U.S. Senate Judiciary Committee
Hearings on "Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"
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Testimony of James J. Benjamin, Jr.

Mr. Chairman, members of the Committee, thank you for the opportunity to be here this morning. You have asked me to talk about a report on terrorism prosecutions that I co-authored along with my law partner and close friend, Richard Zabel, who is also present here this morning. I will outline the findings of our report, and I ask that the executive summary of the report, as well as the report itself, be included in the record.

Rich and I practice law together at Akin Gump Strauss Hauer & Feld in New York. Our area of expertise is white-collar criminal defense. We are not academics; we are not policy experts; and we do not litigate terrorism cases ourselves. But between us, we spent more than 13 years as federal prosecutors in the Southern District of New York. We have considerable experience investigating and trying cases in federal court, and over the years, we have developed a thorough understanding of the way that the federal criminal justice system functions on a practical, everyday level. We also have a deep respect for our nation's system of justice, which in so many ways represents the very best of our cultural traditions. And of course, like so many millions of Americans, we are deeply concerned about the threat posed to our nation by international terrorist organizations.

About a year ago, Human Rights First, a longstanding pro bono client of our firm, approached Rich and me and asked us to undertake a comprehensive study of the capability of the federal courts to handle international terrorism cases. Last week, we published the results of that study, entitled *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*. Human Rights First has provided the report to the members of this Committee and it is available

on the HRF website. Although Akin Gump is proud of the firm's commitment to pro bono work, the views expressed in our report are those of Rich and myself and of Human Rights First; they are not the views of Akin Gump as a whole or of other Akin Gump attorneys.

I want to say at the outset that, while Rich and I are proud to have served as prosecutors in the federal system, we certainly acknowledge that the system is not perfect. It sometimes stumbles, and terrorism cases have, in some instances, posed significant strains and burdens on the justice system. This was especially true in the 1990s, when many of the issues that are presented in terrorism cases were being litigated and resolved for the first time. And I also want to make clear that we don't believe the criminal justice system by itself is "the answer" to the problem of international terrorism. Terrorism is a complex problem, and in combating it the government must have at its disposal the full range of military, intelligence, diplomatic, economic, and law enforcement resources. When armed conflict is necessary, there can be an important role for the military justice system and for military detention under the law of war.

We prepared *In Pursuit of Justice* in the hope that we could make a contribution to the important public debate about how best to prosecute and punish individuals suspected of complicity in terrorism. As members of this Committee are well aware, in recent years some have argued that terrorist criminals should be prosecuted outside of the civilian court system, either in special military commissions or in an entirely new "national security court." A significant premise of these arguments is that the traditional court system is not equipped to handle terrorism cases. In our report, we set out to test that premise. After all, it is no small thing to dramatically reshape the justice system, creating a parallel system from scratch. There are obvious advantages to sticking with the existing court system, unless, of course, it is not up to the job. In fact, however, our extensive review of international terrorism cases in the federal

criminal justice system points to the opposite conclusion: over the years, the federal system has in general capably handled challenging terrorism cases without compromising national security or sacrificing rigorous standards of fairness and due process.

I want to say a few words about how we went about this study. First and foremost, we approached this project from an empirical perspective. We focused on terrorism that is associated – organizationally, financially, or ideologically – with self-described "jihadist" or Islamist extremist groups such as al Qaeda. Since the late 1980s, the government has brought scores of criminal prosecutions against defendants who are alleged to have been involved in Islamist terrorism. In preparing our report, we set out to identify and examine every case involving Islamist terrorism that has been prosecuted in federal courts in recent years.

This was a challenging task because there is no single, definitive list of terrorism prosecutions. The Justice Department itself has two separate lists, with different numbers, and the Administrative Office of the U.S. Courts has yet a third list. In order to come up with our own list, we spent months combing through the available government reports plus court records, news accounts, and other sources. Based on that effort, we identified 123 international terrorism cases that have been brought since the 1980s. It is likely that we missed some cases, but we believe we were able to generate a reasonable body of data that permits us to draw sound conclusions about the efficacy of the criminal justice system.

