

Better Rules for Terrorism Trials

A Working Paper of the Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution

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May 8, 2009

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Introduction

More than seven years after the attacks of September 11, 2001, the government's legal, practical and moral authority to detain suspected terrorists without trial remains a subject of fierce debate. There is general agreement among those who support preventive detention as well as those who oppose it, however, that the government can and should prosecute some individuals for terrorism-related criminal activity. Potential defendants could theoretically include the planners of or participants in actual terrorist attacks; United States citizens or legal residents who knowingly provide financial or other support to organizations such as Hamas, Al Qaeda or the Tamil Tigers; even home-grown sympathizers or "wannabes" whose grandiose plots may or may not prove to be unrealistic.

Prosecutors have, in fact, brought many such cases in federal court. Many of these cases have resulted in convictions, some not. Yet in the years since September 11, no consensus has formed about the best way to try persons accused of terrorism-related crimes.¹ Rather, a tripartite debate rages:

- The Bush Administration and others who generally view terrorism as a military problem did not prioritize criminal trial at all and favored trials by military commission whenever possible, arguing that traditional criminal trials in federal court are hamstrung by rules of procedure that make them not merely ineffective to secure convictions but affirmatively dangerous to national security.² They correctly point out that military commissions are not a jury-rigged invention of the post-September 11 world but are a well-established method of trying war criminals.³
- Civil libertarians contend that the traditional laws of war cannot be transferred without change to a potentially endless war on terror; that the current system of military tribunals lacks credibility and is legally flawed; and that the alleged inadequacies and dangers of criminal trials have been vastly overstated.⁴ They therefore argue that all terrorism trials should take place in federal courts under traditional rules.
- Finally, a third group argues that we need a special tribunal of some sort—a so-called "national security court"—with special rules to overcome the problems attendant to trials in federal court.⁵

The dispute about the optimal forum in which to try terrorists is, in reality, a dispute about what rules should apply in those trials. Do the existing rules of procedure and evidence in federal criminal cases pose unacceptable and unnecessary hurdles to the successful prosecution of terrorists? To the extent that they do, are less strict rules—for some or all terrorism trials—compatible with the Constitution and good policy? This paper suggests answers to these questions, while addressing only in passing whether those trials should take place in federal court, a court martial, a military commission, or some new national security court. The need for a coherent set of rules—regardless of the forum in which those rules apply—is underscored by recent events. In early May, press reports indicated that the Obama Administration was considering retaining the military commissions established by its predecessor, with added procedural safeguards.⁶ Given the questions that have been raised over the last seven years about the legality and fairness of these tribunals, the viability of these new commissions will depend

greatly, if not entirely, upon what their procedures are, the extent to which they depart from the familiar rules of procedure for criminal cases, and the Administration's ability to justify those departures.

For the most part, we conclude that there is no reason to depart dramatically from existing rules and procedures. Although the trial of alleged terrorists places burdens on the prosecution, defense counsel, the intelligence community and the courts, the available evidence does not establish the need for dramatic changes. We do suggest some minor modifications that could be made, consistent with the Constitution and overall fairness, to deal with particular concerns.

In one respect, however, the current situation calls for more substantial changes, both to limit the risk of improper disclosure of information that could damage our national security and to make the criminal justice system operate more smoothly and fairly in counterterrorism cases. The Constitution, federal law and the rules of criminal procedure both require the disclosure of much evidence to the accused in a criminal case and require that the accused be allowed to call witnesses in his defense and confront his accusers. When the evidence is classified or the witnesses are themselves terrorists, current procedures can create a Hobson's choice between potential danger to national security from the disclosure of classified evidence or access to detained individuals, on the one hand, and restrictions on a defendant's right to defend himself, on the other.

Congress could significantly ameliorate, if not entirely eliminate, these problems by authorizing the creation of a National Security Bar—a permanent corps of security-cleared lawyers who would be available to represent defendants in terrorism-related cases—and changing the rules for handling classified evidence when a defendant is represented by a member of this new bar. Many former government lawyers or others already have security clearances and have shown that they can be trusted to protect government secrets just as much as prosecutors. Composed of such lawyers, a National Security Bar would have full access to all classified information that is subject to disclosure in representing their defendants—access as unencumbered as if no national security issues were involved in the case at all. They would participate in all court proceedings about classified information—proceedings that are often now held on an *ex parte* basis. To the extent that other detained terrorists are potential witnesses, cleared counsel could participate in depositions of these witnesses. But they would be barred from disclosing classified information to their client or to any co-counsel who is not also a member of the National Security Bar.

Critically, however, the choice of whether to be represented by a member of the National Security Bar or by other counsel would be up to the defendant, not the government or the court. The defendant, after a hearing in open court, could choose between having counsel with full access to relevant information but restricted communication, or full communication with counsel and restricted access to information. By allowing for the participation of counsel with a security clearance, creation of a National Security Bar should minimize the risk of improper disclosure; by placing the choice in the hands of the defendant, it should minimize the burden on constitutional rights.

This proposal is not a panacea. It does not fully deal with the problem of the defendant who represents himself, for example, and then seeks access to classified information. Nor does it ensure that legally acceptable alternatives will always be available to prevent the need to disclose classified evidence—such as the testimony of a detainee who is being held for intelligence interrogation—although it should minimize the number of such situations. Creation of a National Security Bar to represent alleged terrorists, combined with the flexible use of deposition testimony and substitutes for classified information, all accomplished through the participation of cleared counsel, can ameliorate but will not entirely eliminate the conflict between a defendant’s rights and national security imperatives.

Still, establishing a National Security Bar and modifying the rules for handling classified information should enable the justice system to conduct trials that look as much as possible like normal criminal trials, while handling more deftly than it now does classified information that can currently both cause unfairness to defendants and unduly inhibit prosecutions. There is, unfortunately, no cost-free method of resolving the problems created by criminal trials of alleged terrorists. Benefits in speed, ease of conviction and protection of information are accompanied by costs in accuracy, fairness and public perceptions, and vice versa. What follows is our assessment of the right way to strike the balance between these countervailing costs, with particular emphasis on how a National Security Bar might alleviate our current problems.

Three Basic Premises

We begin by discussing three important underpinnings of our analysis: the likely continued existence of a system of detention of terrorists without trial, the unavailability to the public of complete information about the problems with criminal terrorism trials, and a general preference for existing trial procedures unless they are shown to be inadequate.

A Continued Detention System

The first of our three premises is that some system of non-criminal detention will continue to exist. We recognize that this position is controversial. Our belief that preventive detention will continue reflects a judgment about political realities rather than the underlying legal, moral and policy issues. President Obama ordered Guantanamo’s closure as one of his first official acts, but in establishing a task force to review “lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition” of terrorists, he made clear that the possibility of detention without criminal trial has not been ruled out.⁷ And in recent court filings the new administration has reiterated its predecessor’s assertion of broad authority to detain captured terrorists.⁸

Certainly, military law has historically permitted the detention of enemy combatants until the end of hostilities.⁹ Authors like Benjamin Wittes have argued that there are at least some current detainees who would be threats to American national security if released, but who may not be triable in court, and that it is likely that American forces will apprehend in the future other

captives for whom detention may be a more practical option than trial.¹⁰ We doubt that the government will want to deprive itself of this tool.¹¹

This assumption has implications for our analysis, because the need for looser criminal trial rules is inversely related to the scope of the government's authority to detain terrorists outside the criminal process. To the extent that security risks or procedural impediments make it difficult or impossible to try terrorists, the risks to national security can be lessened by more ample detention authority. On the other hand, if detention is prohibited or severely limited, the resulting security gap will lead to pressure for more flexible trial procedures. If there is a class of persons who are both dangerous and not triable under existing law—a proposition that some have disputed¹²—and the government's choice is limited to trying them using procedures that diverge from the norms in criminal courts or releasing them, we expect that the government will follow the former path. The assumption that some detention authority will continue to exist thus informs our judgment about the need to change the rules for criminal trials.

Reliance on Public Information

The dispute over whether there exists a class of persons who should be detained without trial reflects a second, methodological constraint on our analysis: It is based entirely on publicly available sources. This imposes an important limitation, one that although seemingly obvious often goes unacknowledged. Much of the information most relevant to the effectiveness of current federal criminal trial procedures remains secret. The government may decline to bring some terrorism cases in light of procedural or national security constraints that have nothing to do with the cases' merits.¹³ Likewise, federal courts and military commissions must delete classified information from their decisions. Without access to the information that dissuaded the government from indicting these hypothetical cases, or to the classified materials that drove the courts' decisions, it can be hard to know whether a particular rule was obeyed, whether it needs adjusting, or whether we could adjust it while maintaining our fundamental values.

The debate over federal courts' handling of classified information illustrates this shortcoming and its import. Two exhaustively researched studies have reviewed public materials and rejected the oft-made argument that terrorism cases cannot be successfully tried in federal court because trial procedures are insufficiently protective of national security interests.¹⁴ According to these studies, of the two most widely cited security breaches in terrorism trials, one never happened and the other did not result from the inadequacy of existing rules but from the prosecution's failure properly to invoke those rules.¹⁵ Both studies go on to catalog criminal terrorism cases that have been conducted without compromising sensitive information.¹⁶ They consequently dismiss critics' security concerns, arguing that federal judges do an excellent job of protecting our secrets while ensuring a fair process for the accused.

But evaluating trial procedures by examining only actual prosecutions is like evaluating the dangers that salmon face when swimming upstream by looking only at those fish who reach their goal. Just as that approach to piscine ecology misses the impact of bears, fatigue and fishermen, analyzing the effectiveness of criminal prosecutions by assessing only those cases that have been brought fails to account for cases that may not have been brought because of hidden but

insurmountable problems. In the case of criminal trials, for example, there is a huge group of potential cases that has very publicly *not* been brought as criminal prosecutions: the overwhelming majority of the nearly 800 detainees who have passed through the detention facility at Guantánamo Bay, Cuba. How many of these detainees could have been charged successfully? More specifically, how many of those whose incapacitation represented an urgent national security priority could have been tried? How many other suspects were never even taken into custody because prosecutors believed existing rules would preclude a trial? Without such data, any evaluation we undertake will necessarily be incomplete. If we knew more about this undisclosed information, both our perspective and our proposals might be different.

