THE PHILIP D. REED LECTURE SERIES

PANEL DISCUSSION

TRYING CASES RELATED TO ALLEGATIONS OF TERRORISM: JUDGES' ROUNDTABLE*

PANELISTS

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Judge, Southern District of Florida

Hon. Gerald Ellis Rosen
Judge, Eastern District of Michigan

Hon. Leonard Burke Sand
Judge, Southern District of New York

Hon. Shira A. Scheindlin
Judge, Southern District of New York

MODERATOR

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PROFESSOR CAPRA: My name is Daniel Capra. I'd like to thank you for coming tonight. This is a very impressive panel that we have here, so I'm not going to spend a lot of time on my stuff. All I'll say is I'm the Philip Reed Professor.

We thank Philip Reed for funding this. Philip Reed is one of the most outstanding of Fordham graduates, and to have this chair and to be able to provide these programs is a real honor for me.

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I also want to thank the *Fordham Law Review,* because these proceedings will be transcribed and will be published in a forthcoming issue of the *Law Review.* I want to thank them for their assistance.

I want to thank Helen Herman for her help in putting all of this together.

So let's just get right to the panelists. The issue that we are going to discuss today is special problems that arise in trying cases that are related in some way to allegations of terrorism. We have four experienced judges in this area. They will tell you about what their experiences have been and what kinds of pointers they have.

I'm just going to quickly introduce them: Judge Gerald Rosen from the Eastern District of Michigan; Judge Marcia Cooke from the Southern District of Florida; Judge Leonard Sand from the Southern District of New York; and Judge Shira Scheindlin from the Southern District of New York.

We are going to go in that order, just so we do not get confused or anything like that. After that, I have a couple of questions that I'd like to ask; and then we'll have maybe, hopefully, a general discussion among the panelists; and then we'll open it up for discussion with all of you.

Judge Rosen is going to provide an introduction to some of these issues and we'll proceed from there. Judge Rosen.

JUDGE ROSEN: Thanks very much, Dan. Thank you very much for inviting me to join you here at Fordham Law School. It's always a pleasure to come back to New York. I still have family here, and it gives me an opportunity to visit with some of my family.

Professor Capra has asked me to be the leadoff hitter here and sort of set the table for the heavy hitters that follow behind. I am going to do that.

As I was flying out here and I was trying to think about what I was going to say, it occurred to me how much the world is changing—not just for all of you, especially here in New York in the aftermath of 9/11, but for those of us in the judicial system and in the courts. We all have to adapt and change.

I can tell you, when I was a young man in law school and as a young lawyer, I could never have imagined that one day I would be a judge, much less a federal judge, coming to talk to this august group about the war on terror and the legal implications of that. But then I realized, back when I was a young lawyer, I would never have imagined that Arnold Schwarzenegger would have gone from being the Terminator to being the governor of California. So the world changes, and we all have to adapt to change, and that is going to be the theme of what I am going to be talking about.

It is particularly daunting and humbling to come here to New York, in the shadow of 9/11 and the aftermath of that tragedy, to talk about some of the issues that have arisen, because I think for all of us, the challenge is how we calibrate our responses to the threat of world terrorism.

Now, of course, in the first instance, these decisions will be made by those in the policy branches of government, in the military, and in the

intelligence community—the border guards, the immigration services. But we are ultimately a nation that defines itself by law. We operate under a rule of law, and I think in the community of nations around the world, that is one of the things that distinguishes us.

For those of us in the courts, that becomes a challenge, because ultimately the measures taken by the other branches of government will be tested, as we are seeing today, against the substantive and procedural protections of our civil liberties that have become embedded in our constitutional lives over more than two centuries of jurisprudential evolution. So, for those of us in the courts, perhaps when we think about change, the question is not so much whether the war on terrorism will change how we protect ourselves from outside threats, as it is for those in the policy and law enforcement branches, but whether it will change the nature of the constitutional protections that we depend upon in the courts to safeguard our civil liberties.

As Professor Capra has indicated, and as some of the materials that you have received indicate, all of us have had these cases involving charges of terrorism that involve classified information. So I thought that what I would do today, as kind of the leadoff hitter, is talk about some of the substantive, procedural, and evidentiary issues that are unique to terrorism cases, particularly focusing upon a very important slice of this very, very large topic, that being when the parties and the lawyers and the judge are confronted with very highly sensitive classified information that poses very complex constitutional and national security issues.

I always do this with the caveat that terrorism cases, particularly those which present issues involving classified information, are very different, and each presents its own set of challenges for the lawyers and for the court. As I found out in the *Koubriti*[1] case, these cases do not come with an instruction manual, and you sometimes find yourself in uncharted waters without a paddle.

Let me just talk about what a case looks like when it starts and what a judge and the lawyers will do. The first thing that the judge should do is to have a conference with the lawyers and attempt to determine whether classified information is going to be a part of the case. That's not as easy as it sounds, because sometimes it is unclear whether classified information will be a part of the case. The government may have classified information, but they may not be certain if they are going to use it. So, at the very least, if it looks remotely as if classified information may be implicated in the case, the court should discuss this with counsel and have a very open discussion.

The first thing that I think the court ought to confront is whether classified information, if it is going to be used, contains any—what we call

1. United States v. Koubriti, 435 F. Supp. 2d 666 (E.D. Mich. 2006).

in the law—*Brady*[2] or *Giglio*[3] information, meaning any information that may be deemed to be exculpatory for the defendants, or at the very least may provide impeachment material for the defense lawyers to cross-examine government witnesses. In discussing this, that, too, is not an easy question, because at the beginning of the case it is not always clear. The government's theory may not be fully developed, and even the defense counsel may well not know the extent of what their defenses are going to be. So the determination of whether classified information is going to implicate *Brady* and *Giglio* rights is not an easy question to answer.

Now, what I do is, I always assume the worst—I assume that it is going to—which means that, at the very least, the court is going to have to see classified information to make determinations, and, quite possibly, defense counsel may have to see classified information. That, itself, opens up a whole range of problems and challenges not only for the court, but for the lawyers.

For example, the court is going to have to determine whether the lawyers, and particularly defense lawyers, are familiar with the provisions of the Classified Information Procedures Act,[4] otherwise known as CIPA; if not, the court has to make sure that it quickly acquaints itself with CIPA. The court must also determine whether it will be necessary for counsel to have security clearance to review this classified information—particularly defense counsel. The prosecutors that are working on these cases always have clearance, or at least they should.

But it is not only the lawyers that will require clearance. The court staff, the law clerks, perhaps the court reporter, and perhaps the courtroom deputy, will have to have clearance. We have here an expert on that, Mike Macisso, who was my judicial security officer in the *Koubriti* case. It's Mike's job—and maybe in the question and answer session we can ask Mike to talk a little bit about his job—to acquaint all of us with the protocols and procedures for handling highly classified, highly sensitive information, to get counsel cleared, and a number of other things, not the least of which are the logistical problems posed by having to set up a SCIF.

I don't know how many of you are familiar with that. For all of us, that's a term of art that we have to live with. A SCIF is a Sensitive Compartmented Information Facility, which is basically a fully secured, alarmed office. All highly classified information must not only be maintained in the SCIF at all times, but any review of the information by anyone, including the judge and his staff and the prosecutors and the defense lawyers, can only be done in the SCIF. Suffice it to say I have learned this the hard way, and I now have a SCIF—which, by the way,

2. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that suppression of exculpatory evidence violates the Due Process Clause of the Fourteenth Amendment).

3. Giglio v. United States, 405 U.S. 150, 151 (1972) (addressing treatment of new evidence after conviction).

4. 18 U.S.C. app. §§ 1–16 (2000).

flooded a week ago Saturday, and I had to sit there on a Saturday afternoon with my ten-year-old for an hour and a half while they stopped the flood.

But at any rate, as to all of these issues, it is important to remember that obtaining security clearance for the lawyers and for court staff can be very time-consuming and has to be done as soon as is practical.

The court and the parties immediately then should begin to explore protocols for handling classified information upon which the government is going to claim a national security privilege. Much of this is set forth in CIPA, but CIPA is just a very broad outline. It is what I would call aspirational, rather than a detailed blueprint.

Classified information has many different levels, some of them very confusing and complicated when you are going through them. You have to set up these protocols for handling the classified information at an early point in the case. I use a privilege log approach, which, perhaps, we can get into in the question and answer session. I don't have time to do it now.

So far, what I have described is just sort of a logistical framework for dealing with some of the early issues that have to be confronted. What I want to talk about now are some of the very challenging and sensitive national security issues and constitutional civil liberties issues that are raised by classified information.