Our data set of 123 cases includes the celebrated mega-trials from before 9/11, which were mainly (but not exclusively) brought in the Southern District of New York (*e.g.* the first World Trade Center bombing trials, the prosecution of Sheikh Rahman and his co-conspirators; the Philippine airline "Bojinka" case; the Embassy Bombings trial; and the trial of Ahmed Ressam, the so-called "Millennium Bomber") as well as a range of cases prosecuted in federal

courts across the country since then. The post-9/11 cases include the prosecutions of Richard Reid and Zacarias Moussaoui, numerous prosecutions for material support of terrorist organizations (including, for example, the *al-Moayad* case in Brooklyn, the Lackawanna Six case from upstate New York, and terrorist financing cases such as the *al-Arian* case in Florida and the Holy Land Foundation case in Texas). We also include cases brought under a variety of criminal statutes, including generally applicable statutes such as credit card fraud, false statements, and the like, so long as there was something in the public record that demonstrated a link to Islamist terrorism. Our list of 123 cases, and a more detailed explanation of how we identified the cases, is contained in the report.

Once we identified the universe of cases, we proceeded to examine them in detail. We looked through the docket sheets, talked to lawyers – both prosecutors and defense attorneys – who participated in some of those cases, read extensively what has been written about the cases in the media and in scholarly journals, and built a database that captures important information about each case. Our report contains data in the form of charts and graphs categorizing the post-9/11 cases.

For each of these cases, we undertook a detailed examination of the key legal and practical issues that were presented. In particular, we focused on the issues that critics have suggested impede effective prosecution of terrorism suspects: the scope of the substantive law; securing the defendant's presence in court; detention of suspects; dealing with classified or other sensitive evidence; the government's discovery obligations; Miranda and the right to remain silent; evidentiary and speedy trial issues; sentencing; and the physical safety of trial participants. Each of these issues has its own chapter in our report, but in summary, our findings are the following:

- Prosecutors have invoked a host of specially-tailored anti-terrorism laws as well as longstanding, generally applicable federal criminal statutes to obtain convictions in terrorism cases, and that the decision not to prosecute has rarely, if ever, been based on the unavailability of a criminal statute under which to do so. The federal criminal laws aimed at terrorism now reach conduct that may be merely preparatory to violent incidents, for example the material support statutes, as well as criminal offenses committed abroad through statutes with extra-territorial reach. In addition to terrorism crimes, prosecutors have been able to successfully charge terrorist suspects with criminal offenses not directly related to terrorist activity, such as immigration violations, false statements, credit card fraud and the like.

- Obtaining jurisdiction over terrorist defendants has not posed a significant impediment to prosecutions. Courts have consistently exercised jurisdiction over defendants brought before them, even those defendants apprehended by unconventional or forcible means. There is language in some lower-court cases suggesting that a federal court might not have jurisdiction over a defendant if U.S. officials participated in conduct that is "shocking and outrageous," but no case has ever been dismissed on this ground.

- Federal authorities have exercised a wide range of powers, through existing criminal statutes and immigration laws, including the material witness statute, to detain and monitor suspects in the vast majority of known cases.

- Courts have used the Foreign Intelligence Surveillance Act (FISA) and the Classified Information Procedures Act (CIPA) successfully to balance the need to protect national security information, including the sources and means of intelligence gathering, with defendants' rights to receive exculpatory evidence and other discovery. CIPA outlines a comprehensive process for dealing with classified evidence and our extensive case review uncovered not a single terrorism case in which CIPA procedures failed and a serious security breach occurred.

- *Miranda* warnings are not required in battlefield and non-custodial interrogations or interrogations conducted purely for intelligence gathering purposes, and the *Miranda* issue has not had significant implications for criminal terrorism prosecutions.

- The Federal Rules of Evidence, including rules that govern the authentication of evidence collected abroad and admissibility of hearsay evidence, have provided a common-sense, flexible framework for guiding admissibility decisions.