Nevertheless, we are constrained by the known facts, rather than possible but unknown ones. While we recognize the gaps in the information available to us, we believe that for both policy reasons and political reasons, decisions about the rules governing terrorism trials should be based upon evidence and not speculation or hypotheticals. The conceded lack of complete information, however, necessarily renders our conclusions tentative and subject to revision.

Adherence to Normal Criminal Procedures

Our third premise is that the framework for trying terrorists should deviate from the rules ordinarily applied in federal criminal trials only when necessary. Those rules have evolved over many centuries to achieve an appropriate balance between punishment of the guilty and protection of the innocent. And in establishing rules for the trial of terrorists we cannot discount the possibility of error. Certainly our experience with the Guantánamo detainees suggests that the heat of battle, the fog of intelligence and the venality or ignorance of third parties can lead to unfounded charges of terrorist activity.¹⁷ Loosening the rules would surely make conviction of terrorists easier, but accuracy of conviction is no less important than ease of conviction, even in the context of terrorism.¹⁸

Moreover, the existing rules for federal criminal trials provide courts a great deal of flexibility, and various statutory innovations have been developed to deal with novel problems as they arise. Finally, while we cannot identify and analyze with certainty those cases in which the government has felt it could not make use of the criminal justice system, the fact remains that it has repeatedly prosecuted terrorists and those associated with terrorists with considerable success.¹⁹ The burden should be on those who seek to modify those procedures.

There are also pragmatic reasons to start with the procedures already applied in federal courts. They are established and familiar, for one thing. As the erratic experience of setting up military commissions has shown, it is likely to be easier to strike an appropriate balance by embroidering around the edges of existing procedures than by weaving new ones out of whole cloth. Moreover, America's international stature, and hence ultimately its national security, will continue to suffer to the extent that people around the world perceive us as treating Muslim terrorists differently than we treat other terrorists—be they domestic terrorists or non-Muslim aliens.

In addition to the various specific concerns raised about trials in federal courts, critics make two general theoretical arguments for starting anew, either with military commissions or with a national security court. One is that “we are at war,” and treating terrorism as a law enforcement

problem will be inadequate to protect us. Military commissions can try enemy combatants for violations of the laws of war, and the procedures in those tribunals need not comply with ordinary evidentiary or even constitutional rules, so long as those procedural deviations are properly authorized and comport with the law of war's minimal standards.²⁰ Procedural modifications to federal court trials, on the other hand, must be consistent with the Constitution. Thus, it is argued, military proceedings, or a national security court, will permit the flexibility needed to try terrorists.

There is considerable force to this argument but, in the end, it is not persuasive. One can acknowledge that our nation's fight against Islamic terrorists must have a significant military component without accepting that it must have *only* a military component or that the component devoted to adjudicating criminal activity must reside in the military. The claim that criminal trials are inadequate to protect us is speculative. It rests largely on the fact that the September 11 attacks occurred despite indictment and trials of Islamic terrorists prior to that time. However, since that time—years during which the great majority of terrorism prosecutions continued to occur in federal court—we have had no terrorist attacks. Of course, the absence of terrorist attacks since September 11 does not establish that prosecution of terrorists in criminal court, combined with a vigorous military and intelligence response, has adequate deterrent and protective effect. But it does suggest that the contrary argument—that they are not adequate—is in no way proven, and is a shaky basis for fundamental changes to our legal structures.

Similarly, it is now a commonplace that the “war” against Islamic terrorists is in many respects different from other armed conflicts. There is no defined “battlefield” and no readily identifiable way of determining when the conflict will end. Indeed, the Bush administration relied upon the novel nature of its “war on terror” to deny persons seized and detained in Afghanistan and elsewhere the protections of the Geneva Conventions. And while that approach has since been repudiated by the Obama Administration, the decisions of the Supreme Court in cases such as *Boumediene*²¹ suggest that the laws of war as previously understood cannot be mechanically translated to the new armed conflict. Military commanders in the field should retain full authority to try war criminals seized on the field of battle; but in our view, when terrorists are captured away from a field of battle or have been transported and detained, the exigencies of war do not furnish a persuasive justification for trying them before military commissions.²²

The other theoretical argument advanced against trying terrorists in federal court is the fear of “spillover.” Judges faced with the inevitable clash of procedure and security in a terrorism case may be tempted—subtly or consciously—to bend the rules to favor the government. Then Judge, later Attorney General, Michael Mukasey predicted that “if conventional legal standards are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, these adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.”²³ The desire to immunize the criminal justice system against the infection potentially caused by the virus of terrorism trials is frequently advanced as a reason to establish a separate national security court.²⁴

This argument, too, is not without force. History does teach that tools created to advance limited prosecutorial goals tend to expand throughout the justice system, like ink on a blotter. For example, the RICO statute²⁵ was initially enacted to combat traditional organized criminal activity such as the Mafia, but is now routinely used in run-of-the-mill fraud or corruption cases.

Similarly, the statutory power of federal law enforcement agencies to subpoena records without judicial authority has spread from the national security context to a variety of ordinary criminal investigations.

At the end of the day, however, this concern does not justify jettisoning the existing trial system. For one thing, there has been little indication to date that pro-government distortions of the law in terrorism cases are “infecting” ordinary criminal trials. Quite the contrary, the principal concern expressed about criminal trials has been that they afford terrorists too many rights, and there is some irony in the fact that some of those who worry about spillover of pro-government rulings are the same ones who strongly advocate that criminal trial rules are too favorable towards terrorism defendants.²⁶

More importantly, even if a military commission system remains, or a national security court is created, there will continue to be some terrorism cases in the federal courts. Under current law, military commissions cannot try American citizens, and no one really has suggested that they, or a national security court, be allowed to.²⁷ Nor has there been any effort to try aliens seized in the United States before existing military commissions. In addition, other nations have declared military commissions to be illegitimate and may not extradite people to face trial before them.²⁸ The result is that some people will have to face trial in traditional federal court proceedings irrespective of whether America experiments with other options as well. The problem of spillover is thus going to exist under any circumstances, and having one system for trying terrorists is probably better than having two.

Concerns About Trying Terrorists

It does not follow, however, that we should continue to follow the existing rules merely because they are the existing rules. If federal trial procedures seriously inhibit or preclude prosecution of terrorists, we should consider new ones that are consistent with fundamental fairness and the Constitution. The concerns that have been expressed about trying suspected terrorists under normal rules can roughly be classified in three groups:

- fears that terrorist trials would result in the release of information that would compromise national security,
- complaints about the burdens imposed by evidentiary and procedural rules, and
- worries about the costs and burdens that terrorism trials place on the courts.

The weightiest set of concerns is the first category. Broadly understood, the fear is that the panoply of constitutional and statutory rights afforded criminal defendants would necessarily result in *the disclosure of classified or other information that would endanger national security*. The Constitution guarantees a defendant tried in federal court a variety of rights, including the rights to counsel, to confront the witnesses against him, to subpoena witnesses on his own behalf, and to a public trial. It also requires the government to disclose exculpatory evidence to the

defendant.²⁹ And the Federal Rules of Criminal Procedure require advance disclosure of much evidence, including statements of witnesses.³⁰

These requirements present unavoidable challenges in a terrorism case. First, defendants in cases involving classified information—whether they be espionage cases or terrorism cases—often make wide-ranging demands for discovery of classified information.³¹ Or, as Zacarias Moussaoui did, they may demand that persons whom the government has detained and is interrogating for intelligence purposes be produced as witnesses in their behalf.³² They may claim that they are entitled to extensive disclosure of statements of witnesses or potential witnesses. Release of intelligence information to a terrorism defendant may create a risk that this information will be disclosed; even information that is not classified may be sensitive and of value to our enemies. Release of such information may also discourage essential cooperation from foreign intelligence services that are sympathetic to our anti-terrorism efforts yet unwilling to have their assistance revealed.³³ Moreover, the witnesses whose testimony a defendant seeks may have been subject to interrogation techniques that the government does not want to reveal, although this concern has been reduced by the extensive disclosures of information about CIA coercive interrogation techniques in the months following the change of administration.

On the other hand, the government itself may face the need to use classified information in the prosecution of a defendant. For example, critical evidence against a defendant may derive from the interception of communications, yet the government may not wish to reveal that it has the capability to intercept those communications. In such situations, the government has a major problem: A bedrock principle of constitutional law prohibits the use of secret evidence against a defendant. Thus, the government would be faced with the Hobson's choice of forgoing potentially critical evidence against a defendant or risking that it will be disclosed to the enemies of our nation.³⁴

The second category of concerns is that *the federal evidentiary rules are too strict* and that they would foreclose terrorism prosecutions or make them exceedingly difficult. The most commonly cited examples are:

- When a crime is committed in the United States, police are able to secure the crime scene and observe a careful chain of custody rules as they gather evidence. But evidence of terrorist operations is often seized overseas, perhaps in the course of a military operation, where it would be impractical to ensure a clear chain of custody.³⁵
- Similarly, terrorists are often apprehended abroad under circumstances where it is not possible to provide them effective *Miranda* warnings.³⁶ How does one provide counsel before interrogating a captive seized in North Waziristan?³⁷ In addition, one cannot expect our military or intelligence officers to obtain warrants before seizing evidence abroad.
- Restrictions on the use of hearsay evidence imposed by the Federal Rules of Evidence and the Constitution would greatly diminish prosecutors' capabilities, as terrorism cases may need to rely on information provided by witnesses who cannot be hauled from the battlefield or who are not amenable to process.³⁸

All of these rules, according to critics, make trial of terrorists in federal court particularly difficult.

Third, opponents of federal trials claim that *federal courts simply cannot handle terrorism trials*. Unruly defendants can transform the normally staid trial environment into one of chaos. The problem is particularly acute in the cases of defendants who exercise their constitutional right to represent themselves. An uncontrolled atmosphere inures to the benefit of terrorists, who can exploit a highly visible forum for attacking America and its policies and recruiting sympathizers.³⁹ The most frequently cited example here is the case of Zacarias Moussaoui, which was characterized by courtroom outbursts and a barrage of intemperate motions.⁴⁰ Some fear also that terrorists would use the forum of a trial to convey coded messages to their allies.⁴¹

A related worry is that public trials create an unacceptable risk to the physical security of judges, court personnel and jurors. One federal judge has warned that “witnesses and jurors may be subjected to threats of violence or become the targets of attack. The willingness of terrorist organizations to retaliate against civilian participants in a terrorist trial cannot be overlooked.”⁴² Jurors in such a case may be intimidated from reaching a fair verdict.