First, let me talk a little bit about how we look at classified information in the context of claims by the government of national security privilege and countering arguments by defense counsel as to their right to see this information.

As I said, CIPA sets forth some procedures regarding the material to be turned over to defense counsel who have been cleared, but in cases—and there are many of these kinds of cases—in which the government will not agree to turn over material even to cleared counsel, there are some options that are available. But they are not all good options.

The problem, for example, is that when you are dealing with classified information, CIPA says that if the government will not turn over the raw material, you should attempt to find alternatives or substitute evidence.[5] Well, that's not always easy, particularly if you are looking for *Brady* information or *Giglio* information.

One option is to attempt to get the government and the intelligence agencies that are involved to declassify the information, or to scrub it, which means to redact out any highly sensitive information. But that, too, is not as easy as it sounds, because often when it comes to classified information, it's not the substance of the classified information that the government is most concerned about. What the government is most concerned about are the sources and methods of the collection of the information that can be very revealing.

I have found that this presents the greatest problem. In my case, I went to the CIA, and I spent two or three days with Mike Macisso and some

5. *Id.* at app. § 6(c).

other folks at the CIA looking at classified information. The problem was not so much the substance of it, but the fact that that information alone would have revealed not only the sources of the information but also the nations that were involved. I can tell you from my own experience that sometimes the government has highly accurate and material information which either supports its case or is exculpatory for the defendant, but which can never be disclosed, even to cleared counsel—and, as I said, in some cases, the government won't even give it to law clerks—because to even disclose the fact of an intelligence relationship with some foreign governments would not only dry up those sources of information for the future and end their future utility, but could, in fact, jeopardize the stability of those governments.

But really, the biggest issue raised—and the most difficult issue to deal with, I think, in the context of classified information—is the right of the defendant to confront witnesses. Sometimes this information contains material which the defense lawyers could use to confront witnesses against the defendants. If the defense lawyers do not have an opportunity to have access to that material and to question the witnesses about it, particularly in open court, they cannot effectively represent their clients and cannot effectively confront the defendants.

Probably the most famous example of this is the *Moussaoui* case.[6] Some of you may remember Mr. Moussaoui, who was known as the "twentieth hijacker." He was tried down in Virginia on capital charges related to 9/11. He claimed that there were folks down in Guantánamo who had exculpatory information that indicated that he was not involved in the 9/11 plot. The government refused to give the defense counsel any access to these folks. Even the substitute information that they were willing to provide did not fully satisfy Mr. Moussaoui's confrontation rights. I am not going to get into the case in any detail. There is a whole long history and many decisions that were written about it.

But there could hardly be a more definitive clash of, on the one hand, the government's national security interests, and on the other hand, a defendant's right to be able to confront his accusers and to present a full defense. When this conflict came to the Fourth Circuit Court of Appeals, the Fourth Circuit said this:

> [T]he Executive's interest in protecting classified information does not overcome a defendant's right to present his case. . . . If no adequate substitution can be found, the government must decide whether it will prohibit the disclosure of the classified information; if it does so, the district court must impose a sanction, which is presumptively dismissal of the indictment.[7]

6. United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003), *aff'd in part*, *rev'd in part*, 365 F.3d 292 (4th Cir.), *and amended on reh'g*, 382 F.3d 453, 476 (4th Cir. 2004).

7. *Moussaoui*, 382 F.3d at 476 (citing 18 U.S.C. app. § 6(a)).

There are a number of other constitutional issues. Maybe we can get into these during the discussion. But even beyond the constitutional issues, I want to raise just a few practical evidentiary issues. Professor Capra and I are evidence nerds. We like to go home and have a glass of wine and read over the latest juicy evidence cases. So, I want to talk about some of the very real evidentiary issues that are presented in these cases.

First of all, some of the material may not be able to pass even rudimentary authentication and foundation standards. For example, documents and photographs, when you use them in court, have to be authenticated, which means you have to lay a foundation for them. I won't give my twenty-minute lecture of laying a foundation and authentication, but I would ask this question: what if a document or a photograph is obtained through surreptitious means—for example, electronic intercepts—and it cannot be authenticated by the person who took the photograph, and if it's an electronic intercept, it can't be authenticated by the person who was intercepting it? Although this evidence may be highly accurate and highly probative, and even highly reliable, it is virtually impossible to lay a proper foundation for it and get it admitted in court. This, of course, says nothing about the myriad hearsay issues that arise by evidence taken from classified sources that the government cannot reveal.

Another issue arises out of the public trial rights of the defendant. How can you use national-security-sensitive information in public trials? How do you present this information to a jury? It's one thing to say, "Well, you can have security clearance done for all sixteen or eighteen jurors that have been selected," but that, too, is not easy, because passing security clearance for anybody when you're looking at highly classified information is not simple.

These are just some of the practical issues—I see I have expended at least my fifteen minutes—that I'll put on the table, and maybe we can get into some of the other issues during the question and answer session.

PROFESSOR CAPRA: Thank you, Judge Rosen.

Judge Cooke.

JUDGE COOKE: I am the newest judge on this panel, and most of you have heard a lot about the case I will discuss on the evening news. I am the judge who will at some point in time be either favored or regaled in an upcoming Supreme Court decision for my rulings in the case. So take your pick, and say you knew me when from today's presentation.

Most of you, as I said, are aware of my role as a judicial officer presiding over the trial in *United States v. José Padilla*,[8] the American citizen held for almost four years as an enemy combatant. The American public was told that he was involved in a conspiracy to detonate a "dirty bomb." I want everyone to understand that—as I discuss this case and what happened in my case—that wasn't the issue.

8. No. 04-60001-CR, 2007 WL 1079090 (S.D. Fla. Apr. 9, 2007).

In 2004, Adham Hassoun was arrested and charged with a variety of immigration crimes. This was the initial indictment in my case. I think it was about four pages. The indictment was superseded several times, and the charges shifted from garden-variety immigration counts to perjury counts to ultimately involving conspiracy to support terrorist activities overseas, and added another defendant, Kifah Jayyousi. I know all of you are going, "Who the heck are these people?"

The evidence included thousands of hours of intercepted telephone calls, cellular phone calls, and facsimile transmissions. Most of the electronic evidence was obtained through the Foreign Intelligence Surveillance Act (FISA)[9] warrants, and the majority of the transcripts were in Arabic, and the case was simply known as *United States v. Hassoun.*

Pretrial motions were flying back and forth, and the trial calendar was set for early 2006—a case with two defendants, with the best estimate of a trial being approximately four months. The media indicator on this trial was a minor, very soft blip on the evening news.

On November 17, 2005, the legal landscape in this case changed forever. The indictment was superseded for the fifth time and went from that nice, cozy document I just showed you to this tome, adding José Padilla as a codefendant. After much legal wrangling all the way up to the United States Supreme Court, José Padilla was transferred to the Southern District of Florida, and *United States v. Hassoun* for all the world became *United States v. José Padilla.* The soft blip on the evening news was now a very large siren.

On ancient maps there is written "beyond here there be dragons," meaning that that is where the map ends and we know not what lies beyond. I knew then there were a lot of dragons out there, and I had no experience being a dragon slayer. So the question was: how do you try this case? I know judges in high-profile cases have asked themselves that all the time and will continue to ask themselves that throughout other cases.

Yet, this case presented unique challenges to the effective administration of justice and the right to a fair trial for all the parties. I want to discuss a couple of those issues as they arise in a criminal case by virtue of the evidence and by the popular media. When you have criminal defendants that—using a biblical term—are unevenly yoked, how do you handle the trial, select the jury, and allow an ordered presentation of the evidence, when everyone thinks they know everything about the case, and the case is absolutely not about the thing everybody thinks they know that it's about? What issues arise when the underlying crime concerns an issue that is front and center in the media, in politics, and the popular discourse? What happens when your case is the equivalent of the 800-pound litigation gorilla?

You have to start dealing in the world of myths. No matter what anyone tells you, when most Americans hear the words "terrorist" or "terrorism," or

9. 50 U.S.C. §§ 1801–1863, 1871 (2000).

any derivative of those words, coupled with "Muslim," there is one thing that comes to their mind: the events of September 11, 2001. Most people think of attacks on American soil. Almost every popular discussion on the issue of terrorists and terrorism in this country flows from that event, and anyone charged with an act of terrorism must therefore be connected with September 11. It's obviously a faulty syllogism, but somehow it seems to work out that way.

In the American psyche, José Padilla was and is an enemy combatant. He was arrested and held as an enemy combatant for forty-two months. The allegation: conspiracy to detonate a "dirty bomb." He has never been charged with that crime in any court, but in the popular discourse, in the mythological world, José Padilla is the "dirty bomber."