- The Federal Sentencing Guidelines and other applicable sentencing laws prescribe severe sentences for many terrorism offenses, and experience shows that terrorism defendants have generally been sentenced to lengthy periods of incarceration.

- With some exceptions, courts have generally been able to assure the safety and security of trial participants and observers.

We recognize that the project we have undertaken is large and that the views on this subject are charged and will vary. We do not profess to have found definitive answers, only to have undertaken a serious and objective review of the subject. We hope our findings and analysis are of value in the ongoing debate about how best to reconcile our commitment to the rule of law with the imperative of assuring security for all Americans.

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In an effort to provide a more complete description of *In Pursuit of Justice*, we offer the following executive summary of the report:

Executive Summary

In attempting to eradicate the threat of international terrorism by Islamist extremists, our country faces enormous challenges. Among the more difficult problems is what to do with individuals who come into the custody of the U.S. government and who are suspected of complicity in terrorist acts. Some detainees may properly be held under the law of war for the duration of active hostilities to prevent them from returning to the field of battle, and without any effort by the government to file charges or impose punishment. However, for some suspected terrorists, military detention is not appropriate and, even if it is, the government may find it both desirable and necessary, at some point, to bring formal charges in the civilian court system with a view toward imposing punishment.

Recently, some commentators have proposed an entirely new "national security court" to handle some or all international terrorism prosecutions. Although proposals vary, many offer novel features that would give the government more power and make it easier for the government to secure convictions. However, creating a brand new court system from scratch would be expensive, uncertain, and almost certainly controversial. Indeed, there is the risk that

the very same issues now debated simply would be transferred to a new arena for resolution. In our view, before dramatic changes are imposed—such as the creation of an entirely new court or new detention scheme—it is important to take a step back and evaluate the capability of the existing federal courts and the existing body of federal law to handle criminal cases arising from international terrorism. Given the strength and vitality of our existing court system—and the fact that it reflects in many ways the best aspects of our legal and cultural traditions—there are obvious advantages to relying on the existing system, provided that it is up to the job.

In *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, available online at www.humanrightsfirst.org, Richard Zabel and I set out to analyze the capability of the federal courts to handle criminal cases arising from international terrorism. *In Pursuit of Justice* is based heavily on the actual experience of more than 100 international terrorism cases that have been prosecuted in federal courts over the past fifteen years. Based on our review of that data and our other research and analysis, *In Pursuit of Justice* concludes that, contrary to the views of some critics, the court system is generally well-equipped to handle most terrorism cases. A high-level summary of our analysis follows immediately below.

Discussion of Data Collection

In preparing *In Pursuit of Justice*, we sought to avoid abstract or academic approaches, focusing instead on the rich body of actual experience with terrorism cases in the federal courts. We sought to identify all cases arising from terrorism that is associated—organizationally, financially, or ideologically—with Islamist extremist terrorist groups like al Qaeda. With that as our focus, we combed through a number of sources in an effort to identify all such cases that have been brought in federal courts since 9/11, as well as the most significant cases from the 1990s. To the extent that materials were publicly available, we obtained docket sheets, motion

papers, and judicial opinions from these cases, as well as press accounts and other information, in an effort to understand the major issues that were presented in each case. Although our data collection effort was not foolproof and, indeed, was almost certainly incomplete, we believe that we gathered a reasonable set of data that permits us to draw reasonable conclusions about the way the court system has dealt with a whole array of substantive and procedural issues in terrorism cases. In Appendix A of *In Pursuit of Justice*, we include a list of all of the terrorism cases that we have identified and examined.