What Should the Rules Be?

Many of the objections to current trial rules are overstated or rest on misapprehension of the applicable rules. Other objections—those relating to the defendant’s access to classified information, the prerequisites for introducing a defendant’s own statements against him, and the possible use of out-of-court statements by third parties—are more substantial. Fortunately, Congress could address those with relatively simple changes to current trial procedure: These include, most importantly, the creation of a National Security Bar and revising the procedures for dealing with classified information to account for the advantages of a reliable and experienced bar of cleared defense attorneys.

The Non-Problems

A number of the objections to the normal rules of criminal procedure disappear upon closer inspection. For example, there is no ironclad rule requiring that a “chain of custody” be established before a document or other physical object is introduced into evidence. The only foundation that the Federal Rules of Evidence require before evidence can be introduced is that the government provides enough evidence “to support a finding that the [evidence] is what [the government] claims.”⁴³ This is hardly an onerous burden, and the government can meet it in many different ways. The government has been able, for example, to use documents seized from Al-Qaeda training camps and turned over to law enforcement.⁴⁴ And in cases involving corruption in the Iraq Oil-for-Food program, the government successfully authenticated and introduced documents seized from Iraqi ministries after the conquest of Iraq.⁴⁵

More importantly, it is difficult to imagine a fair trial system that allowed the introduction of evidence on a lesser standard—that is to say, where there is *not* enough evidence for someone to conclude that the evidence is what the government claims. What probative value could a piece of evidence have if a juror can't say what it is?⁴⁶ Indeed, the rules for the military commissions that were set up because of the supposed deficiencies in the criminal trial process included an authentication standard essentially identical to that provided by the Federal Rules of Evidence.⁴⁷

Similarly, federal courts have a wide range of tools to deal with dangerous or obstreperous defendants, including shackling them or removing them from the courtroom,⁴⁸ empanelling anonymous juries to prevent juror fear or intimidation,⁴⁹ and imposing so-called Special Administrative Measures that limit an incarcerated defendant's ability to communicate with others.⁵⁰ The government's Witness Security Program likewise can help guarantee the safety of individuals who testify for the prosecution.⁵¹

The problem of disruptive behavior can be most acute in the case of the *pro se* defendant, as the case of Zacarias Moussaoui showed. Here too, however, courts have experience in dealing with defendants who wish to make their trial a political platform, or who are unable to control their behavior. As with any other constitutional right, the right to represent oneself can be forfeited by conduct.⁵² A *pro se* defendant, just as much as a lawyer, must obey court rules and respect decorum. And just as the court can deny admission to or sanction a lawyer who ignores those rules, it can revoke the right of an incorrigible defendant to represent himself. Moreover, while Moussaoui's trial may have been a "circus,"⁵³ it is hard to see that his antics did any lasting damage to national security, to the criminal trial system, or indeed to anyone except Moussaoui himself.

While it is of course theoretically possible that a defendant could use the public forum afforded by a trial to communicate with co-conspirators, the extent of the genuine danger presented by such communications, and a defendant's ability to make them without detection, is uncertain at best.⁵⁴ Moreover, as the experience with Combatant Status Review Tribunals and military commissions in Guantanamo has demonstrated, any forum in which a terrorist can be tried offers the opportunity for disruption or public statements. And while providing special protective measures is costly and undoubtedly burdens the court system, we are as a nation willing to accept substantial additional costs, for example, in non-terrorism cases where the death penalty is sought. Surely we should be willing to bear them when our national security is at stake.

Finally, the Fourth Amendment's limitations on searches and seizures are unlikely to impose any significant restrictions on the use of evidence against terrorism defendants. The Supreme Court held in a 1990 case that the Fourth Amendment has "no application" to searches of aliens conducted outside of the United States, so that no alien would be able to complain of the seizure abroad of evidence used against him.⁵⁵ Following this decision, at least one court has held that warrants are not required for searches conducted abroad by American officials even in the rare cases where they are directed at U.S. persons, and that such searches are limited only by a flexible "reasonableness" requirement that is likely to be met in most terrorism cases.⁵⁶ Thus, even apart from the current Supreme Court's increasing hostility towards the exclusion of evidence as a remedy for illegal searches and seizures, the Fourth Amendment is unlikely to present any obstacles to prosecution of terrorists.

The Real Problem—and a Partial Solution

To understand the problems presented by the use of classified information in criminal cases, it is helpful to outline briefly how federal courts currently deal with such evidence. The principal tool is the Classified Information Procedures Act (CIPA).⁵⁷ When a defendant seeks access to classified material, the court must first make a determination as to whether that information is properly subject to disclosure under the applicable rules. If so, and if the government does not wish to disclose the classified information, it may ask the court either to substitute “a statement admitting relevant facts that the specific classified information would tend to prove,” or “a summary of the specific classified information”; the court may only permit the use of a substitution if it would “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.” If the court finds that no substitution would be adequate, and the government still refuses to disclose the classified information, the court may strike testimony, find relevant facts adverse to the government, or dismiss the charges in whole or in part. Hearings under CIPA may be held without the presence of defense counsel.

Congress passed CIPA itself without terrorism trials in mind. The law was developed largely to deal with cases in which a defendant with prior access to classified information sought to frustrate prosecution by threatening to disclose classified information in the course of his trial. This is the so-called “graymail” problem. More recently, the government has used the law affirmatively to permit it to use evidence derived from classified information—normally in the form of an unclassified substitution approved under CIPA—as part of its own case against the defendant. The core point of CIPA is statutory recognition of a few key principles: that a court cannot compel the government to disclose classified information; that if classified information is otherwise disclosable under the rules, the government must either disclose it or provide sufficient information to put the defendant in essentially the same position he would have been in had he had access to the classified information; and that if it cannot do either of these things, it cannot proceed with its case against him.

CIPA is generally considered to have worked well in preventing the unauthorized disclosure of classified information.⁵⁸ But it has been attacked as insufficiently protective of a defendant’s rights. And while CIPA manages and alleviates the government’s Hobson’s choice between a prosecution and keeping its secrets, eliminating the problem altogether is probably impossible, since it reflects the core requirements of the Fifth and Sixth Amendments. But the problems CIPA poses for the defense are potentially addressable with salutary consequences for the functioning of the judicial system as a whole.

First, because the government is entitled under CIPA to make submissions to the court *ex parte*—that is, without sharing them with the defendant or his counsel—the court is often forced to make judgments on whether or not a substitute is adequate to enable the defendant to put on his defense without input from those who are most familiar with what that defense is. Second, because the defendant will usually not have the security clearances necessary to review classified information, information is often shared with defense counsel that the lawyer cannot discuss with his or her client, arguably infringing the defendant’s right to counsel.⁵⁹ Indeed, sometimes even

the substitution that the government prepares is classified, and may not be shared by counsel with the defendant.⁶⁰ In cases that rely heavily on classified information, as many terrorism-related cases do, the strictures of CIPA often therefore lead to burdens on the prosecution, the defense or both and to decision-making by the courts without the benefit of the best argumentation possible.

A National Security Bar

Current CIPA procedures do not guarantee in terrorism cases either that a defendant will receive a trial that is both fair and perceived as fair, or that federal judges will base their decisions on the strongest possible presentations—and their mechanism for protecting classified information is cumbersome and time-consuming. The core of our proposal is that Congress should establish a National Security Bar, consisting of lawyers with the highest level of security clearance. These lawyers would agree to be available for appointment to represent defendants in terrorism-related cases.

The idea that counsel in a case involving classified information should have a security clearance is not new, of course. But creating a National Security Bar would offer many advantages over the existing system, in which defense lawyers often must seek security clearances on an *ad hoc* basis.⁶¹ Establishing a National Security Bar first would eliminate the lengthy delays and disputes over individual clearances, which have frustrated speedy resolution of many terrorism cases. Under the current approach, the court, the defense, and the prosecution must all await the conclusion of a defense lawyer's clearance investigation, the outcome of which is not assured. Creating the National Security Bar will solve the delay problem—and provide added assurances to the defendant, who can be confident that he will not have to find a new lawyer in the event that his chosen lawyer's clearance application proves unsuccessful. Members of a National Security Bar would also acquire expertise in dealing with CIPA and the other difficult issues raised by terrorism cases, eliminating the need to “reinvent the wheel” in each trial and ensuring speedier and more consistent outcomes.

Finally, the existence of a permanent National Security Bar should make the procedural changes to CIPA that we propose more palatable. The intelligence community, justifiably concerned with the protection of sources, methods and information, regularly resists disclosure of classified information in criminal cases, even to cleared counsel. If, however, the intelligence community knew that defense counsel were someone who was cleared in advance and found reliable, rather than someone selected initially by the defendant and then cleared, it might be more willing to accept the following modifications to existing CIPA procedures.

First, no discoverable information at all would be withheld from counsel who is a member of the National Security Bar, nor would any *ex parte* submissions to the court be permitted. All normal discovery rules would apply, and anything that the government is otherwise obligated to produce under the law would be provided to such counsel, regardless of its classification level. Unclassified material, of course, can be provided to any counsel. In other words, having a National Security Bar would enable terrorism trials to look a great deal more like regular trials.

Second, as under existing law, counsel would be barred from discussing classified information with his or her client—or with uncleared counsel. But the defendant would have the right to decide whether or not to accept this restriction on his right to counsel. At the outset of any case, the defendant would be offered a choice: He could accept counsel from the National Security Bar—either as sole counsel or as co-counsel—with the concomitant limitation on that counsel’s ability to discuss classified information with him, or he could reject such counsel, with the understanding that decisions regarding disclosure of classified information would then be made without the participation of the defense.

Third, no information that is not provided to the defendant personally would be used against him. If the facts are to be determined by the judge rather than a jury—for example, if the defendant waives the right to a jury trial, or if classified information is relevant in connection with a sentencing hearing—a second judge or a magistrate should make the relevant determinations under CIPA to avoid “tainting” the trier of fact with inadmissible information.⁶² Of course, CIPA’s requirement that resulting substitutions provide the defendant a full opportunity to make his defense would continue to apply.