So what is this case about, or what was this case about, really, and what was the case I was supposed to try? According to the counts of convictions—and listen to this carefully because I'm certain if you've been reading the popular press this will all be a mystery to you—contained in the indictment, defendants Adham Hassoun and Kifah Jayyousi were members of a North American support cell that sent money, physical assets, and Mujahideen recruits to overseas conflicts in Bosnia, Chechnya, Somalia, and Afghanistan. You didn't hear one word about the United States because that wasn't in the indictment.

The reason for their support? To establish Islamic states under Sharia. Adham Hassoun and Kifah Jayyousi were not involved in the events of September 11, 2001, and it had nothing to do with the events charged in the indictment.

Reality number two: according to counts of conviction contained in the indictment, José Padilla was recruited to be a member of a North American support cell to support violent jihad and travel overseas for that purpose. There is no mention of the "dirty bomb."

So what happens? Each defendant comes into court and says, "Guess what, Judge? I don't want to sit next to that guy." Each defendant files motions to sever and says to me, "Judge, I can't possibly get a fair trial."

What does Hassoun argue? He says, "Judge, I would be prejudiced and tainted because, after all, I'm a computer programmer, a devout Muslim, a family guy. I've never even left the United States since I immigrated. How could I possibly be associated with someone that everybody thinks is a 'dirty bomber'? Please sever me from that trial. Don't get me wrong. He's a nice guy. I just don't want to sit next to him."

Mr. Jayyousi's arguments were somewhat similar: "I'm a talented civil engineer, a public servant, a United States citizen, served in the Navy. All I did, Judge, was publish a newsletter. I just wanted American Muslims to know what was going on in Chechnya, Somalia, Bosnia, and Afghanistan." At the time, the news media wasn't telling it and the Internet was in its infancy. According to Jayyousi, he was just "a guy doing public service for his community." It begged the question: Why would a United States

citizen, a Navy veteran, a devout Muslim, want to sit next to that guy? "Judge, please get me out of here."

Defendants Jayyousi's and Hassoun's arguments for severance focused on the massive amount of pretrial publicity and the spillover effect from defendant Padilla—media, media, media. So you think, you get these two guys resolved.

What would defendant Padilla want to do? "Guess what, Judge, I don't want to sit next to those guys." Of the charging language in the counts, Mr. Padilla's name is mentioned possibly only ten times in that big tome that I showed you. He says the overwhelming evidence against the other two guys would prejudice him. His voice is heard on less than ten of the intercepted phone conversations, and his arguments focused on the comparatively large amount of evidence, documents, and intercepted communications regarding the other two defendants. He contended that he knew nothing about what those other guys were doing. After all, he's not an educated man; he worked at a fast food restaurant. "All I wanted to do was study Arabic and Islam. Judge, please don't make me sit next to that guy."

In essence, each defendant was arguing against a myth: "Let me try my real case, not the mythological public perception of what this case is about." What the alleged criminal conduct was, what the counts of convictions were, were very rarely discussed in the popular press. In the end, they all sat next to each other, or at least near each other. With three defendants and two lawyers for each defendant, space was at a premium, and the motions for severance were denied.

I would like to tell you that the difficulties ended there. They didn't. And as Judge Rosen intimated just a moment ago, there were many evidentiary issues throughout this trial where I had to balance the need of an individual defendant's right to have an effective defense while not compromising the defense of one of the other defendants.

Every single judge in this room has had the challenge of picking a jury where there is strong media attention. How do you pick a jury when the media attention surrounding one of the defendants has really nothing to do with the crime he is being charged with? Every day there were editorials, pundits, and law professors discussing "the case," but not talking about our case, because they were talking about the mythical case, not the real case in the indictment.

It is amazing, because you sit there and you wonder: How am I going to pick a jury? How do I pick a jury for the real case when all the jurors are hearing about the mythological case?

So jury selection was obviously critical. The initial questionnaire was sent out to three thousand potential jurors. The number was winnowed down to three hundred. Sometime, almost a month later, we had a jury.

So once you have a jury, how do you maintain the jury? The first set of preliminary instructions was a bit unusual. It's very seldom that you start out telling jurors what they are not supposed to think: "Don't think about

the events of September 11, 2001. Don't think about anything that may have happened to any of the defendants in this case because those things are absolutely not evidence, even though I know that you know that we all know that you are thinking about them every day."

Then there are the standard instructions: "No talking about the case amongst yourselves; no talking about the case with anyone else; no reading about the case in magazines or on the Internet."

And then there were the continuing limiting instructions to protect the evidence: "This evidence only applies to this defendant," and, "This evidence is not offered for the truth of the matter asserted; it is offered for A or B or C, and not as to Defendant A but maybe as to Defendant C."

As a judge in this type of trial, every day you live in fear of the media. For those of you who may be media wonks in the room, I have nothing against the media. They were just trying to do their jobs. But the news at six o'clock blurbs—I lived in fear of them. What was this week's magazine cover going to be? Would it be "the growth of radical Islamic schools in Islam," staring there at the newsstand as a juror went for coffee? Was it going to be something about terrorism trials overseas or issues related to the Foreign Intelligence Surveillance Act that seemed to crop up just at the most inopportune time in our trial on the front page of *The New York Times*? What about the local police department that decided to do a mock terrorism drill in the middle of my trial?

Do you ban all newspapers? Do you ban all Internet surfing? I even began to hate those little blurbs that go across the bottom of the screen during sporting events. There's a lot of information there.

And where do you put a jury? How do you hide them away from the mythological trial when you are trying to try your real case?

There are a number of other issues confronting the judicial process in these cases where the myth of the case abuts the reality. Popular misconceptions confront the legal reality every day, and the role of the judge is to protect the process. It takes a lot of effort to keep the mythological case from intruding and interrupting reality and harming the process. I guess, after all, I became a dragon slayer. Thank you very much.

PROFESSOR CAPRA: Thank you, Judge Cooke.

Judge Sand.

JUDGE SAND: I am very pleased to be here with this distinguished panel.

I was the presiding judge in a case which for three or four months of trial was known as *United States v. Bin Laden*.[10] Bin Laden, you know, was not in the courtroom.

10. United States v. Bin Laden, 160 F. Supp. 2d 670 (S.D.N.Y. 2001); *see* United States v. El-Hage, 213 F.3d 74 (2d Cir. 2000); United States v. Bin Laden, 109 F. Supp. 2d 211 (S.D.N.Y. 2000); United States v. Bin Laden, 93 F. Supp. 2d 484 (S.D.N.Y. 2000); United States v. Bin Laden, 92 F. Supp. 2d 225 (S.D.N.Y. 2000); United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000); United States v. Bin Laden, 91 F. Supp. 2d 600 (S.D.N.Y.

The original indictment was filed in September of 1998, naming one defendant, El-Hage. Then, there were seven superseding indictments, adding four other defendants. The last superseding indictment was May 8, 2000. One of the defendants, Salim, was severed—I'll talk about that later. We went to trial with four defendants.

Two of the four defendants were subject to the death penalty, so the voir dire was quite extensive. We had a questionnaire, but the questionnaire asked a general question about attitude toward the death penalty. Many, many of the people who filled out the questionnaire said, "We'll follow the judge's instructions. We'll do what the law dictates." Of course, with the federal death penalty, the law does not hold whether or not the death penalty should be imposed. So I spent some time with each potential juror explaining this was not like it used to be, when first-degree murder, premeditation, was the death penalty; you knew from the nature of the crime alleged and the verdict whether or not the death penalty would be imposed.

I was pleased to read an opinion of the Court of Appeals of the Second Circuit a week or so ago saying that in death cases, in the voir dire, one should not rely only on the questionnaire, but should engage in dialogue with a potential juror. I thought: I surely did that.

The verdict of guilty was returned at the end of May of 2001, three months later, and then we had two separate penalty hearings. The result of that was that the death penalty was not to be imposed.

Sentencing was originally set for September 11, 2001. Now, that date had been postponed to a date in October some time earlier, but obviously there was speculation that the date of September 11 may have had some significance.

Following sentencing, for reasons internal to the court, the case was reassigned to Judge Kevin Duffy. I thought: well, the case is over. But it wasn't, because there were post-trial disclosures relating, among other things, to the fact that the marshals had videotaped conferences between the prosecutor and a key prosecution witness, unbeknownst to the U.S. Attorney and, of course, not revealed to the defendants in discovery.[11] Judge Duffy held some hearings.[12]

All of which is leading up to me telling you that the appeal of this case, which ended, I thought, on July 10, 2001, was heard last December, just December 10. And so the many, many substantive issues—this is the government's brief on the appeal, 650 pages—are before that court. And you know what? I'm not going to talk about them.