Substantive Law

Over the years, and especially since 1996, Congress has enacted a host of anti-terrorism laws. Prosecutors have successfully invoked many of these specially tailored terrorism laws to obtain convictions in all manner of criminal terrorism cases. In addition, prosecutors have relied on the large body of generally applicable criminal statutes in cases against accused terrorists, including statutes that criminalize murder, bombings, conspiracy, money laundering, and other unlawful conduct. Experience has shown that the existing array of federal criminal statutes contains a more-than-adequate set of tools for prosecutors to invoke against accused terrorists. Some of the most important criminal statutes in terrorism cases are those prohibiting "material support" of terrorist organizations. Under these statutes, it is unlawful for a person to provide money, personnel, or any other support to an organization if the person knows or intends that the organization is planning to commit a terrorist act or if the person knows that the organization has engaged in terrorism or has been designated, by the U.S. government, as a terrorist organization. The material support statutes initially were drafted very broadly, causing concerns that they could be used to penalize individuals for exercising legitimate First and Fifth Amendment rights,

but over the years the courts have construed and Congress has amended the statutes so that they are less susceptible to abuse.

Because material support prosecutions do not require that any act of terrorism actually occurred, they have been a pillar of the government's post-9/11 strategy of preventive prosecutions. Material support cases have been brought against persons who enrolled at terrorist training camps, who acted as messengers for terrorist leaders, who intended to act as doctors to terrorist groups, or who raised money to support terrorist organizations. Although these cases can potentially result in overreaching, and although not all material support cases have resulted in convictions, the government's overall record of success in this area is impressive, and most if not all of the convictions seem sound.

Another key approach, since 9/11, has been for law enforcement to charge terrorism defendants with violations of "alternative statutes"—i.e., generally applicable crimes that are not directly related to terrorism such as immigration violations, false statements, credit card fraud, and the like. Prosecutors have used a similar strategy for many years in other areas of criminal law, and we believe that it is both appropriate and effective to deploy it against terrorists. Individuals who are involved in terrorism will often violate a number of generally applicable criminal laws—for example, by traveling with a forged passport or using stolen credit cards—and prosecutors have been able to bring successful and largely uncontroversial cases against them for engaging in these violations.

Other statutes, such as those prohibiting seditious conspiracy and terrorism-related homicide, have been used in important cases such as the prosecutions of Sheikh Omar Abdel Rahman and the Embassy Bombers. The government rarely has charged terrorism defendants with treason but that statute, too, offers a powerful tool in certain cases. Other statutes, such as

detailed criminal laws regarding biological weapons and radiological dispersal devices, have not yet been used, one hopes because those weapons are still not easy for terrorists to obtain. Finally, the government has brought several important cases against authority figures who have engaged in criminal incitement by urging their followers to commit acts of violence against the United States. Although such cases need to be carefully considered in light of the First Amendment implications, to date, courts and prosecutors have ensured that incitement cases are brought within proper constitutional boundaries and in appropriate cases.

Securing the Defendant's Presence in Court

In many terrorism cases, the defendant is brought to court to face criminal charges after being arrested by a federal law enforcement officer or after traditional extradition proceedings. These cases present no novel issues. In some cases, however, defendants have been brought into the justice system by unconventional means, including transfer by U.S. military authorities or informal "rendition" by foreign officials outside the extradition process. In some scenarios, the circumstances surrounding the defendant's apprehension may be murky, and the defendant may allege that he was subjected to forcible treatment or prolonged detention.

Under longstanding Supreme Court precedent embodied in the so-called *Ker-Frisbie* doctrine, irregularities in the manner in which a defendant was captured and brought to court do not generally prevent federal courts from exercising jurisdiction over the case. Over the years, lower courts have identified two narrow circumstances in which a defendant's irregular abduction might cause a federal court to lose jurisdiction over a criminal case—(i) if the abduction violates an explicit term in an extradition treaty or (ii) if it is accompanied by torture or other extreme conduct that "shocks the conscience" of the court. However, to our knowledge the courts have never dismissed a case under either of these exceptions, and case law indicates

that both exceptions are narrow. Indeed, the first exception is so narrow as to be virtually invisible given the manner in which U.S. extradition treaties generally are drafted. There is a possibility that a federal court might decline to exercise jurisdiction under the second exception if U.S. officials were shown to have participated in torture, but no court has ever dismissed a case on this basis.