This approach should greatly ameliorate the burdens that the CIPA process currently places on defense counsel. Permitting cleared counsel access to all discoverable information, regardless of classification, would ensure that a court’s decisions under CIPA are made on the basis of the fullest information. It is no disrespect to the court or the prosecutors to suggest that an assessment of whether a substitution leaves the defendant in the same position as the original information is more likely to be accurate if defense counsel participates than if defense counsel does not participate.⁶³

Nevertheless, from the defendant’s point of view, this procedure is still imperfect. It is undeniably true that the participation of the defendant himself is often critical to formulating a defense.⁶⁴ Yet CIPA’s restrictions on the disclosure of classified information to the defendant have repeatedly been upheld as constitutional,⁶⁵ and in other contexts, courts have approved the disclosure of information to defense counsel that cannot be shared with the defendant personally.⁶⁶ The new procedures would give the defendant the ability to make a voluntary choice between full communication with less-informed counsel, or more limited communication with fully informed counsel. In our opinion, the defendant would be better off if his counsel has full information and can participate fully in the CIPA process; but the choice should be the defendant’s, not the court’s or the government’s.⁶⁷

Critically, although this system would result in the disclosure of much more classified information to defense counsel, it should not increase the risk of improper dissemination of that information. A large number of defense attorneys have served in sensitive positions in the government without violating their trust. Many lawyers in private practice already have clearances at the top level in connection with matters they are working on, whether they be criminal cases or business transactions involving companies that do classified work, and they manage to keep government secrets secure. There is no reason to believe that these lawyers are less trustworthy, or less careful, than prosecutors are.⁶⁸ By creating a National Security Bar, in other words, Congress can at once speed up and facilitate complicated adjudications, give fuller disclosure of key information to defense counsel, keep government secrets safe, and improve the quality of information and argument presented to American courts.

When a defendant chooses to exercise his right to represent himself, of course, the situation becomes more complicated. Such a defendant may be willing to accept a member of the National Security Bar as “stand-by” counsel to handle classified matters, and this choice should be accepted by the courts.⁶⁹ But exclusion of an uncleared *pro se* defendant from the CIPA process does not violate the Constitution. By choosing to act as his own lawyer, a defendant loses many benefits of being represented by counsel: He cannot interview potential witnesses; his access to evidence is more limited; he may lose the ability to consult freely with experts; he cannot have confidential conversations about his defense. Before permitting a defendant to represent himself, a court must assure itself that he is knowingly and voluntarily forgoing those benefits.⁷⁰ In a terrorism case, access to classified information is simply one more right the defendant would have to waive—bearing in mind that the end result of the CIPA process must still leave him in a position to make his defense.

The most complicated issues regarding classified and other sensitive information will arise in the context of defense attempts to obtain testimony from witnesses the government wishes to keep away from court. This problem is especially acute when the witness is himself a terrorism detainee—as the witnesses in the Moussaoui cases were. The Constitution guarantees a defendant the right to secure the attendance of witnesses to testify on his behalf, so long as their testimony is material and favorable, and they are subject to subpoena or within the control of the government.⁷¹ While CIPA itself does not directly address this issue, the court in the Moussaoui case—where this issue arose acutely—analyzed this situation to CIPA and required substitutions that would put the defendant in the same place as he would have been had the testimony of those witnesses been available.⁷² In other cases, however, it may not be possible to craft substitutions that are as effective for the defendant as the actual testimony would be.

In some cases, the problem can be dealt with by a pretrial deposition of the witness, via video hookup if necessary.⁷³ During the deposition, the parties may be separated, with the witness testifying from an undisclosed location, and the defendant, counsel and the district court participating from the courtroom.⁷⁴ Delays and pauses also could be employed as needed to make sure the government had the opportunity to keep highly classified material out of court. And the defendant can be limited to listening to the witness and speaking to his or her counsel, to minimize the possibility of improper communication.⁷⁵

Moreover, if the government anticipates that the detainee will, intentionally or unintentionally, reveal sensitive information in the course of his testimony, the CIPA process may provide protection.⁷⁶ If a witness possesses information that affects national security, the government can classify the information and, to the extent it touches on the classified information, the witness’s deposition testimony will be governed by CIPA.⁷⁷ Cleared counsel could then take the deposition without the defendant being present, and would then work with the court to craft an unclassified substitute.⁷⁸ Here again, participation by a member of a dedicated National Security Bar could provide comfort to the government that disclosure will not unduly risk national security.

Where all circumstances unite into a kind of perfect storm, not even a National Security Bar will do much to help. For example, in the case of a defendant who insists upon representing himself and rejects standby counsel from the National Security Bar, courts will have to use creative solutions on a case-by-case basis to ensure that such a defendant is not deprived of the right to call witnesses on his own behalf. Possible solutions include depositions upon written questions, or video depositions supervised by the court where there is a delay after each question and answer to permit editing and objections. Creation by the government and the court, without participation of the defendant or standby counsel, of substitutes for a witness's testimony should only be used as a last resort. These procedures will not completely eliminate the risk that a detainee witness might be able to communicate valuable information to a defendant. However, communication between individuals who are already in government custody may not present a significant risk to American interests. Moreover, prosecutors will often be able to reduce even that residual risk by designing indictments so as to make detainee testimony immaterial, or by working with the court and the defense to develop a legally adequate substitute for classified detainee statements. The remaining issue, in short, should be manageable.

Residual Problems

The creation of a National Security Bar will not by itself solve all of the major difficulties with trying terrorists. Other issues also make terrorism trials difficult, after all, and while having a cadre of cleared counsel involved in every stage of the proceedings may make dealing with them easier in individual cases, it will not correct the underlying problems. Some of these problems may be addressable through policy changes or subtle doctrinal shifts in by the courts. Others are probably intractable and simply reflect limitations on criminal prosecution as a means of disabling terrorists.

The Government's Use of Defendant Statements

In a criminal trial, statements of a defendant made in response to interrogation may not be admitted against him unless they are voluntary and unless the defendant had been warned of his *Miranda* rights. Requiring that potential terrorists captured abroad be read their *Miranda* rights before being questioned would undoubtedly be impractical and might well interfere with obtaining needed intelligence. Nevertheless, the United States Court of Appeals for the Second Circuit, in a well-reasoned opinion arising out of the 1998 bombings of the U.S. Embassies in Kenya and Tanzania, assumed without deciding that statements from a defendant taken in violation of *Miranda* could not be admitted in a trial of that defendant, even if the defendant was a non-resident alien and the interrogation occurred overseas.⁷⁹

How exactly *Miranda* will affect terrorism cases in the long run remains unsettled. For one thing, holding that *Miranda* limits the admissibility against terrorists of statements they make under interrogation does not necessarily lead to the conclusion that, if we managed to capture Osama bin Laden, we would have to warn him of his right to remain silent before questioning him, and immediately cease interrogation if he invoked that right.⁸⁰ As the Second Circuit noted, *Miranda* has a well-established "public safety" exception that permits the use against a defendant of his

unwarned statements “[w]hen exigent circumstances compel an un-warned interrogation in order to protect the public.”⁸¹ A plausible application of this rule would permit interrogation of captured terrorists without *Miranda* warnings so long as the interrogation is primarily intended to gather intelligence rather than to build a criminal case against the defendant—even if the information elicited proves to be evidence against him.⁸² Applying this standard should not be too difficult; courts are already experienced in applying the public safety exception at distinguishing interrogation for evidentiary purposes from interrogation needed to protect public safety.⁸³ Still, it remains to be seen which direction constitutional doctrine will head on this point. The results over time may have significant implications for the vitality of many terrorism prosecutions.

Still more difficult problems arise with statements elicited from a defendant by more or less coercive interrogation techniques. Statements offered against a defendant in federal court must meet the Fifth Amendment’s voluntariness standard, regardless of where or by whom they were elicited.⁸⁴ For a statement to be voluntary it must be “the product of a rational intellect and a free will.”⁸⁵ Statements that are the product of torture or other techniques calculated to overbear a defendant’s will are not admissible. By contrast, the rules of evidence for military commissions appear to allow more flexibility in admitting statements, permitting the use of statements not obtained by torture if they were reliable and probative.⁸⁶ This looser admissibility standard is presumed to be permissible because specific constitutional protections do not apply to military proceedings, which are subject to far looser procedural requirements.⁸⁷

Should courts allow, in a terrorism case, the introduction of statements of a defendant that do not meet traditional voluntariness standards? Simply put, the costs of permitting use of this sort of evidence are too great. As a practical matter, with the Obama Administration’s repudiation of coercive interrogation techniques, this problem should arise with much less frequency, if at all, in the future.⁸⁸ Second, one of the principal purposes of the voluntariness requirement is to ensure the reliability of a defendant’s statements, and a principal objection to the use of coercive interrogation techniques has been that persons subject to such interrogation may make false statements to end the coercion.⁸⁹ Finally, in our opinion admission of statements that are not voluntarily made is inconsistent with fundamental American values and will likely damage our international credibility.

Without access to classified information, we cannot say whether there are persons now in custody who could not be convicted without the use of statements that were coerced from them. The assumption, however, that the government will retain the ability to detain such persons if they are deemed a continuing danger makes the exclusion of coerced statements an acceptable risk.

The Government’s Use of Statements Made by Third Persons

Another problem is that witnesses against a terrorist defendant may often be unavailable, or available only at great cost and effort. Military personnel who apprehended and interrogated a defendant may be in combat, and acquaintances who know the defendant and his activities may be unwilling to travel to the United States to testify. Much of the evidence against those currently

in custody appears to have come from the interrogation of other detained terrorists, whom the government may not wish to bring to the courtroom for legitimate national security reasons. Ordinarily, statements made by third parties, not present to testify and not subject to cross-examination, may not be admitted against a defendant in a criminal trial.

However, numerous exceptions permit the introduction of hearsay in a wide variety of circumstances, including statements made in furtherance of a conspiracy, statements against the speaker's interest, records of regularly conducted activity, statements that are not offered for the truth of what was said, or statements about an event made while the event is happening.⁹⁰ Most significantly, the Federal Rules of Evidence contain a "residual exception" permitting the introduction of *any* out-of-court statement if it is "evidence of a material fact," if it is "more probative . . . than any other evidence which the proponent can procure through reasonable efforts," and if introduction of the statement would be consistent with the general purpose of the rules of evidence and the interests of justice.⁹¹ Before offering a statement under this rule the government has to notify the defendant; in addition, the defendant is permitted to attack the credibility of the person making the statement in the same manner as if he or she had testified, and the government is required to produce for the defendant material that could be used for that purpose.⁹²

These rules provide a great deal of leeway and would permit the introduction of many probative out-of-court statements. It is not hard to imagine, for example, that one example that has been posited to demonstrate the problems created by the hearsay rule—testimony by a friend of Osama bin Laden's mother that she told the friend about a warning she received from her son shortly before September 11—would be admitted under one or more of those exceptions.⁹³ But the flexibility of the hearsay rules is limited by the Sixth Amendment to the Constitution, which affords a defendant the right "to be confronted with the witnesses against him." The Supreme Court has defined this right to prohibit the introduction of any "testimonial" statements against a defendant unless the defendant is able to cross-examine the person making the statement, and while the Court has not provided a full definition of the term "testimonial" it seems likely that it would cover most statements made in response to questioning by law enforcement or intelligence agents.⁹⁴ The Confrontation Clause would thus limit the government's ability to rely on statements made by a captured terrorist to government agents that incriminate his former confederates, no matter how reliable and probative they might be.