I would like to talk about something that I think is unique in terrorist cases. That is the relationship that exists between the defendants and

2000); *see also* United States v. Bin Laden, No. 98CR1023, 2005 WL 287404 (S.D.N.Y. Feb. 7, 2005) (Duffy, J.).

11. *Bin Laden*, 2005 WL 287404, at *7–9.

12. *See id.* at *1.

defense counsel. In no terrorist case was a defendant represented by counsel privately retained. These are all either public defenders or court-appointed counsel. Now, we're all familiar with the syndrome of the defendant who felt that his court-appointed counsel wasn't really on his side—you know, he talked in a friendly manner to the prosecutor—and sought to have that counsel changed.

But the relationship that exists in a terrorist case is somewhat unusual. Lawyers don't often represent somebody who hates them, who, all things being considered, would just as soon kill them. How you maintain an attorney-client relationship under those circumstances is very difficult.

As I look back on the case, I think I devoted more time to issues raised dealing with the attorney-client relationship than any other issue in the case. The differences, the cultural and theological disparity, between the lawyer and the client were tremendous.

Let me give you an example. An attorney who was very diligently representing his client was talking to his client. His client explained that if he died as a martyr he would go immediately to paradise and have thirteen virgin brides. The lawyer said, "Can you imagine having thirteen fathers-in-law?" The next morning there is on my desk a motion to replace the attorney. The defendant said, "How can I be represented by a lawyer who mocks my religion?" I granted the application.

Now, the relationship between the defendants and the lawyers also had complications relating to the physical security in the courtroom. I held a conference before the jury was selected in my regular courtroom, which is a fairly standard size courtroom. The four defendants were seated in the jury box with a marshal on each side. The issue was that one of the defendants, El-Hage, had written a letter that he wanted to send to the media. The government objected, because they thought, "How do we know whether there are codes in that or other things that would not be apparent to us?" And so we were discussing the sending of a paraphrase—not the exact language, but the substance.

While this discussion is going on, El-Hage, seated between two marshals in the jury box, jumps out of the jury box and races toward the bench. Now, I don't know why he was racing to the bench. I have a suspicion that he was not coming to shake my hand and thank me for the careful attention I was giving to his case. The courtroom was scattered with security officers. You know, you sort of look around and you see them, and they sometimes don't look so alert to you. Instantly, there was a security officer standing in front of me, shielding me with his body, which I appreciated. There had been a sketch artist who was just in the line of fire between El-Hage and myself. She immediately threw her easel over and ducked. Of course, one of the security officers tackled El-Hage just as he was coming up to the bench.

There was another security issue that had a less happy ending. When the defendants met with their attorneys, they were escorted from their cells to the place where they met with the attorneys and were escorted back.

Defendant Salim was escorted back by a corrections officer who was well known to be kind. Protocol would have called for the inmate, the defendant, to be put into the cell, the cell to be locked, with the corrections officer outside the cell, the defendant still handcuffed. Then the defendant was to put his hands through an opening left for that purpose and the cuffs to be removed.

Well, Officer Louis Pepe didn't follow that protocol and took the handcuffs off Salim while he was still in the cell. Salim had taken a plastic comb and honed it into a knife and stabbed the corrections officer and inflicted a permanent brain injury to him.

The concern for security, the concern of what could happen, was very real. So we had the problem of how do we protect the counsel from their own clients and how do we protect everybody else in the courtroom, given the two experiences that we had.

I read all the cases, as many as I had, about how you don't bring the defendant before the jury shackled unless it was absolutely necessary. So we worked out this arrangement. The defendants were seated before the jury came into the courtroom and they were shackled to the floor. They were told not to rise. We put a skirt, much like the skirt here, around that table so that the jurors could not see the fact that they were shackled.

We had a security officer between the defendant and his attorney. That created some language problems, and so we needed interpreters. We had so many interpreters that the courtroom looked almost like a sound studio, because there had to be an interpreter who would interpret for the defendant what his attorney was saying; there also had to be an interpreter who would be interpreting what the witness on the witness stand was saying, and two sets of interpreters, Arabic and Swahili. So there was a lot of going back and forth. But that seemed to work out. It worked out pretty well.

The lack of rapport between defendant and his counsel had other aspects. One defendant objected to the fact that his attorney had a female paralegal. That never got to me. I heard of that only by scuttlebutt. Apparently, that worked itself out.

A motion to suppress was obviously lurking in the case against one of the defendants. His lawyer said, "Judge, I'm going to make this motion to suppress. My client won't let me do it." I said, "That's a problem that you have." The motion to suppress was finally made during jury selection, months and months later.

The trial was a very interesting experience. I remember at one point leaning forward, asking the chief government attorney, Patrick Fitzgerald, "How do you pronounce A-L-Q-A-E-D-A?" It was the first time I had ever heard of Al Qaeda, and I think for many it was the first detailed exposure to the existence of Al Qaeda and how it operated.

I think that some of these problems are not peculiar to this case but are going to be faced, and have been faced in many instances, in terrorist cases.

Thank you.

PROFESSOR CAPRA: Judge Scheindlin, and we have a PowerPoint coming up here.

JUDGE SCHEINDLIN: I, too, am grateful to be here.

When Professor Capra asked me to join this panel, I said, "But I've never had a terrorism case," and he said, "That's precisely the point." I initially resisted his invitation on that ground, but as any of you who have worked with Professor Capra knows, he is a very persuasive guy. So here I am. Hopefully, you will see the wisdom of Professor Capra's choice.

United States v. Awadallah[13] was an extraordinary case. I must say the comments of Judge Cooke with respect to media and 9/11 really resonated with me, and I think you'll see why. A brief review of the facts of this case will set the stage, and I put them on the PowerPoint.

Awadallah was arrested as a material witness on September 21, 2001, just ten days after the September 11 attacks. The evidence supporting his arrest as a material witness was that he was acquainted with two of the September 11 hijackers through his job as a gas station attendant and through attending his mosque.

His telephone number was found on a slip of paper in a car left at Dulles Airport by one of the hijackers, although this telephone number was assigned to a previous residence that Awadallah had not used for eighteen months.

A so-called "box cutter" was found in a search of Awadallah's car, although it turned out to be a carpet knife, and witnesses observed that he had indeed recently installed a carpet. Finally, videotapes of the war in Bosnia were found in a search of his apartment, as well as a computer-generated picture of Osama bin Laden.

Awadallah appeared before a magistrate judge in San Diego on September 25 and bail was denied. It took ten days from the date of his arrest as a material witness to transport him to New York to give testimony before a grand jury. He was held in maximum security conditions throughout his detention. Another ten days passed before he testified to the grand jury on October 10 and October 15, during which time he was shackled to a chair in the grand jury room throughout the testimony.

On October 18, the government filed a complaint against Awadallah for the first time, charging him with making false statements to a grand jury. The alleged false statements related to whether he knew the name of a second hijacker who was often together with the other hijacker whom Awadallah knew better. He knew the first fellow's name, but he couldn't remember the name of the second one. Of course, by then, the entire world knew the names of the hijackers. On October 19, bail was again denied by a federal magistrate judge here in New York. On October 31, he was indicted for perjury for the very statement I just told you about.

13. 457 F. Supp. 2d 246 (S.D.N.Y. 2006).

On November 27, less than a month after the indictment, I issued my first opinion in the case, granting bail to Awadallah.[14] He was released from custody on December 13, 2001, on a half-million-dollar bond supported by $50,000 raised by family members and members of his community in San Diego. Five years later, on November 11, 2006, he was acquitted of all the charges by a jury sitting in the Southern District of New York.

The story of the intervening five years, I think, is a fascinating story. I can't adequately cover it in the time I was allotted, but I want to share the highlights.

The case generated seven district court opinions and two circuit court opinions.[15] I'm going to put them up on the screen slowly. Hopefully, you'll have a little chance to read the parentheticals.

Two trials were held and three juries were selected in this one case. The first jury was selected in May of 2005, nearly three and a half years after he was first arrested as a material witness.