Detention of Individuals Suspected of Involvement in Terrorism

Some commentators have argued that the existing legal system does not give the government enough authority to detain individuals who are suspected of terrorism, but we believe that this criticism is overstated. There are at least four well-established and lawful means by which the government can detain persons whom it suspects of participating in terrorism. Three of these approaches do not require the government to file criminal charges:

- Under the law of war, the government has ample authority to detain combatants under the Third Geneva Convention on POWs and civilians who participate in hostilities or otherwise pose a serious security risk and who fall within the Fourth Geneva Convention, in order to prevent them from rejoining the battle.

- Whether in situations of armed conflict or peacetime, the government has broad latitude to arrest and seek detention of suspected terrorists as soon as it is prepared to file criminal charges against them. After arresting a defendant, the government must promptly bring the defendant before a magistrate judge, who decides whether the defendant should be detained or released on bail. But the government is entitled to a presumption that terrorism defendants should be detained, and judges have often ordered detention of defendants charged in such cases.

- In cases involving aliens who are alleged to have violated the immigration laws, the government has broad latitude to arrest and detain aliens pending a decision on whether they should be removed from the country. Thus, under the immigration laws, the government can arrest and detain many suspected terrorists (excluding U.S. citizens, of course) without filing criminal charges. Under the immigration statutes, the courts have no power to review the Executive Branch's discretionary decision to detain an alien charged with immigration violations.

- When a grand jury investigation is under way, the government may apply to a federal judge for authority to arrest an individual who is deemed to be a "material witness" in the investigation. This provision allows the government to arrest and seek detention

> of individuals who are charged neither with crimes nor with immigration violations. However, the material witness procedure is subject to close judicial oversight, carries a number of procedural protections, and may only be used for a limited period of time.

As experience shows, each of these procedures has at times been put to widespread use in the years since 9/11. In general, detention in criminal and immigration cases is uncontroversial and based on well-settled principles. There has been some controversy surrounding the use of the material witness statute, but the procedure is well-established in our existing legal system and is subject to close judicial oversight. Together, these various tools have given the government the authority to detain the overwhelming majority of individuals whom it has arrested in connection with terrorism.

We acknowledge the possibility that, on rare occasions, the government may believe that an individual is dangerous and is closely associated with terrorism, but may lack the legal authority to detain the person. For example, consider the hypothetical possibility of a U.S. citizen where the government has valid intelligence information suggesting a link to terrorism but insufficient admissible evidence to bring criminal charges, and where the material witness procedure has expired or is otherwise unavailable. In such a case, the government would face a dilemma and existing legal tools would probably not afford a means of detaining the individual. However, we believe that this hypothetical scenario is an unlikely one. Given the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable. And experience reflected in the public record bears out this conclusion. The empirical data we have reviewed from actual terrorism cases reveals only a tiny handful of cases where, potentially,

existing tools may have been insufficient to secure the detention of a suspected terrorist. Those exceptional cases, *Padilla* and *al-Marri*, merit discussion and analysis, but we believe that they are anomalous and provide a poor basis to draw broader conclusions about the efficacy of the justice system. To the contrary, the overall body of cases strongly suggests that existing tools provide an adequate basis for the lawful detention of suspected terrorists.

We recognize further that the public record may not fully reflect all the occasions during which prosecutors could not charge and detain a dangerous individual. While it is not possible for us to assess the magnitude of the non-public record of this problem, there are likely to be those who will invoke it to argue for additional means of detaining individuals even where they cannot be charged, as is done in certain European jurisdictions. Putting aside as beyond the scope of this White Paper the very serious constitutional questions such an administrative detention scheme would raise, two practical considerations bear mentioning. First, even where law enforcement cannot charge and detain an individual, it is not powerless. It may confront the individual and disrupt and/or monitor in a variety of ways that individual's conduct. Second, in our experience, most prosecutors with whom we have discussed the issue agree that the ability to administratively detain an individual for several days or even weeks, as can be done in some European jurisdictions, would not materially help them beyond the available tools in developing a case against an individual who posed the problems Jose Padilla did. Therefore, anyone who is arguing for an administrative detention scheme to address the dilemma of a defendant like Padilla, will likely be arguing for a long-term scheme that would mark a dramatic departure from our country's longstanding ideals and practices.