However, it is critical to note that the Confrontation Clause does not present an absolute bar to the use of such statements. It merely requires that the defendant have an opportunity to cross-examine the witness. Thus, the government always has the option of bringing the witness in question to testify at trial. In such a case, "the Confrontation Clause places no constraints at all on the use of [the witness's] prior statements."⁹⁵

This situation is one in which Congress might consider modifying the Federal Rules of Evidence. Under present law—in one of those gossamer distinctions that the law is famous for—if a witness had previously given statements inculcating the defendant but when testifying disavows them, the prior statements cannot be used as substantive evidence against the defendant but only to impeach the witness, unless the prior statement was under oath and made during a trial, hearing or other proceeding.⁹⁶ In other words, if a detained terrorist told interrogators that the defendant was a member of Al-Qaeda but testifies and denies it, the earlier statement can only be

used to prove that the witness is lying—not to prove that the defendant was actually a member of al-Qaeda. And if there is no other evidence that the defendant was a member of al-Qaeda, the government’s proof may fail.⁹⁷ Because this limitation is imposed only by rule and not by the Constitution, however, it could be modified, and so long as the witness is subject to cross-examination and all circumstances surrounding the making of the prior statements can be brought out in court—including the relevant interrogation techniques so that the reliability of the prior statement can be adequately assessed—admission of such statements would not seem to do violence to fundamental principles of justice.

Existing procedures can also alleviate problems arising under the Confrontation Clause. Specifically, relatively liberal use of video depositions offers a means to avoid yanking soldiers from the field to testify back home or to obtain the testimony of detained terrorists. The federal rules permit pre-trial depositions of witnesses and the use of that deposition testimony at trial.⁹⁸ And while both the federal rules and the Confrontation Clause require that the defendant be present at such a deposition if it is to be introduced against him at trial, courts have held that this requirement can be satisfied if the defendant is linked by video to the deposition and has a private line to consult with counsel.⁹⁹ Moreover, taking testimony via deposition affords certain advantages: Because the deposition itself is not a public proceeding, the tape can be edited before it is played in court to remove irrelevant political statements or disruptive comments.¹⁰⁰ Such depositions could be taken at U.S. consulates or military bases overseas.¹⁰¹

Depositions may not be possible in all cases, however. There may well be cases in which the government does not want to expose a witness to any kind of examination, either because interrogation is still proceeding and a deposition would disrupt it, or for security reasons. Moreover, a witness who gave important statements may be in the custody of a foreign government that does not wish to permit access to him for a deposition, or he may simply be unwilling to testify. In some instances, a reasonable delay of trial might permit deposition of someone who is still undergoing valuable intelligence interrogation. But there will undoubtedly remain cases where the government is unable or reluctant to produce a witness for cross-examination, either at trial or for deposition, and under existing rules would have to forgo use of the interviewee’s statements, however probative.

This, however, is not a novel problem. Any experienced prosecutor has confronted situations in which he or she has been unable to use important and probative evidence, or been able to do so only with significant risks. Informants may be uncooperative, unavailable to testify, or subject to substantial impeachment that could undermine the prosecution’s case. Public disclosure of evidence that might be important to convict one defendant might frustrate another investigation. Nor is it unusual for other government agencies to have an interest in those decisions. For example other law enforcement bodies may oppose disclosure of the identity of an informant; the State Department may believe, in a case with international ramifications, that foreign policy considerations should trump prosecution; and disagreements between the Department of Justice and the intelligence community over the extent of disclosure in espionage cases are the rule rather than the exception.

Prosecutors thus have experience making the kind of judgments that would be required when critical evidence against a potential terrorist cannot be used because of Confrontation Clause concerns. They also have experience working closely with—if often in tension with—the intelligence community to resolve competing interests. In some instances, careful selection or drafting of charges could permit a case to move forward without the use of the challenged evidence.¹⁰² In some instances, the government will conclude that no viable case can be brought against a potential terrorist and will likely fall back on some sort of detention authority to prevent the release of genuinely dangerous individuals who cannot be prosecuted. And in some instances, the government will conclude that prosecution of a terrorist—exposing his crimes to the public and securing a just sentence—outweighs the costs and risks of exposing witnesses to deposition testimony.

But in our view, the theoretical concerns that have been raised about the use of hearsay testimony—concerns that, so far as appears on the public record, have not prevented successful prosecution in many cases—should not lead us to set up a system that abandons the fundamental values embodied by the Confrontation Clause. As Justice Scalia noted:

The [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.¹⁰³

Some Final Thoughts

The proposals we advocate here represent a balancing of values and a prediction about risks, based on the available information. They represent our best judgment about the most effective way to protect all of the national interests affected by the prosecution of terrorists: to secure the conviction of the guilty while enabling the acquittal of the innocent; to guard national secrets while holding trials that are not only fair but are perceived to be fair; and to protect a defendant’s rights without endangering national security.

Some of our proposals may bump up against limits imposed by the Constitution. Courts may find, for example, that extensive use of depositions where the defendant participates only by video hookup, or requiring the defendant to choose between counsel with access to classified material and counsel with whom he can communicate fully, do not comport with constitutional norms. It is, however, worth taking the risk that these procedures might be struck down, both because we believe they are in fact proper, and because, for the reasons discussed above, we believe it is preferable to make every effort to try alleged terrorists in proceedings that are as close as possible to normal criminal trials.

Finally, we do not in any way minimize the costs and burdens that the procedures we advocate will impose on the intelligence community and the criminal justice system. Trial of an accused terrorist will be an expensive, time-consuming and labor-intensive process. It will require many difficult decisions on the part of the government and a great investment of resources by the law enforcement and intelligence communities. But the cost of these trials, while substantial, is almost a rounding error to the overall cost of our efforts to combat terrorism.¹⁰⁴ And as many have noted, there is no greater priority for the government than to protect our national security. If that is the case, we should be willing to accept these costs and burdens for the sake of ensuring that we do so in a manner that is consistent with both our fundamental values and our long-term stature in the world.

Notes

¹ The term “terrorism-related crime” is not self-defining. Equating it to prosecution for violations of particular statutes is both over-inclusive (since it could include prosecutions of domestic terrorists that do not present the same problems discussed in this paper) and under-inclusive (in that, for example, prosecution of al Qaeda members for immigration violations or false statements could present those problems). The need to define the term is most acute if terrorists are to be tried in special tribunals, to delineate the tribunal’s jurisdiction.

² See, e.g., Ruth Wedgwood, “The Case for Military Tribunals,” *Wall Street Journal*, December 3, 2001.

³ See Curtis Bradley and Jack Goldsmith, “The Constitutional Validity of Military Commissions,” *The Green Bag* 5, vol. 2 (2002): 249, 250-52, recounting the United States’ use of military commissions during the Revolutionary War, Civil War and World War II; Jack Goldsmith and Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONSTITUTIONAL COMMENTARY 261 (2002), noting widespread praise for the establishment of a military commission to try captured Nazi saboteurs.

⁴ See, e.g., Neil Lewis, “Red Cross Criticizes Indefinite Detention In Guantanamo Bay,” *New York Times*, October 10, 2003; Anthony D. Romero, “End Military Commissions,” *Huffington Post*, February 12, 2008, http://www.huffingtonpost.com/anthony-d-romero/end-military-commissions_b_86249.html; Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, Human Rights First, May 1, 2008; Kenneth Roth, “After Guantanamo: the Case against Preventive Detention,” *Foreign Affairs* 87, iss. 2 (May/June 2008): 2; “[S]uspects tried before military commissions can be convicted, and even executed, on the basis of statements secured by coercion. Rules protecting interrogation methods from disclosure coupled with lax hearsay rules mean that these men could be sentenced to death based on second- or third-hand affidavits summarizing statements obtained through abuse, without any meaningful opportunity to challenge the evidence.”

⁵ See, e.g., Andrew C. McCarthy and Alykhan Velshi, “We Need a National Security Court,” working paper (American Enterprise Institute, 2006), <http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf>; Harvey Rishikof, “A Federal Terrorism Court,” working paper (Progressive Policy Institute, 2007). Many proposals for a national security court encompass trial as well as preventive detention, an issue that is beyond the scope of this paper.

⁶ William Glaberson, “U.S. May Revive Guantanamo Military Courts,” *New York Times*, May 1, 2009.

⁷ See Executive Order, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities” (January 20, 2009). See also Executive Order, “Review of Detention Policy Options” (January 22, 2009), § 1(e).

⁸ Memorandum, “In Re: Guantanamo Bay Detainee Litigation: Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay,” no. 05-0763 (JDB) (D.D.C., January 29, 2009), 3; “The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.”

⁹ Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin Press, 2008), 151; “The power to lock up the enemy is a matter of black-letter law written on pure white paper with indelible ink;” *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

¹⁰ Wittes, *Law and the Long War*, 158. It has been reported that some of those released from Guantanamo in fact returned to terrorism. See Robert F. Worth, “Freed by the U.S., Saudi Becomes al Qaeda Chief,” *New York Times*, January 22, 2009; Rajiv Chandrasekaran, “From Captive to Suicide Bomber,” *Washington Post*, February 22, 2009.

¹¹ It is possible that the courts may determine that detention is prohibited by the Constitution. As discussed below, we believe such a holding would increase the pressure to enact more flexible procedures to try terrorists.

¹² See generally Roth, “After Guantanamo,” note 4 above.

¹³ For example, critical information about a terrorist may have been obtained from a foreign intelligence service that does not want its cooperation revealed.