Although the jury was selected, before that jury was even sworn, the government took an interlocutory appeal of a pretrial ruling barring grand jurors from testifying as witnesses at the upcoming perjury trial.[16] The government also asked the appellate court to reassign the case to a different judge on the grounds that I had demonstrated an antigovernment bias.[17]

Nearly a year later, after the U.S. Court of Appeals for the Second Circuit affirmed the ruling barring grand jury testimony and denied the

14. United States v. Awadallah, 173 F. Supp. 2d 186, 192 (S.D.N.Y. 2001) (granting bail).

15. *Id.* (granting bail); *see* United States v. Awadallah, 436 F.3d 125, 134–35, 137 (2d Cir. 2006) (affirming exclusion of grand juror testimony and declining to disqualify the trial judge); United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003) (reversing district court and holding that material witness statute could apply to a grand jury witness; seizure of Awadallah did not violate the Fourth Amendment; the agent's affidavit was not misleading and was sufficient to support the arrest warrant; and information improperly seized could not be suppressed at perjury trial because there would be no deterrent effect on police with respect to a crime that had not yet been committed); *Awadallah*, 457 F. Supp. 2d at 246 (declining to change venue and denying Awadallah additional peremptory challenges); United States v. Awadallah, 457 F. Supp. 2d 239 (S.D.N.Y. 2006) (permitting jurors seated in first jury selection to be recalled); United States v. Awadallah, 401 F. Supp. 2d 308 (S.D.N.Y. 2005), *aff'd*, 436 F.3d 125 (holding that grand jurors could not testify at trial as to subjective impressions); United States v. Awadallah, 202 F. Supp. 2d 82 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (holding that FBI agent's affidavit was misleading and insufficient to support arrest warrant; defendant was seized in violation of the Fourth Amendment; defendant's consent to search his apartment was involuntary; and defendant was *not* the victim of a perjury trap); United States v. Awadallah, 202 F. Supp. 2d 55 (S.D.N.Y. 2002), *rev'd*, 349 F.3d 42 (holding that material witness statute could not be used to detain a grand jury witness); United States v. Awadallah, 202 F. Supp. 2d 17 (S.D.N.Y. 2001) (declining to dismiss the indictment on grounds of recantation, deprivation of right to counsel, failure to notify Jordanian consulate, abuses during arrest and transportation, but deciding to hold an evidentiary hearing to determine whether the court should invoke its supervisory power to dismiss indictment based on a combination of circumstances including unlawful arrest, unlawful search, abuse by law enforcement officials while in custody, denial of access to visitors while in custody, and testifying while shackled).

16. *Awadallah*, 401 F. Supp. 2d at 310.

17. *Awadallah*, 436 F.3d at 128.

government's motion to remove the judge,[18] a second jury was selected. The case then proceeded to trial.

That first trial ended in a hung jury, and the vote was eleven to one for conviction. That was on May 4, 2006. The second trial ended almost exactly six months later, on November 16, 2006, with an acquittal.

The issues that I will highlight include the use of the material witness statute in grand jury proceedings, the government's effort to use grand jurors as witnesses and to seek a reassignment of the case to a different judge, and how I believe the jury selection process eventually affected the outcome of the trial. Now, there are at least a half-dozen really interesting other issues that I don't have time to cover, but there is a question-and-answer session, so maybe somebody will ask.

I begin with the material witness statute, which provides:

> If it appears from an affidavit filed *by a party* that the testimony of a person is material in a *criminal proceeding*, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person . . . *in accordance with the provisions of section 3142 of this title*. No material witness may be detained . . . *if the testimony of such witness can adequately be secured by deposition* . . . . Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.[19]

That's the statute.

For at least four reasons—and they are highlighted right in the plain language—I found that the material witness statute could not be used to detain a grand jury witness, as opposed to a trial witness.

First, there is no party in a grand jury proceeding. The phrase clearly applies to an adversarial proceeding.[20] Second, § 3142,[21] which is referred to within § 3144, refers to proceedings "pending trial" and specifically asks a court to weigh the nature and circumstances of the offense charged and the weight of the evidence against the person—neither of which can apply to a grand jury witness.[22] Third, the government had argued in the district court that a deposition was not permitted in the grand jury context, although it changed its position on appeal, causing the circuit court to note, "Such a pivot by the government on appeal is awkward . . . ."[23] Finally, depositions provided for in the Federal Rules of Criminal Procedure relate to pretrial proceedings, not grand jury proceedings.[24]

18. *Id.* at 137.
19. 18 U.S.C. § 3144 (2000) (emphasis added).
20. *See Awadallah*, 202 F. Supp. 2d at 76.
21. 18 U.S.C. § 3142.
22. *Id.*; *Awadallah*, 202 F. Supp. 2d at 63–64.
23. United States v. Awadallah, 349 F.3d 42, 59 (2d Cir. 2003).
24. *Awadallah*, 202 F. Supp. 2d at 65.

In addition to this plain language analysis, I concluded that holding a material witness for grand jury proceedings was subject to abuse as a form of indefinite detention because of the absence of any fixed trial date.[25]

Sadly, the Court of Appeals disagreed, rejecting both the plain language analysis and the fear of indefinite detention.[26] I cannot help but wonder whether its analysis might have been different if this case had not involved a witness who knew two of the September 11 hijackers.

I now turn to the use of grand jurors as trial witnesses and the government's efforts to displace the trial judge. On the eve of the first scheduled trial, May 2005, the government notified the court and the defense, through submission of a witness list, that the government intended to call several of the grand jurors to testify as to their impression of Awadallah when he testified before the grand jury. We looked through the witness list and said, "Who are these people? We don't know the names. Who are these people?"

The proposed testimony was that Awadallah did not appear at all confused or nervous when he testified. The purpose of the testimony was clearly to support the grand jury's decision to indict him for perjury, which requires an intent to testify falsely.

Rule 606(b) of the Federal Rules of Evidence states: "Upon an inquiry into the validity of a verdict or indictment, *a juror may not testify* as to any matter or statement occurring during the course of the jury's deliberations or *to the effect of anything upon that or any other juror's mind* . . . ."[27]

I concluded that the government's proposal was fraught with dangers, and I precluded the testimony on two grounds. First, such testimony was barred by the plain language of Rule 606(b).[28] Second, that it should not be permitted under Rule 403 because the prejudice of such testimony outweighed its probative value for two reasons.[29] First, the risk that the trial jury would be unduly influenced by the testimony of these jurors and would not make its own decision as to intent and materiality; and, second, the use of such testimony would confuse the trial jury because of the distinction between probable cause necessary to indict someone and proof beyond a reasonable doubt necessary to convict someone.[30]

However, I permitted the grand jurors to testify about facts they observed, such as the physical surroundings in which Awadallah testified or the number of people in the room and where they were located.[31] The

25. *Id.* at 79 & n.29.
26. *Awadallah*, 349 F.3d at 62.
27. FED. R. EVID. 606(b) (emphasis added).
28. United States v. Awadallah, 401 F. Supp. 2d 308, 316–18 (S.D.N.Y. 2005), *aff'd*, 436 F.3d 125 (2d Cir. 2006).
29. *Id.*
30. *Id.* at 319–20.
31. *Id.* at 320.

Second Circuit affirmed the ruling on Rule 403 grounds but did not reach the issue of whether Rule 606(b) would have prohibited such testimony.[32]

The government also argued that I was biased because I had raised a number of issues sua sponte—for the few nonlawyers here, I raised issues on my own—and because the government had lost on a number of issues raised by the defense. The Second Circuit completely rejected these arguments, noting that the government had failed to mention how many of the issues it had won.[33] The following language from the Circuit Court's opinion I believe is worth quoting for its importance as well as its eloquence:

> [A] district judge is not a spectator. . . . When a trial judge observes occurrences that potentially call into question the fairness of the proceedings or the thoroughness of a defense, it is incumbent on the judge to inquire. While impartiality is required, the distance between disengagement and officiousness leaves district judges considerable leeway to satisfy themselves that justice has been served.[34]

The final topic is the jury selection process and how it may have affected the outcome of the trial. Many people have wondered what changed in the six months between May and November, 2006, that caused the second jury to reach such a different result from the first jury, although the lawyers, the evidence, and the arguments in both trials were nearly identical. I have always had two explanations in my own mind.

The first was the difference in the voir dire process, which is how we select juries, which was much more searching at the second trial. In other words, we tried much harder to tease out potential juror bias.

The second—and this is sheer speculation on my part—but, unlike the other judges on this panel, my case is completely over. Remember, there was an acquittal. We don't have appeals of acquittals. So I am allowed to comment on my case because it is completely over.

The second reason—and this is sheer speculation on my part—was the changing mood of the country, as demonstrated in the November midterm election of 2006, which had concluded just a week before the second trial began. By then, there had been a good deal of press reporting and commentary that the intelligence on which the government relied to initiate the Iraq War had been false. This may have caused many citizens—and some of my jurors—to give less credence to the government's version of events at the trial.