The Challenge of Dealing with Sensitive Evidence that Implicates National Security

In many terrorism cases, the government seeks to rely on evidence that is probative of the defendant's guilt but which implicates sensitive national security interests, particularly intelligence sources, means of intelligence gathering, and even the state of our intelligence on other subjects or intelligence priorities. Dealing with classified or sensitive evidence can be one of the most important challenges in terrorism cases. Over the years, however, courts have proved, again and again, that they are up to the task of balancing the defendant's right to a fair trial, the government's desire to offer relevant evidence, and the imperative of protecting national security.

The Foreign Intelligence Surveillance Act ("FISA"), provides a lawful means for the government to conduct wiretaps and physical searches within the United States in terrorism investigations without satisfying the normal Fourth Amendment requirement of probable cause that a crime was committed. Under FISA, the government must make an ex parte application to a special FISA court, composed of a select group of federal judges, and must satisfy a number of technical requirements before the FISA court can give authority to conduct a FISA wiretap or a FISA search. The FISA procedures are very different from those used in normal criminal investigations.

In the years before 9/11, the Department of Justice imposed an internal "wall" that made it difficult for FISA evidence to be used in court. Under the "wall" procedures, the government erected barriers between intelligence gathering, on one hand, and criminal prosecution on the other. As a result, it was difficult for the government to use FISA evidence in court, since it was deemed to be the province of the intelligence community. FISA itself, however, did not require the "wall"; to the contrary, from its inception the statute envisioned that FISA evidence could be

used in court. After 9/11, Congress amended FISA to make it clear that the "wall" should be dismantled and FISA evidence could be shared with criminal investigators and prosecutors. Courts have found the amendments constitutional, and in the years since 9/11, FISA evidence has been used without incident in many criminal terrorism cases.

A separate statute, the Classified Information Procedures Act ("CIPA"), outlines a comprehensive process for dealing with instances in which either the defendant or the government seeks to use evidence that is classified. Before CIPA was adopted in 1980, some criminal defendants, mainly in espionage cases, sought to engage in "graymail," the practice of threatening to disclose classified information in open court in an effort to force the government to dismiss the charges. CIPA was intended to eliminate this tactic and, more broadly, to establish regularized procedures and heavy involvement by the presiding judge, so that the defendant's right to a fair trial would be protected while national security would not be jeopardized by the release of classified information.

Under CIPA's detailed procedures, classified evidence need not be disclosed to the defense in discovery unless the court finds, based on an in camera review, that it is relevant under traditional evidentiary standards. If the government still objects to the disclosure after a finding that the information is relevant, then the court enters a non-disclosure order and determines an appropriate sanction for the government's failure to disclose. Absent a non-disclosure order, the judge enters a protective order and the information is disclosed only to defense counsel, who must obtain a security clearance, but not to the defendant. Alternatively, the judge may find that the information can be provided directly to the defendant in a sanitized form—e.g., through a summary or redacted documents.

As trial draws near, if either the government or the defense seeks to use classified information at trial, a separate proceeding occurs, in private, in which the judge and the lawyers for both sides (but not the defendant himself) attempt to craft substitutions for the classified evidence—using pseudonyms, paraphrasing, and the like—which must afford the defendant substantially the same ability to make his defense as if the original evidence were used. If it proves impossible to craft an adequate substitution, then the court must consider an appropriate sanction against the government, ranging from the exclusion of evidence to findings against the government on particular issues to dismissal of the indictment in extreme cases. Under CIPA, all of these proceedings are conducted in secure facilities within the courthouse, and sensitive documents are carefully safeguarded pursuant to written security procedures.