¹⁴ Zabel and Benjamin, *In Pursuit of Justice*, note 4 above; Serrin Turner and Stephen J. Schulhofer, *The Secrecy Problem in Terrorism Trials*, Liberty & National Security Project, Brennan Center for Justice at NYU School of Law, 2005.

¹⁵ Columnist Charles Krauthammer claimed that the defendants in the Embassy Bombings case learned through government disclosures that American intelligence services had been tapping Osama bin Laden's satellite phone. As a consequence, Krauthammer wrote, bin Laden stopped using the phone and the United States was deprived of vital intelligence about al Qaeda's activities during the months leading up to 9/11. Charles Krauthammer, "In Defense of Secret Tribunals," *Time*, November 26, 2001. Andrew McCarthy, lead prosecutor on the Blind Sheik case, has recounted that he was required to turn over to the defendants a list of unindicted co-conspirators—al Qaeda targets who were not yet suspects but who were being tracked by the intelligence community. According to McCarthy, "[w]ithin a short time of its being sent, the [list] had found its way to bin Laden in Sudan. It had been fetched for him by al-Qaeda operative Ali Mohammed who, upon obtaining it from one of his associates, forwarded it to al-Qaeda operative Wadith El Hage in Kenya for subsequent transmission to bin Laden." McCarthy and Velshi, "We Need a National Security Court," 11, n. 19.

According to Turner and Schulhofer, however, Krauthammer was mistaken: bin Laden had stopped using his satellite phone long before the trial, apparently in reaction to press reports regarding the U.S. intelligence community's monitoring efforts; and in any event, prosecutors and defense counsel from the Embassy Bombings case agree that no sensitive information was disclosed during the trial. Turner and Schulhofer, *Secrecy Problem*, 9. In the Blind Sheik trial, McCarthy and his colleagues never sought a protective order that would have prohibited counsel from sharing the unindicted co-conspirators list with the defendants. Zabel and Benjamin, *In Pursuit of Justice*, 88.

¹⁶ Zabel and Benjamin, *In Pursuit of Justice*, 87-89; Turner and Schulhofer, *Secrecy Problem*, 22-25.

¹⁷ Wittes, *Law and the Long War*, 74-75, citing press reports and academic studies casting doubt on the guilt of many detainees held at Guantanamo Bay.

¹⁸ It has been argued that terrorism presents a threat to national security sufficient that the traditional criminal law balance between conviction of the guilty and protection of the innocent should be altered. See, e.g., McCarthy and Velshi, "We Need a National Security Court," 7-8. While the gravity of the threat may justify a detention regime with lower standards, it is an insufficient basis to modify the system of trying people for crimes that could potentially result in life imprisonment or the death sentence.

¹⁹ According to one tally, between September 12, 2001 and September 11, 2008 federal prosecutions led to the conviction of over 400 terrorists, many on non-terrorism related charges. Karen Joy Greenberg, ed., *Terrorist Trial Report Card: September 11, 2008*, Center on Law and Security, New York University School of Law, 2008, 2. Prominent cases in which convictions have been secured over the years after trial or by guilty plea include those of Ramzi Ahmed Yousef, the Blind Sheikh, the perpetrators of the Embassy Bombings, Zacarias Moussaoui, Richard Reid, Jose Padilla and John Walker Lindh.

²⁰ See *Ex Parte Quirin*, 317 U.S. 1, 44 (1942), finding that Fifth and Sixth Amendment protections did not apply in commission convened to try offenses against the law of war. See also *Hamdan*, 548 U.S. at 621-635, finding that military commissions were improperly authorized and violated Geneva Conventions.

Two justifications have been advanced in support of the constitutionality of lower standards for trying accused terrorists before military tribunals or a national security court. The first is that military proceedings do not need to conform to the requirements of the Constitution. See *Quirin*, 317 U.S. at 44; *Yamashita v. Styer*, 327 U.S. 1, 23 (1945), rejecting, among other things, Fifth Amendment challenges to military commission procedures; cf. *Davis v. United States*, 512 U.S. 452, 457 n. 1 (1994), noting but not deciding the question of whether the Self-Incrimination Clause applies in military court. The second is that "alien enemy combatants...have no rights under the U.S. Constitution." McCarthy and Velshi, "We Need a National Security Court," 17, 30-31, n. 55; *Johnson v. Eisentrager*, 339 U.S. 763, 782-85 (1950). Neither proposition has been tested as applied to terrorists after 9/11.

²¹ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), holding writ of habeas corpus available to Guantanamo detainees despite prior cases barring writ for military detainees.

²² Cf. *Al Maqaleh v. Gates*, no. 06-1669 (D.D.C. April 2, 2009), holding writ of habeas corpus available to detainees captured outside the active theatre of combat and moved there for detention.

²³ Michael Mukasey, "Jose Padilla Makes Bad Law," *Wall Street Journal*, August 22, 2007. See also John Farmer, "The Wrong Weapon Against Terrorism," *International Herald Tribune*, January 13, 2008, criticizing the Padilla prosecution and observing that "when terrorism cases are treated as ordinary criminal prosecutions, the principles of law that they come to embody will guide law-enforcement conduct and be cited by the government not just in terrorism cases but in other contexts;" *Al-Marri v. Pucciarelli*, 534 F.3d 213, 310 (4th Cir. 2008), (Wilkinson, J., concurring in part and dissenting in part); "In adopting corrective measures to deal with the unique problems presented by terrorism prosecutions, courts may dilute the core protections of the criminal justice system in other cases...The government will seek to take advantage of 'terrorist precedents' in other cases."

²⁴ See, e.g., McCarthy and Velshi, “We Need a National Security Court,” 13; “Principles and precedents we create in terrorism cases generally get applied across the board. This, ineluctably, effects a diminution in the rights and remedies of the vast majority of defendants—for the most part, American citizens who in our system are liberally afforded those benefits precisely because we presume them innocent. It sounds ennobling to say we treat terrorists just like we treat everyone else, but if we really are doing that, everyone else is necessarily being treated worse.”

²⁵ 18 U.S.C. § 1961, et seq.

²⁶ Compare McCarthy and Velshi, “We Need a National Security Court,” 13, quoted note 24 above, with *ibid.*, 9-11, arguing that federal discovery requirements reveal intelligence information to accused terrorists.

²⁷ *Military Commissions Act*, Public Law 109-366, 120 Stat. 2600 (2006), § 948b (a), establishing procedures for trial of alien enemy combatants. See also McCarthy and Velshi, “We Need a National Security Court,” 36, proposing a “national security court” with jurisdiction over the detention and trial of “alien combatants captured during the war on terror.” In *Quirin*, 317 U.S. 1, the Supreme Court approved the use of a military tribunal to try a group of German saboteurs seized in the U.S., one of whom was an American citizen. However, even the Bush Administration Department of Justice was uncertain that this aspect of *Quirin* would be followed today. See Patrick F. Philbin to the Counsel to the President, memorandum, “Legality of the Use of Military Commissions to Try Terrorists,” 6 November 2001, 14-16.

²⁸ See Neal Katyal, “Now Can We Try Using Courts-Martial for Enemy Detainees?” *Slate*, July 11, 2006; “England refuses to recognize the commission system, with its attorney general calling them completely ‘unacceptable’ because they fail to offer ‘sufficient guarantees of a fair trial in accordance with international standards.’”

²⁹ See U.S. Const., amends. 5-6; *Brady v. Maryland*, 373 U.S. 83 (1963).

³⁰ Federal Rules of Criminal Procedure, 16, 26.2.

³¹ McCarthy and Velshi, “We Need a National Security Court,” 9-11.

³² Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Military and Criminal Detention Models*, 60 STAN. L. REV. 1079, 1107 (2008).

³³ McCarthy and Velshi, “We Need a National Security Court,” 11.

³⁴ Chesney and Goldsmith, *Detention Models*, 1107-08.

³⁵ See, e.g., John B. Bellinger, *Remarks on the Military Commissions Act*, 48 HARV. INT. L. J. 5 (2007); Senate Committee on the Judiciary, *Hamdan v. Rumsfeld: Establishing a Constitutional Process*, “Testimony of Mr. Steve Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice,” 109th Cong., 2nd sess., 2006, 4.

³⁶ *Miranda v. Arizona*, 384 U.S. 486 (1966).

³⁷ See e.g., Wedgwood, “The Case for Military Tribunals,” Senate Committee, *Hamdan v. Rumsfeld*, 4.

³⁸ Wedgwood, “The Case for Military Tribunals,” note 2 above; Senate Committee, *Hamdan v. Rumsfeld*, 4-5.

³⁹ *Al-Marri*, 534 F.3d at 310; “[W]hile a showcase of American values, an open and public criminal trial may also serve as a platform for suspected terrorists. Terror suspects may use the bully pulpit of a criminal trial in an attempt to recruit others to their cause.”

⁴⁰ Wittes, *Law and the Long War*, 172; “Moussaoui... was a nutcase who tried to represent himself, filed crazed pleadings, and made ludicrous courtroom speeches in which he repeatedly compromised any potential defense by admitting to key elements of the charges against him—for example, that he was a member of al-Qaeda, pledged to attack America. For months, he refused to cooperate with his court-appointed lawyers, and when the judge took away his ability to act as his own counsel, he pleaded guilty—thereby relieving the government of the burden of proving a tricky case.”

⁴¹ *Al-Marri*, 534 F.3d at 307; “Likewise, terror suspects may take advantage of the opportunity to interact with others during trial to pass critical intelligence to their allies.” See also *In Re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 149 (2d Cir. 2008), in which the district court refused to disclose a letter written by the defendant to the public, because the district court “didn’t know whether there are codes in this letter” and did not want “to become the medium by which the defendants seek a larger audience [internal citations omitted].”

⁴² *Al-Marri*, 534 F.3d at 309 (Wilkinson, J., concurring in part and dissenting in part).

⁴³ Federal Rules of Evidence, 901(a).

⁴⁴ Zabel and Benjamin, *In Pursuit of Justice*, 108, describing the introduction against Jose Padilla of a mujahidin form bearing his fingerprints. See also *United States v. al Moayad*, 545 F.3d 149, 172-73 (2d Cir. 2008), upholding authentication of the mujahidin form based on testimony of an FBI agent in Pakistan who received material seized during post-9/11 raids of an al Qaeda facility in Afghanistan and transmitted it to FBI headquarters.

⁴⁵ One of the authors represented a cooperating defendant in these cases.