In each of the trials, I used a written juror questionnaire prepared jointly by the government and the defense and revised by the court. After the mistrial, in which the jury hung eleven to one for conviction, the press reported, based on post-trial interviews of jurors, that the jurors had spent much of their deliberations engaging in emotional descriptions of their

32. Awadallah, 436 F.3d 125.
33. *Id.* at 136.
34. *Id.*

experiences on September 11, which, needless to say, they were not supposed to be talking about. Indeed, one paper quoted the foreperson of the jury as stating that several jurors cried as they described their personal experiences on that day.

Because of my concern that this behavior had tainted the deliberation process, we revised the questionnaire to add a number of new questions. I prepared slides showing you these new questions. The new questions asked whether the juror had any knowledge of the investigation conducted after the attack; sought the juror's views as to whether she believed that because Awadallah was acquainted with two of the hijackers, the juror would have difficulty being fair and impartial; asked whether the juror believed that because Awadallah was acquainted with two of the hijackers, he would be more likely either to *participate* in terrorist acts or to *sympathize* with terrorist acts against the United States; asked whether the juror could be fair to an observant Muslim of Palestinian descent who was admittedly sympathetic to the Palestinian cause—because that was going to come out in the evidence, that Awadallah was exactly this, he was a Muslim of Palestinian descent who openly said, "I am sympathetic to the Palestinian cause." Could the juror be fair and impartial? The final question was whether she believed such a person would be more likely to *participate* in terrorist attacks against the United States or to be more likely to *sympathize* with terrorist attacks in the United States.

Getting the answers to these kinds of questions began to tease out biases that we had not begun to pick up in the first jury selection. People were candid. People were torn, but they told the truth. They told us: "Yes, once this fellow says he's sympathetic to the Palestinian cause, I believe he would be sympathetic to, if not participate in, attacks."

I want to show you some slides that were used at both trials just so you see the kind of voir dire we did.

In both trials, jurors were asked whether they believed that Islam endorsed violence to a greater extent than followers of other major religions; whether they knew any of the victims; and where they were on the morning of September 11.

Based on the jurors' responses to these written questions, I conducted a fairly searching oral follow-up, depending on the answers I got from jurors. Jurors that we had any doubts about their potential bias were dismissed. I think this more careful jury selection influenced the outcome of that second trial.

I hope this highlights tour of the *Awadallah* case has justified Professor Capra's decision, insisting that it added something to our understanding of terrorist trials, even though Mr. Awadallah has never been accused of being a terrorist. The government has admitted that, during his detention as a material witness, he was treated in the same manner as a convicted terrorist.

As a postscript, I note that Awadallah has now completed graduate school, and he is living and working successfully in San Diego, despite his five-year ordeal with the criminal justice system.

Thank you.

PROFESSOR CAPRA: For the record, let me say that it did prove me right, because one of the things that I hope has been teased out here is that when terrorist allegations are made or because of terrorist ideas or the press about terrorism, etc., it changes the perspective of the prosecution in many cases. You know, it's rare that, for example, the prosecution undertakes an interlocutory appeal on evidence rulings. That's very rare. That's the kind of thing that it seemed to me, while putting together this panel, that we wanted to tease out.

That's why we are going to get back to Judge Rosen, who actually did yeoman work in terms of setting things up. But I didn't, because I'm autocratic or whatever, I am going to let him talk about his case which deals with the very kinds of things that we are talking about. So I wanted to turn it over to Judge Rosen for a couple of minutes so he can tell us about those events.

JUDGE ROSEN: Thank you, Professor Capra.

After listening to my colleagues, I didn't talk about my case not because it isn't over—I think it's over. I hesitate, after almost six and a half years, to say that.

But, lest anybody think that my case went smoothly—I don't know how many of you are familiar with *United States v. Koubriti*[35]—my case began six days after September 11, on September 17, when three young Arab men were arrested. For those of you who don't know, the Detroit area has the largest Middle Eastern population outside of the Middle East. Three young Arab men were arrested in an apartment in southwest Detroit. They had some interesting things in their possession, including sketches that the government alleged were surveillance sketches of an Air Force base and a hospital complex in Jordan. When we went to trial at the time, it was the first trial that was tried post 9/11. So in case any of you think it went smoothly, let me just list about five or six things that might disabuse you of that notion.

First of all, jury selection began two days before the war in Iraq began, which created all sorts of problems. I was doing jury selection anonymously in a closed court—and I can talk more about that in the Q&A if you want—which occasioned, of course, a challenge by the media.

Secondly, on the fourth day of jury selection there was a death threat to the jury. I can't talk too much about that in the Q&A, but it created some very serious problems.

Third, the Attorney General of the United States violated a gag order that was stipulated by the parties—indeed, drafted by the government—not once, but twice, which occasioned contempt motions by the defense throughout the trial, which I put off until after the trial. I think I was the first federal judge to be required to issue a public admonishment of the Attorney General of the United States.

35. 435 F. Supp. 2d 666 (E.D. Mich. 2006).

There were leaks to the media. I'm sure all of us experienced these. Judge Cooke raised some of these issues. But one of the leaks was particularly disturbing. The superseding indictment, which contained the terrorist allegations, was not only leaked to the media, but it was leaked to the media before the grand jury actually issued the indictment. Those of you who know something about this know how disturbing that would be to the judge presiding over the case. I saw this when I was watching the evening news, and the political correspondent of one of the networks was reading the indictment before the grand jury had even issued it. Needless to say, that was disturbing.

By the way, I also found out that I had the case when I was watching the evening news. They showed a picture of the indictment on the screen with my name on it. That was the first I learned that I actually had the case.

Another unusual event: a cooperating defendant who had lived with the other defendants decided to testify for the government. A very interesting character. Among other things, he had lived in at least five different countries under at least thirteen different names that we knew of. In one of those areas that he lived in, Chicago, he was engaged to two different women under two different names. He was a unique person. I could talk about him all night. But perhaps most interesting was that after the case, he was called down by Senator Chuck Grassley to testify about identity theft, how dangerous and how prevalent it is, and how easy it is to do it. I hope that his testimony is never released.

In fact, when I went to sentence him, I rejected his plea agreement. I found that he had committed perjury. His lawyer said to me when I said I was going to give him the statutory maximum, "But he'll be deported." I said, "I don't know how effective that will be, because with his talents, I'm sure he'll be back in the United States within a month or two." His lawyer said to me, "Well, Judge, it may actually take him only two weeks because he'll be out of practice."

The case is probably most famous for the postverdict unhappiness that occurred. Two weeks before I was going to sentence the defendants, two of whom were convicted on terrorism charges and another on fraudulent document charges, the government came to me to confess that there were a number of documents that had not been turned over, which were, in their words, "probably material." By this time, the line prosecutor had been removed from the case under very suspicious circumstances. There had been a fair amount reported about that. A new prosecutor had been appointed.

I wish I had all night to go into all the details, but we had a very unhappy hearing, after which I ordered a full investigation—and I met Mike Macisso during this period—requiring me, as I said earlier, to go out to the CIA to review some very disturbing classified information that certainly should have been turned over.

The investigation lasted nine months. When I ordered the investigation, I thought it might last a few weeks, and there might be a couple of additional

documents that I would be required to review and rule on. That's not what happened. There were literally dozens and dozens, if not hundreds, of documents that raised very serious questions, not only about the conduct of the case and the prosecutor's conduct, but the validity of the verdict, and in fact resulted in the government itself—the Attorney General had appointed a special counsel to lead the investigation—moving to vacate the verdicts, which I granted.

It also resulted in the chief prosecutor in the case himself being indicted on charges of subornation of perjury and obstruction of justice. He was acquitted about two-and-a-half or three months ago.

Those are just some of the issues that I had. So I didn't want anybody to think that my case had smooth sailing.

PROFESSOR CAPRA: It wasn't easy.

I know you probably have a lot of questions, and we're going to open it up. But I wanted to ask just one thing. That is, recently there has been discussion—for example, by Judge Michael Mukasey, the Attorney General—that perhaps the way to handle these cases is kind of a national security court, which I kind of interpret to be somewhere between the Guantánamo military tribunals and the trials that you all have conducted. If anybody on the panel has an opinion about whether that's a proper alternative or not, I invite it now. Anybody want to go for it?

JUDGE ROSEN: Any colleagues want to handle it before I talk about it? I actually talked to him about it. For me, Judge Mukasey was a real mentor in my case.

For those of you who don't know, he tried the "blind sheik" case here in New York.[36] He had a tremendous amount of experience. I had met him, and he was very, very helpful to me in my case.

