner*, 428 F.2d 730, 733 (8th Cir. 1970), cert. denied, 400 U.S. 930 (1970); *United States v. Sternman*, 415 F.2d 1165, 1169–70 (6th Cir. 1969); *Juelich v. United States*, 342 F.2d 29, 31 (5th Cir. 1965); *United States v. Johnson*, 333 F.2d 1004, 1005 (6th Cir. 1964).

protections for the defendant. The court, for instance, could appoint special defense counsel—e.g., either a government attorney selected for the purpose (and sequestered from the prosecution), or a private attorney provided with the appropriate security clearance<sup>179</sup> This approach already has been adopted in Article III courts for criminal cases involving terrorist charges.<sup>180</sup> For this process, the court may have to consider whether to make an appointment outside the routine selection of lawyers pursuant to the Criminal Justice Act. A similar action would be necessary if counsel for defendants are denied a security clearance or refuse to participate in the process.

Where a defendant may still insist on proceeding *pro se*, the court can appoint a counsel that has obtained a clearance as a backup. Failure to provide counsel of any sort, who could see the classified materials, would almost certainly result in a lack of fairness to the defendant in the course of the trial.

It was precisely concern about the impact of *pro se* representation on the fairness of a trial that contributed to Congress's insistence in the 2006 Military Commissions Act (MCA) that defendants be provided with counsel.<sup>181</sup> Under that statute, military defense counsel is detailed to every military commission.<sup>182</sup> Counsel must be a judge advocate who has graduated from an accredited law school or is a member of the bar of a Federal court or of the highest court of a state, and certified to perform duties as defense counsel before courts-martial by the Judge Advocate General of the armed force of which he is a member.<sup>183</sup> No individual who has acted as an investigator, prosecutor, judge, or member of a military commission can then be appointed as military defense counsel in the same case.<sup>184</sup> Article III courts have upheld the

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179. For more specific examples of these types of challenges and the various options courts can use to solve them, see generally ROBERT TIMOTHY REAGAN, NATIONAL SECURITY CASE STUDIES: SPECIAL CASE-MANAGEMENT CHALLENGES (2013).

180. See, e.g., *United States v. Abdulmutallab*, 739 F.3d 891 (6th Cir. 2014) (Abdulmutallab representing himself *pro se* at the trial stage at which point the court appointed standby counsel, and Travis A. Rossman arguing for Abdulmutallab on appeal); see also Vickie Thomas, 'Underwear Bomber' Case Fizzle – But Why?, CBS DETROIT (Oct. 13, 2011, 12:39 PM), <http://detroit.cbslocal.com/2011/10/13/underwear-bomber-case-fizzles-but-why/> [<http://perma.cc/A5SZ-QGVZ>].

181. 10 U.S.C. § 948k (2012).

182. *Id.*

183. *Id.* § 948k(c)(1)–(2).

184. *Id.* § 948k(e).

MCA's statutory requirement even where defendants have protested the provision of counsel.<sup>185</sup>

In civil cases, Congress has provided for a right to appear *pro se* in federal court.<sup>186</sup> This right, in similar manner, has been circumscribed. For instance, corporations and partnerships must be represented by counsel; non-attorney parents may not appear on behalf of their children *pro se*, outside of efforts to appeal denial of social security benefits; and in class action lawsuits, a *pro se* litigant may not represent the class.<sup>187</sup>

Terrorist cases may represent a similar exception to the general right, requiring, in the interests of placing the defendant in the strongest possible position to present the best defense and, thus, to ensure the fairness of the proceedings, that counsel be appointed, granted security clearances, and provided with access to classified evidence. While this solution is not without drawbacks, it would address the underlying concern whence the right to appear *pro se* derives.

Other steps may be taken to reinforce the purpose for which the right to appear *pro se* is being limited. For instance, it is important that such a step is taken early in the proceedings to avoid delays. This contributes to the underlying purpose as well: namely, to ensure fairness and construction of the best defense possible (and

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185. See, e.g., Motion of the United States to Require Petitioner's Counsel to Demonstrate Authority to Pursue the Appeal or, in the Alternative, to Dismiss the Appeal, *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (No. 11-1324); Response to the United States' Motion to Require Counsel to Demonstrate Authority to Pursue Appeal or, in the Alternative, to Dismiss, *Al Bahlul*, 767 F.3d 1 (No. 11-1324); Reply of the United States to Petitioner's Response to the Motion to Require Counsel to Demonstrate Authority to Pursue the Appeal or, in the Alternative, to Dismiss, *Al Bahlul*, 767 F.3d 1 (No. 11-1324); Surreply to the United States' Motion to Require Counsel to Demonstrate Authority to Pursue Appeal or, in the Alternative, to Dismiss, *Al Bahlul*, 767 F.3d 1 (No. 11-1324); Order, *Al Bahlul*, 767 F.3d 1 (No. 11-1324) ("ORDERED that the motion to require petitioner's counsel to demonstrate authority to pursue the appeal or, in the alternative, to dismiss the appeal be denied. Respondent has not demonstrate the requested relief is warranted. The Military Commission Act directs that a person convicted by military commission 'shall be represented' before this court by appellate counsel appointed under procedures established by the Secretary of Defense. 10 U.S.C. § 950h(a), (c) (2012). As respondent acknowledges, petitioner's counsel was duly appointed by the Chief Defense Counsel. Respondent's evidence does not provide an adequate basis for the court to question counsel's authority to represent the petitioner in this case.").