⁴⁶ This point needs to be distinguished from the possibility that the evidence needed to authenticate a document or other piece of evidence might be classified, which is simply an aspect of the overall problems attendant to the use of classified information at trial, discussed below.

⁴⁷ Under the Military Commission Rules of Evidence, evidence can be admitted if “the military judge determines that there is sufficient basis to find that the evidence is what it is claimed to be.” Military Commission Rules of Evidence, 901(a).

⁴⁸ See, e.g., *In Re Terrorist Bombings*, 552 F.3d at 149-50, approving the shackling of a defendant after the defendant had charged the bench during a pretrial hearing and after co-defendants had stabbed a prison guard during pretrial detention; *United States v. McKissick*, 204 F.3d 1282, 1299 (10th Cir. 2000), approving the requirement that a defendant wear a stun belt under his clothes during trial after U.S. Marshals informed the court that the defendant’s fellow gang members might attempt to interrupt proceedings; *Illinois v. Allen*, 397 U.S. 337, 344 (1970), authorizing district courts to remove obstreperous defendants until they agree to comport themselves; *United States v. Williams*, 431 F.3d 1115, 1119-20 (8th Cir. 2005), approving the removal of an obstreperous, *pro se* defendant, who continued to harass and interrupt trial judge after repeated warnings.

⁴⁹ See *United States v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994), permitting anonymous jury procedure when justified by threat to jurors and when the district court takes precautions to ensure that the defendant’s rights are protected. Anonymous juries were empanelled in both the Embassy Bombings and World Trade Center bombing cases. Benjamin Weiser, “First Day of Jury Selection in U.S. Embassy Bombings,” *New York Times*, January 3, 2001; Benjamin Weiser “Bomb Trial Judge Tries to Put Jury at Ease,” *New York Times*, August 10, 1997.

⁵⁰ 28 C.F.R. § 501.3; *United States v. Ali*, 396 F.Supp. 703, 708-10 (E.D.Va. 2005), approving pretrial measures which prevented the defendant from communicating with individuals outside prison other than his attorneys or with other inmates; *United States v. El Hage*, 213 F.3d 74, 81-82 (2d Cir. 2000).

⁵¹ 18 U.S.C. § 3521.

⁵² *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975); *United States v. Moussaoui*, Crim. no. 01-455-A (E.D. Va. Nov. 13, 2003).

⁵³ Wittes, *Law and the Long War*, 172.

⁵⁴ In *United States v. Sattar*, 395 F. Supp. 2d 79 (S.D.N.Y. 2005), a lawyer and a paralegal for Sheik Abdel Omar Rahman violated Special Administrative Measures by conveying messages between their client and members of a terrorist organization, indicating Rahman’s support for the group’s resumption of violence. It appears from the court’s opinion that the government became aware relatively early of the potential violation of the SAMs, as many of the conversations were monitored, so that if they presented any genuine and immediate danger the government could have intervened.

⁵⁵ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁵⁶ *In re Terrorist Bombings*, 552 F.3d at 171.

⁵⁷ 18 U.S.C. App. III. In addition to CIPA, courts have other tools available to protect classified or sensitive information from improper disclosure. For example, undercover intelligence agents can testify anonymously or under an assumed name. Courtrooms can be closed to the public, on a limited basis, when particularly sensitive information is being discussed. See, e.g., *United States v. Marzook*, 412 F. Supp. 2d 913, 919, 923-24 (N.D. Ill. 2006), permitting Israeli intelligence officers to testify in a closed courtroom under assumed names. As noted above, Special Administrative Measures can be used to control, at least partially, a defendant’s ability to communicate with outside individuals.

⁵⁸ According to former CIA General Counsel Jeffrey Smith, “CIPA is awkward and cumbersome, but it works.” Turner and Schulhofer, *Secrecy Problem*, 25. See also Association of the Bar of the City of New York, Committee on Federal Courts, *Indefinite Detention of ‘Enemy Combatants’: Balancing Due Process and National Security in the War on Terror*, February 6, 2004, reviewing CIPA’s performance and finding “no indication that [CIPA], reasonably interpreted by federal judges, is inadequate to the task of protecting national security interests while affording defendants a fair trial.” We are not aware of any case in which the CIPA process has resulted in the improper disclosure of classified information. But see Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorist Prosecutions: Problems, Paradigms and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1, 12 (2003), claiming that under CIPA classified material will invariably seep into the public domain.

⁵⁹ Compare *Geders v. United States*, 425 U.S. 80 (1976), invalidating a court order that prevented counsel from communicating with the defendant during overnight recess in trial proceedings, with *United States v. bin Laden*, no. 98-cr-1023, 2001 WL 66393, n. 5 (S.D.N.Y. Jan. 25, 2001), rejecting the defendant’s claim that his Sixth Amendment rights had been violated because only defense counsel could review classified materials.

⁶⁰ One of the authors has been involved in a non-terrorism criminal case in which the government provided classified information allegedly relevant to sentencing to the judge on an *ex parte* basis, over defense objections, and in which the court approved classified substitutions (rather than unclassified ones) that counsel could not share with the defendant. See also *Marzook*, 435 F. Supp. 2d at 746-47, portions of suppression hearing conducted *ex parte* pursuant to CIPA.

⁶¹ Before the September 11 attacks, the National Commission on Terrorism had concluded that “where national security requires the use of secret evidence in administrative immigration cases, procedures for cleared counsel...should be used.” National Commission on Terrorism, 2002, 32, available at <http://www.gpo.gov/nct>. Turner and Schulhofer have specifically called upon Congress to create a cleared counsel bar, within either a federal public defender’s office or that of a legal aid society, where lawyers can seek top secret clearances in advance of their appointment or retention in terrorism cases. Turner and Schulhofer, *Secrecy Problem*, 27.

⁶² The desirability of having judges acquire expertise in dealing with issues relating to classified information is one of the stronger arguments in favor of a specialized national security court.

⁶³ In any criminal case, the prosecution reviews its own files and makes its own determination, without judicial supervision, of what material is subject to disclosure. Practical considerations support this practice; it is simply not possible for a judge to review the government’s entire file in every case. The government’s practices in making disclosures to the defense have recently been sharply criticized. See Eric H. Holder, “Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases,” Department of Justice press statement, April 14, 2009, available at <http://www.usdoj.gov/opa/pr/2009/April/09-opa-338.html>. And there is no similar practical justification for excluding defense counsel when the government, having reviewed its files, goes to the court under CIPA.

⁶⁴ See *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990); “To remove from [the defendant] the ability to discuss with his attorney any aspect of his ongoing testimony [would] effectively eviscerate his ability to discuss and plan trial strategy.”

⁶⁵ See, e.g., *United States v. Abu Ali*, 528 F.3d 210, 248-55 (4th Cir. 2008); *bin Laden*, 2001 WL 66393 at n. 5.

⁶⁶ See, e.g., *United States v. Herrero*, 893 F.2d 1512, 1526-27 (7th Cir. 1990); the defense counsel could not disclose the identity of a confidential informant to defendant; reversed on other grounds, *United States v. Durrie*, 902 F.2d 1221, 1225 (7th Cir. 1990); *Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000); the defense counsel was barred from revealing the identity of a cooperating witness.

⁶⁷ It has been suggested that if the defendant makes a sufficient showing of need, counsel should be permitted to share classified information with the defendant, and that Special Administrative Measures should be relied upon to ensure that the information is not further disseminated. Turner and Schulhofer, *Secrecy Problem*, 27-28. This is not an acceptable solution: foreign governments may well be reluctant to share information if a court might subsequently order it disclosed to a defendant, nor does this proposal take account of the possibility that a defendant might be acquitted and released.

⁶⁸ Lynne Stewart, a lawyer for the Blind Sheik, was convicted of having improper communications with her client. She did not disclose classified information, however, but rather transmitted statements between him and terrorist organizations. *United States v. Sattar*, 395 F. Supp. 2d.

⁶⁹ *Faretta*, 422 U.S. at 834 n.46, recognizing the authority to appoint standby counsel, even over the defendant’s objection. Generally speaking, a defendant is not entitled to “hybrid representation,” combining self-representation with representation by counsel. *Cross v. United States*, 893 F.2d 1287, 1291-92 (11th Cir. 1990). But while hybrid representation is not required by the Constitution, neither is it forbidden, and the interests of justice would be well served by permitting it in this context, so long as standby counsel plays no role in the actual trial.

⁷⁰ *Faretta*, 422 U.S. at 835.

⁷¹ U.S. Const., amend. 4. See also, e.g., *United States v. Moussaoui*, 382 F.3d 453, 463 (4th Cir. 2004); *United States v. Resurreccion*, 978 F.2d 759, 762 (1st Cir. 1992).

⁷² *Moussaoui*, 382 F.3d at 477-82. Congress could and should adopt proposals making CIPA expressly applicable to witness testimony. See, e.g., *Terrorism Prevention Act of 2006*, S 3848, 109th Cong., 2nd sess., *Congressional Record* 108 (September 6, 2006): S9045-9046, § 3(d), extending CIPA to non-documentary evidence.

⁷³ Federal Rules of Criminal Procedure, 15.

⁷⁴ This was, in essence, what the district court proposed in *Moussaoui*’s case, after ruling that several detainees possessed information material to his defense but that the government had not proposed legally adequate, unclassified summaries for the detainees’ statements. See *United States v. Moussaoui*, 2003 WL 21263699, no. CR 01-455-A, at n. 3-6 (E.D. Va. Mar. 10, 2001); *United States v. Moussaoui*, 382 F.3d at 458.

⁷⁵ See *United States v. Mueller*, 74 F.3d 1152, 1156-57 (2d Cir. 1996), approving taking of deposition from a witness residing in England, when defense counsel attended deposition and cross-examined the witness and the defendant could listen to witness and speak to defense counsel by telephone.

⁷⁶ A deposition transcript can be edited to remove such testimony and prevent its further dissemination. We discuss this and other aspects of the deposition procedure in Section IV.C, below.

⁷⁷ Federal law provides for the classification of information when, among other things, the classifying authority determines that the unauthorized disclosure of the information reasonably could be expected to result in identifiable damage to the national security. Executive Order 13,292, “Further Amendment to Executive Order 12958, as Amended, Classified National Security Information,” 68 Fed. Reg. 15, 315 (Mar. 25, 2003), § 1.1 (1)-(4). The government has taken the position that information can be classified if it meets this standard, even if it was not derived from the government.