We did a program together, similar to this one, in Washington, at George Washington University Law School. We ruminated about just exactly that issue, whether these cases could be tried effectively in civilian courts. He does feel fairly strongly that maybe the best approach is a specialized sort of FISA trial court. I should also note that my good friend and colleague, Jim Carr from Toledo, the Chief Judge there, is a member of the FISA court.

It is not really as secret a court as the media would like to make out. I think what Attorney General Mukasey's concept is is sort of a FISA trial court, with fully cleared jurors and with fully cleared counsel and with what I would call not relaxed rules of evidence, but rules of evidence which accommodate some of the hearsay issues and authentication issues that I had talked about.

PROFESSOR CAPRA: Any opinion on whether that's workable or better?

36. *See generally* United States v. Rahman, 870 F. Supp. 47 (S.D.N.Y. 1994).

JUDGE ROSEN: Well, that's sort of above my pay grade. I was actually called down to Washington and interviewed about this by one of the staff of the Judiciary Committee. I gave them my thoughts. The issue quickly died. I don't know if it's because of what I told them or not.

Some of the issues that we have raised here I think bring out the real problems in trying these cases and certainly in my case: the clash between providing defendants with classified information to accommodate their confrontation rights, where you have exculpatory information, or as in my case where there was real exculpatory information and *Giglio* information that could have been used with the cooperating defendant. If that had been brought to my attention during the trial, I don't know how I would have accommodated that. It would have been very, very difficult. The nature of the information would have been very difficult to accommodate.

PROFESSOR CAPRA: Again before we open up, Judge Rosen, do you want to introduce your security officer?

JUDGE ROSEN: Do we have time for Mike to talk for a minute?

PROFESSOR CAPRA: Do you want to talk for a minute about what you do?

JUDGE ROSEN: Talk about people who have to deal with these things on the ground, Mike Macisso actually does this stuff all over the country. He is working with some judges here in New York now. He knows more about this than I do.

PROFESSOR CAPRA: Come on up to the podium.

MR. MACISSO: Sort of continuing on the baseball theme, about an hour and a half ago I was told to put on a glove, I'm going into the game. So I have no notes. I was in Brooklyn today, seeing Judge Dora Irizarry on a case that she has, and then last night Judge Rosen said, "Why don't you come here?" So I thought I was going to be sitting in the bleachers watching a nice game. But here I am. Thank you to the professor and the esteemed panel here.

I am a security specialist. I am not a lawyer. I work under the Classified Information Procedures Act. I am one of eight security specialists. We travel throughout the country.

Our role in CIPA is, although we are with the Department of Justice, we get appointed to work for the presiding judge to give security advice and guidance on how to protect the documents. That's our only role. We don't get involved in litigating the case in any way.

A lot of times the defense counsel has never had anything to do with classified information. If they have to be cleared, we are the office that clears them. We set them up in a secure room in the courthouse. We give them computers to use so they can work in the courthouse in a stand-alone mode. Any type of classified filings will be done through our office.

Because of the relationships we've developed since 1980, we end up helping the defense counsel as their security advisors because a lot of these defense attorneys have never had anything to do with classified

information, and left to their own devices, they would either file it in the night box or somehow stumble through and release classified information when they shouldn't. So they deal with our office.

We are neutral parties. Right now we are in the post-9/11 world. Before 9/11, we were dealing with spies and most likely people who had an export-import violation, and they did a bad thing, but they wanted to help with the good things that they did—helping the intelligence community—so they'd want some help at sentencing.

After 9/11, our world just changed. Right now we have 140 criminal cases throughout the country. We have about fifty civil cases. Although there is no civil CIPA, the Civil Division or the U.S. Attorney's Office asks that we get involved to give CIPA-like assistance to the court.

In the "never let a good deed go unpunished" category, we are now supporting the habeas cases down at Guantánamo, which we thought were going to be twelve, fourteen cases, and it blossomed into about five hundred. Lastly, we are also supporting the fourteen "high-value-detainee" cases.

We have cleared a lot of defense counsel around the United States. They work very closely with my office.

Three of the panel members here—we've supported their cases. I didn't know *Awadallah,* so I don't know if there's any classified information there at all, but the other three cases we have supported. As I say, right now we have about 140 cases. We are the ones that, if defense counsel needs clearance, we set it up.

Judge Rosen was talking about a SCIF. Not all cases involve a SCIF. You may have information that is either confidential, secret, or top secret where you can get by with information being stored in a safe. When you have information that's sensitive, compartmented information, that information has to be stored in a SCIF.

We're the ones that go out and take a normal-sized room—we make sure it has slab-to-slab construction. Sometimes, you need nine-gauge metal behind the walls. We put motion detectors in the rooms. We put special locks on the doors. Then there is a safe inside that room.

So we're doing clearances, we're doing physical security, we're doing all the security aspects of it.

JUDGE ROSEN: And he often carries very highly sensitive documents. If you see Mike on a plane, you may see him with a briefcase with handcuffs to the briefcase.

PROFESSOR CAPRA: So it's a very complicated process. If you have any questions for our panelists, or comments, we invite them now. A microphone will be given to you. Please state your name. I'll leave the microphone people to figure out who they're going to catch here.

QUESTION: Hi. I'm Robert Moss.

One thing I haven't heard in these cases is the role of the law of war. We have a lot of defendants, including José Padilla and some of the paintball

defendants and the young man in Guantánamo, who appear to have been intending to go into combat perhaps, and yet they are charged with things like conspiracy to commit murder. So I wonder if I could get a response to that.

JUDGE COOKE: Well, that's the myth. Your question is part and parcel of what I talked about. The idea of José Padilla in war would imply that José Padilla was part of a war with the United States.

Essentially what happens, or what the charge is—conspiracy to provide material support to people overseas, to countries overseas (Bosnia, Somalia, Ethiopia, Afghanistan), or to organizations—you've got to stop that split and say, "If you want to talk about José Padilla as his enemy combatant self, you can do that," and have that discussion. But the criminal charge was not about the United States being at war with anyone.

PROFESSOR CAPRA: We've got to go on.

QUESTION: Thank you. My name is Carol Chodroff. I'm with Human Rights Watch.

I'd be interested to hear each of the judges respond to Professor Capra's question about the national security court issue. I was at a conference on Friday where Judge Leonie Brinkema from the Eastern District of Virginia, who was the trial judge in the *Moussaoui* case, described the criminal justice system as ideally suited to address terrorist cases.[37] She said when judges do their jobs right, we have the tools in the criminal justice system to address these very complicated cases.[38] Hearing each of you speak, it sounds as if, in very complicated cases involving classified information, you've successfully been able to do that. I'd appreciate hearing your responses.

PROFESSOR CAPRA: You're judges. You don't have to all respond. Anybody who wishes to respond may do so.

JUDGE ROSEN: I'm not sure I would characterize my case as a successful case.

JUDGE COOKE: I agree with Judge Brinkema. Every fifty or sixty years, something happens where the courts have to begin to look at how they're going to do something different, whether it's how we treat electronic evidence or whatever. We're going to go through some growing pains as we do this.

We have a system of justice that allows us to do it. We have a system of public trials, an adversarial system, that allows everyone to engage. At a different time, the policymakers may decide that some other different court

37. *See generally* United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003), *aff'd in part*, *vacated in part*, 365 F.3d 292 (4th Cir.), *and amended on reh'g*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

38. Hon. Leonie Brinkema, Judge, U.S. Dist. Court for the E. Dist. of Va., Keynote Address at the Washington College of Law at American University Symposium: Terrorists and Detainees: Do We Need a New National Security Court? (Feb. 1, 2008), *available at* http://www.wcl.american.edu/podcast/podcast.cfm?uri=http%3A//www.wcl.american.edu/podcast/audio/20080201_WCL_TAD.mp3.

should exist. But the system that I think we have now will work. It's going to be hard work for people like those of us up here to make it work, but it will work.

PROFESSOR CAPRA: Anybody else? Judge Sand?

JUDGE SAND: I don't have an answer to the basic question, although I've given it a lot of thought. But I think when we talk about terrorist trials, that covers a broad, broad spectrum.

In the case before me, the defendants were charged with blowing up American embassies in Tanzania and in Kenya. The trial itself was basically a traditional criminal trial. So I didn't have any feeling during the three and a half months of the trial that it should have been before some other tribunal.

Now, of course, all this was before September 11. There are other cases where there are questions of whether somebody is an enemy combatant or not that might be before some other tribunal.

You know, there's one other thing. When you're dealing with lives and the security of the country, you don't usually think in monetary terms. I don't know what the cost of the case that I had was. I don't know how many tens of millions of dollars were spent in that case. When the requests were to appoint experts or investigators in any one of the half-dozen or so countries in which events took place, and two of the defendants were facing the death penalty, one does not lightly turn down that request.