186. 28 U.S.C. § 1654 (2012).

187. *Id.*

not merely to speed things along).<sup>188</sup> Similarly, selection of a new attorney may ensure that any previous counsel, which may not have been adequately representing the client, do not have an opportunity to continue in that capacity. The purpose of having standby counsel is not to represent the court's interest. It is to ensure that the defendant has adequate representation, thus contributing in a meaningful way to the fairness of the proceedings.

Not all terrorism trials may require that a *pro se* defendant be appointed counsel. In 1977, for instance, Marie Haydee Beltran Torres, a member of the Fuerzas Armada de Liberacion Nacional (FALN), took part in a bombing of the Mobil Oil Building in Manhattan.<sup>189</sup> Indicted for her role in the attack, Torres claimed that U.S. courts lacked jurisdiction over Puerto Rico and refused to take any part in her trial or sentencing hearing.<sup>190</sup> Fifteen years later, the Second Circuit denied Torres' claim that she had been denied her rights as protected by the Fifth, Sixth, and Eighth Amendments. The Court found that Torres had knowingly and intelligently waived her Sixth Amendment right to counsel, that the due process clause had not been violated by the absence of mitigating evidence during sentencing, and that the sentence of life imprisonment under the relevant statute fell short of cruel and unusual punishment in violation of the Eighth Amendment.<sup>191</sup> Classified matters apparently played zero role in the proceedings. Other examples from terrorism trials present themselves.<sup>192</sup>

Preventing entirely *pro se* appearances as a general matter carries a risk that reaches to the fundamental right involved. In some circumstances, however, appointment of standby counsel, provided with appropriate clearances, may be warranted.

As a final note, a significant problem with the *pro se* critique in the context of civilian trials is that it holds equally true for military

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188. See Poulin, *supra* note 62, at 686 ("Trial courts often force defendants to proceed *pro se* and then exercise their discretion to select standby counsel as a tool to limit delay of the trial rather than to ensure the trial's fairness.").

189. Torres v. United States, 140 F.3d 392 (2d Cir. 1998).

190. *Id.*

191. *Id.*

192. See, e.g., United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2004) (Moussaoui representing himself for 18 months); Muhammad v. Virginia, 619 S.E.2d 16 (Va. 2005), *cert. denied*, 547 U.S. 1136 (2006) (John Allen Muhammad, one of the Beltway snipers in October 2002, appearing *pro se* in Virginia at the trial stage).

commissions. That is, it militates neither on the side of civilian courts nor on the side of military courts. Either way, it may be impossible to honor a defendant's wishes to proceed *pro se* when classified materials are involved.

#### IV. CONCLUDING REMARKS

The United States has made good use of its Article III courts for terrorism cases, and there is every reason to expect that it will be able to continue to do so in the future.<sup>193</sup> In 2013 the Federal Judicial Center put out a 498-page publication on how ordinary courts could meet the challenges that accompany national security cases.<sup>194</sup> A companion document summarizes case-management principles that judges have found helpful in dealing with counterterrorism, espionage, and other programs involving government secrecy.<sup>195</sup> These documents underscore the viability of the criminal justice system.

Objections to proceeding through Article III courts for matters involving terrorism primarily divide into five categories: rules of evidence, classified material, the right to confront witnesses, swift and public trial, and self-representation.

One risk of arguing that the ordinary system is inadequate, is that cases will be moved to the military system, with substantive and international repercussions for U.S. diplomatic relations and national security. Citizens may be deprived of their right to take part in the execution of justice, even as forum competition follows, altering the metrics of success. Perceptions of incompetence may further erode the judiciary's effectiveness in other areas.

Many of the claims regarding the inability of ordinary courts to handle terrorism cases, moreover, do not stand up to scrutiny. It would be difficult to come up with a more relevant example than the case currently underway: *United States v. Abu Ghayth*. Examination of the proceedings provides a good illustration of how the judiciary may competently handle the challenges involved. One area that may, in some circumstances, still prove troublesome is

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193. See, e.g., Reggie B. Walton, Preface, *Prosecuting International Terrorism Cases in Article III Courts*, in 39 GEO. L.J. ANN. REV. CRIM. PROC. iii (2010); Stephen I. Vladeck, *Terrorism Trials and the Article III Courts after Abu Ali*, 88 TEX. L. REV. 1501 (2010).

194. *Id.*

195. REAGAN, *supra* note 179.

the situation in which a defendant seeks *pro se* appearance. At times, perhaps the only way to ensure fair trial in such circumstances will be to assign counsel and to grant such representatives access to classified materials. This problem, however, is not unique to the Article III context and thus vitiates not in favor of military tribunals or indefinite detention, but rather in favor of more carefully constructing the requisite procedures to create a context in which the strongest defense may be presented.