⁷⁸ The most sensitive area will likely relate to interrogation techniques used on the witness. But CIPA has been successfully used to craft substitutions even in the case of allegedly coercive interrogations. *United States v. Marzook*, no. 03 Cr. 978 at 4-5 (N.D. Ill. 2006), approving substitutions regarding interrogation of defendant by Israeli agents.

⁷⁹ *In re Terrorist Bombings*, 552 F.3d at 199-205 (2d Cir. 2008). The court upheld the defendants’ convictions on the grounds that abbreviated *Miranda* warnings sufficed under the circumstances, and that the defendants had thereafter agreed to answer questions voluntarily.

⁸⁰ See Wedgwood, “The Case for Military Tribunals.” Cf. *Miranda*, 384 U.S. at 473-74, requiring cessation of interrogation upon invocation of the right to silence.

⁸¹ *In re Terrorist Bombings*, 552 F.3d at 203 n. 19; see *New York v. Quarles*, 467 U.S. 649 (1984); *United States v. Khalil*, 214 F.3d 111, 121-22 (2d Cir. 2000), finding *Miranda* inapplicable to unwarned questioning of a suspect in whose apartment a bomb was found to determine whether other bombs existed. In addition, *Miranda* has no application to interrogations conducted by foreign law enforcement or intelligence agencies, even if U.S. agents participate to some extent. *Abu Ali*, 528 F.3d at 227-30, finding *Miranda* inapplicable when U.S. agents suggested questions to Saudi interrogators but Saudis controlled and conducted the interrogation.

⁸² In the Embassy Bombings case, the interrogations were conducted not by intelligence agents but by law enforcement officers and were focused on the past bombing. *In re Terrorist Bombings*, 552 F.3d at 181-86.

⁸³ See, e.g., *United States v. Everman*, 282 F.3d 570, 572 (8th Cir. 2008), refusing to suppress inculpatory statements when police officers did not provide *Miranda* warning before asking a suspect whether he had any weapons nearby; *United States v. Dodge*, 852 F.Supp. 139, 142-43 (D.Conn. 1994), applying public safety exception when police had asked a defendant about the location of a pipe bomb and defendant had told them it was in his bag; *United States v. Newton*, 181 F.Supp. 2d 157, 178 (E.D.N.Y. 2002), applying public safety exceptions to statements made by a defendant regarding the location of a hidden firearm.

⁸⁴ *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

⁸⁵ *Mincey v. Arizona*, 437 U.S. 385, 399 (1978); *United States v. Charles*, 476 F.3d 492, 497-98 (7th Cir. 2007).

⁸⁶ The actual rule, which Congress prescribed by statute, is somewhat more complicated. It forbids admission of all statements obtained by “torture.” Statements resulting from “cruel, inhuman or degrading treatment” can be admitted if they were made prior to December 30, 2005, if “the totality of the circumstances renders the statement reliable and possessing sufficient probative value,” and if “the interests of justice would best be served by admission of the statement into evidence.” Statements made as a result of “cruel, inhuman or degrading treatment” after December 30, 2005, may not be admitted. 10 U.S.C. § 948r. This differs from the rule applicable to courts martial, which forbids admission of all involuntary statements, with ‘involuntary statement’ defined as one obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment, or through coercion, unlawful influence or inducement. See 47 U.S.C. § 831, prohibiting coerced statements; M.R.E. 304, implementing statutory prohibition.

⁸⁷ See note 21, *supra*. It is not clear, however, that genuinely coerced statements could be used as evidence even in a military tribunal. In *Hamdan*, 548 U.S. at 631-35, the Court held that military commissions must meet the requirement of Common Article 3 of the Geneva Conventions that they afford “all the judicial guarantees which are recognized as indispensable by civilized peoples,” and that this provision should be interpreted in light of Article 75 of Protocol 1 to the Conventions. *Ibid.*, 633. Article 75, in turn, provides among other things that “no one shall be compelled to testify against himself or to confess guilt.” “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts,” June 8, 1977, *United States Treaties and Other International Agreements*. With the passage of the Military Commissions Act, Congress overruled this aspect of *Hamdan*. Among other things, the statute deemed revamped commissions to satisfy

Common Article 3 and prohibited commission defendants from relying upon the Geneva Conventions as a source of rights. See *Military Commissions Act*, §§ 948b(f), (g). At least one appellate court has approved this aspect of the statute. See, e.g., *Noriega v. Pastrana*, no. 08-11021, 2009 WL 929960 (11th Cir., Apr. 8, 2009).

⁸⁸ The stricter standards will not completely hamstring interrogators. The constitutional standard of voluntariness permits some degree of pressure or trickery by interrogators, so long as the defendant's will was not overborne. See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969), finding that police misrepresentation of co-defendants' statements during interrogation of a defendant, standing alone, does not render confession involuntary; see also, e.g., *United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir. 1993), finding that psychological pressure does not automatically render a confession involuntary.

⁸⁹ In *Dickerson v. United States*, 530 U.S. at 433, the Supreme Court stated:

The roots of [the voluntariness] test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy. See, e.g., *King v. Rudd*, 1 Leach 115, 117-118, 122-123, 168 Eng. Rep. 160, 161, 164 (K. B. 1783) (Lord Mansfield, C. J.) (stating that the English courts excluded confessions obtained by threats and promises); *King v. Warickshall*, 1 Leach 262, 263-264, 168 Eng. Rep. 234, 235 (K. B. 1783) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt...but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape...that no credit ought to be given to it; and therefore it is rejected"); *King v. Parratt*, 4 Car. & P. 570, 172 Eng. Rep. 829 (N. P. 1831); *Queen v. Garner*, 1 Den. 329, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Queen v. Baldry*, 2 Den. 430, 169 Eng. Rep. 568 (Ct. Crim. App. 1852); *Hopt v. Territory of Utah*, 110 U. S. 574 (1884); *Pierce v. United States*, 160 U. S. 355, 357 (1896).

See also Peter Margulies, *Reliability and the Interests of Justice: Interpreting the Military Commissions Act of 2006 to Deter Coercive Interrogations*, 12 ROGER WILLIAMS U. L. REV. 750, 762 (2007); "Coercion cases have recognized two underlying rationales for the prohibition [against admitting coerced confessions]: the actual unreliability of the confession and the possibility that the confession is unreliable because of undue government pressure." The reliability of information obtained through enhanced interrogation techniques remains the subject of debate. See Greg Miller, "Panetta Tells Senate Panel He'll Examine the Effectiveness of Coercive Interrogation," *L.A. Times*, February 7, 2009.

⁹⁰ Federal Rules of Evidence, 801, 803, 804.

⁹¹ Federal Rules of Evidence, 807.

⁹² *Ibid.*; Federal Rules of Evidence, 806; *Giglio v. United States*, 405 U.S. 150 (1972).

⁹³ See Wedgwood, "The Case for Military Tribunals;" "Osama bin Laden telephoned his mother in Syria shortly before September 11 to warn her that a major event was imminent, and that he would be out of touch for some time. If the mother confided to a close friend about her son's warning, still one could not call the friend to give testimony [if bin Laden were prosecuted in federal court], for technically it would be hearsay."

⁹⁴ *Crawford v. Washington*, 541 U.S. 36 (2004). An argument can be made that statements made in response to interrogation for intelligence purposes, unlike statements made to police questions in the course of a law enforcement investigation, should not be subject to this prohibition. In a later case, the Court held that statements made to a police 911 operator were not "testimonial," articulating the distinction as follows:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006). Statements made in the course of intelligence interrogations are arguably intended to meet an ongoing emergency rather than to prove past events. But in many respects they look more like the kind of interrogation in a police station that is subject to the Confrontation Clause than they look like a 911 call, and so we assume that use of these statements would be barred. See *ibid.*, 824 n.2, specifically declining to consider whether and when statements made to non-law enforcement personnel are "testimonial" for confrontation purposes.

⁹⁵ *Crawford v. Washington*, 541 U.S. at 59 n. 9.

⁹⁶ Federal Rules of Evidence, 801(d)(1)(A).

⁹⁷ Compare *United States v. Tafallo-Cardenas*, 897 F.2d 976, 979-981 (9th Cir. 1990), prohibiting admission of witness's prior, unsworn statement to FBI agents as evidence that the defendant had instructed the witness to transport drugs, while noting that statement could be used to attack witness's credibility; and *United States v.*

Livingston, 661 F.2d 239, 243-44 (D.C. Cir. 1981), holding that a sworn statement taken by a postal worker at the witness's home was not made during a "proceeding" and could not be admitted as evidence that the defendant had robbed a post office; with *United States v. Murphy*, 696 F.2d 282, 283-84 (4th Cir. 1982), when a witness testified that he could not recall whether the defendant took part in bank robbery, the witness's inconsistent grand jury testimony was admitted as evidence that the defendant was an accomplice.

⁹⁸ Federal Rules of Criminal Procedure, 15.

⁹⁹ See, e.g., *Abu Ali*, 528 F.3d at 239-42; *United States v. Medjuck*, 156 F.3d 916, 920-21 (9th Cir. 1998); *United States v. McKeeve*, 131 F.3d 1 (1st Cir. 1997).

¹⁰⁰ In addition, Rule 15 provides that a defendant who persists in disruptive conduct can be excluded from a deposition. Federal Rules of Criminal Procedure, 15(c)(1)(B).

¹⁰¹ In some instances, terrorists may be detained by the U.S. in countries that prohibit or limit the taking of testimony, and arrangements may have to be negotiated to permit this.

¹⁰² Prof. Robert Chesney discusses the wide range of statutes under which potential terrorists can be prosecuted. Robert Chesney, "Optimizing Criminal Prosecution as a Counterterrorism Tool," working paper, *Counterterrorism and American Statutory Law* 4 (2008), http://www.brookings.edu/papers/2008/1219_prosecution_chesney.aspx.

¹⁰³ *Crawford v. Washington*, 541 U.S. at 61.

¹⁰⁴ No single number authoritatively describes the monetary cost of our nation's counterterrorism efforts. With that said, the publicly available information leaves no doubt that the cost of criminal trials will not even distantly approach our expenditures for military and intelligence activities in the global war on terror. See Amy Belasco, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11*, CRS Report RL3310 (October 15, 2008), Summary Page, estimating \$864 billion spent on the wars in Afghanistan and Iraq and on enhanced global security activities since 9/11, projecting the expenditure of up to \$1.7 trillion by 2018.