Now, our court has recently adopted a system where we try to budget cases, and counsel meet with our budget expert to try to work that out. But I think at some point, one has to think of the cost in the monetary sense. How many dollars do you expend?

PROFESSOR CAPRA: Judge Scheindlin.

JUDGE SCHEINDLIN: Since I haven't had a terrorist case, as you know, I have no expertise to answer your question. But for the rest of the audience, not the questioner, I do have a little summary of the February 1st program at American University. I just want to share with you what those participants had to say.[39]

Judge Brinkema was there, who tried the *Moussaoui* case. She agreed that the federal courts are equipped to handle terror trials.

Judge Brinkema went on to say that as far as she's concerned, the notion of a national security court should "send shivers up the spine of everybody."[40] She also said, "I've reached the conclusion that the system, in fact, does work."[41]

So it is for the reasons stated by Judge Brinkema, I like to think, demonstrated by the three judges to my left, that the court system can handle these cases and that any alternative court system is always a very dangerous proposition.

39. *Id.*
40. *Id.* at minutes 42–43.
41. *Id.* at minute 9.

PROFESSOR CAPRA: Judge Rosen.

JUDGE ROSEN: I don't want to be the skunk at the garden party here, but let me come at this from another perspective. As in so many cases with lawyers, it depends on how you frame the question.

Let me first say that whether you're talking about the *Moussaoui* case or the *Hamdan* case or any of our cases, I think that the judiciary as an independent branch of our government has demonstrated that we are not going to simply be a rubber stamp for either the legislative branch or for the executive branch and that the laws that are passed and enacted and the conduct of the executive branch are going to receive very careful scrutiny, and that all of us feel very committed to ensuring those civil liberties, which, as I said earlier, have become embedded in our constitutional jurisprudence over more than two centuries of jurisprudential evolution.

Having said that, there is another side to this, and that is, I am aware of instances—I almost said "cases," but they weren't brought as cases—in which, for some of the reasons I outlined, the government has very reliable, very compelling information—I won't call it "evidence," because under standard rules of evidence that we all deal with, it probably can't be presented—of very serious wrongdoing that could impact our national security and the lives of many, many people in our cities, including New York. The inability of the government to prosecute these cases because of proper constitutional limitations and evidentiary problems should cause all of us some concern, which of course begs the question: What do you do with these people?

As Judge Scheindlin indicated, the material witness statute doesn't work very well; you can only hold somebody for so long. In my case, one of the people, Nabil Al-Marabh, was on the terrorist watch list, and he was the one they were going after when they found these guys. They held him as a material witness for a year before I told them I wasn't going to approve it and I was going to vacate the warrant unless they actually came forward with evidence that they were going to use against him.

But Mr. Al-Marabh, I can tell you, was a very, very serious bad guy. The fact that the government was not able to indict him and prove a case in court doesn't mean that he should not have been dealt with in some way. Whether he could have been dealt with in the civilian justice system I think is a serious question.

So what do you do with people like that and many others? It's always a question of how you frame the issue. Can we deal with garden-variety—if there is such a thing—terrorism cases? Yes, we can. Are there problems? Certainly there are. But there are also instances in which the government has highly accurate, highly reliable information about people who are deadly serious and intend to do great damage to our country that cannot be brought because charges cannot be substantiated, or—and this is very important—the intelligence agencies are not willing to give up the information necessary to bring the case because it would compromise sources and methods of collection of intelligence.

If that sounds Draconian, believe me—

JUDGE SCHEINDLIN: A follow-up question for you. But would that be different if it was tried in a special alternative court?

JUDGE ROSEN: It might be.

JUDGE SCHEINDLIN: It would still be a trial.

JUDGE ROSEN: It might be. For example, you may not have the public trial issues that are available. You might be able to get secured juries. You might have sort of military justice rules that apply.

I know that makes some of us uncomfortable, including myself. But the question of what you do in these kinds of cases I do not think abides a simple answer.

PROFESSOR CAPRA: That is for sure. It's a very complicated area.

I guess we have time for at least two more questions. Can we give it to Judge Jim Carr because Judge Carr has a question?

QUESTIONER [Judge Carr]: I'm starting one of these cases March 4, and that's why I'm here to learn from my colleagues.

On the whole issue of ex parte communications, what happens when you have one of these cases, not just with CIPA but otherwise? And then, what are SAMs, and how do they impact upon the access to counsel and basically the right to fair trial?

PROFESSOR CAPRA: Okay. SAMs is an anagram. Do you want to define that?

JUDGE COOKE: Secure Administrative Measures.

PROFESSOR CAPRA: We have jurisprudence in the Second Circuit that deals in much detail with SAMs, because that was the allegation with respect to Lynne Stewart, that essentially her client was in the SAM and she leaked information.[42]

Anybody want to take Judge Carr's questions?

JUDGE COOKE: I'll take the one about SAMs. It's just the methods of how your given defendant is detained pretrial. There are some very specific—consult your local marshal service. They'll be willing to tell you. Some of the guys are here.

QUESTIONER [Judge Carr]: Do those have a negative impact upon access to counsel and the ability to have a fair trial?

JUDGE COOKE: It will depend upon your federal detention center, but it is not as easy to access an individual in a Secure Housing Unit (SHU) as it is someone who is in the general population. It becomes an issue particularly where you have voluminous evidence that you want to sit with your client to review and how you are going to do that, or if the evidence is electronic—as almost everything is in these cases in terms of the intercepts—and how the facility will allow you or what the facility will

42. For a discussion of the facts surrounding Lynne Stewart's indictment on multiple charges relating to her alleged provision of aid to a foreign terrorist organization, see United States v. Satter, 314 F. Supp. 2d 279, 287–94 (S.D.N.Y. 2004), and United States v. Satter, 272 F. Supp. 2d 348, 353–56 (S.D.N.Y. 2003).

allow you to bring in in order to have your client be able to listen to 3,300 hours of tapes in Arabic.

PROFESSOR CAPRA: And ex parte?

JUDGE ROSEN: I'll take a shot at that.

First of all, CIPA envisions ex parte proceedings. Where you are dealing with cases involving classified information, it is virtually impossible not to conduct ex parte proceedings. Obviously, they should be done on the record, a full record should be made. There's a lot of give and take with the lawyers.

But not only with the prosecutors. As I indicated earlier, when the court is responsible for screening classified information to determine if there is *Brady* or *Giglio* material, the court has to be informed as to what the defendant's theory of the case is and what kind of information the court should be looking for.

So not in my *Koubriti* case, but I have another terrorism case—I actually conducted an ex parte proceeding with defense counsel before I looked at the classified information to determine their theory of the case and the kinds of statements that I should be looking at in some of the electronically intercepted information. I did it on the record.

But I don't think that you can conduct a case involving classified information without following the CIPA procedures that anticipate ex parte proceedings, not only with the prosecutor, not only with the government, but also with defense counsel.

JUDGE COOKE: Just one more thing. What may also happen is that the defense may have a redacted statement. They will have one that has been given by the government that has been cleared, and they will say, "Judge, we would like you to look at the unredacted statement and tell us if we can have it." That would be usually done ex parte, because they are going to tell you, "Judge, this is our theory. This is what we think we want to find out. Would you look at the unredacted statement and tell us if it is on point?" Then you kind of play point person between the government and the defense for how much of it they are willing to declassify so that they may have some access to it.

PROFESSOR CAPRA: One more question.

QUESTION: Is there ever a justification for not providing choice of counsel for someone who is accused of terrorism?

PROFESSOR CAPRA: "Choice of counsel" meaning what—that the defendant would have a particular choice of counsel?

QUESTIONER: Yes. I know that Judge Sand mentioned that the counsel was appointed. I just wonder, was that because they had no choice of counsel or whether they just didn't have a particular choice?

PROFESSOR CAPRA: Because they were indigent.

JUDGE SAND: Yes. Counsel was appointed to them from the panel we have of qualified attorneys who have experience in criminal defense. Those

who were subject to death penalty also had another counsel appointed who was a death penalty expert.

I have on one or two occasions dealt with a defendant who requests a specific identified attorney. Those requests are denied. But it's a random selection from a panel of qualified attorneys.

PROFESSOR CAPRA: We could go on for several hours because there are so many issues to talk about here. There are issues, for example, of jury instructions when classified information is presented—is it presented directly; is it presented indirectly and scrubbed; how are jury instructions affected—and impaneling anonymous juries. There are tons of issues. Unfortunately, we can't do that in two hours.

I really want to thank the panel for doing a great job. Thank you for attending.