CIPA repeatedly has been upheld as constitutional, and it has been used successfully in scores of terrorism prosecutions. We are aware of only two reported incidents in which sensitive information was supposedly disclosed in terrorism cases, but we have not been able to confirm one of those incidents and in the other it is our understanding that the government did not try to invoke non-disclosure protections. Based on our review of the case law, we are not aware of a single terrorism case in which CIPA procedures have failed and a serious security breach has occurred. This is not to say that CIPA is perfect, and in *In Pursuit of Justice* we note some potentially problematic situations—e.g., where a defendant seeks to proceed pro se such as Zacarias Moussaoui—as well as some areas for possible improvement in the statute.

Brady and the Government's Other Discovery Obligations

One of the core elements of our criminal justice system is the requirement, under *Brady v. Maryland*, that the government disclose exculpatory information to the defense so that it can be effectively used at trial. The government also must comply with other discovery obligations,

including the requirement that it turn over prior statements of government witnesses before those witnesses testify during trial. The government's *Brady* and discovery obligations are fundamental, and violations, such as those which occurred in the Detroit Sleeper Cell case, can have disastrous consequences for the effectiveness and reputation of the criminal justice system.

In the *Moussaoui* case, the courts wrestled with a difficult *Brady* problem when Moussaoui demanded to interview notorious terrorism figures who were detained in U.S. custody outside the criminal justice system. The government understandably objected, on grounds that allowing Moussaoui or his counsel to interview these individuals would disrupt intelligence-gathering and jeopardize national security. At the same time, the defense reasonably contended that these individuals could potentially have evidence that would help Moussaoui show that his involvement in al Qaeda activities with which he was charged was limited. After extensive litigation, the Fourth Circuit devised a CIPA-like compromise under which Moussaoui would not be given direct access to the detained individuals, but his counsel would be able to propose summaries from intelligence reports that would be read to the jury, conveying the essence of the exculpatory information. Although Moussaoui ultimately decided to plead guilty, this procedure was employed on his behalf in his sentencing trial. In addition, in a subsequent case in the Southern District of New York, the presiding judge adopted essentially the same approach, and defense counsel consented to the procedure. We believe that the Fourth Circuit's creative approach demonstrates the adaptability of the court system to handle difficult challenges presented by terrorism cases.

Other terrorism cases have presented different *Brady* problems. For example, in some cases the defense has been deluged by thousands of hours of un-transcribed FISA recordings and has been forced to wade through the evidence to see if it contains anything exculpatory. Although

it is indeed a challenge to handle a case with voluminous evidence, courts have generally afforded adequate time for defense counsel to do the job. Another issue is the scope of the government's obligation to search for *Brady* material. In a multi-agency, and sometimes multi-government, investigation involving intelligence and military authorities, how widely must the prosecutors search in order to discharge their *Brady* obligations? These situations are sometimes challenging because of the complicated record-keeping systems and far-flung operations of intelligence and military agencies. And previously unknown problems sometimes emerge, as exemplified by the recent disclosure in the *Moussaoui* case of three CIA recordings which were not previously known to the prosecutors or the defense. Nevertheless, courts have generally adopted common-sense approaches to these problems, and there is no indication that prosecutors experience major or recurring obstacles to conducting proper review of the evidence for *Brady* material.

Miranda and the Right to Remain Silent

The famous *Miranda* warnings—"You have the right to remain silent" and so on—are deeply ingrained in domestic law enforcement and, more broadly, in our national culture. In general, if a law enforcement officer procures a confession from a defendant who is being questioned while in custody, the confession is admissible in court only if the officer read the *Miranda* warning at the beginning of the interrogation and the defendant agreed to waive his *Miranda* rights. Where a terrorism defendant is arrested in the United States by law enforcement, compliance with the *Miranda* warnings is easy. But what happens when an individual is arrested overseas?

If the questioning is conducted by foreign officials, then under well-settled case law, *Miranda* does not apply, and a defendant's post-arrest confession is admissible so long as it was

voluntarily given. However, in the Embassy Bombings case, the presiding judge broke new ground by holding that when U.S. law enforcement questions a detained suspect overseas, the U.S. officers must administer a variant of the *Miranda* warnings even though the questioning is occurring outside the United States.

Some have criticized this holding, invoking the absurdity of soldiers administering *Miranda* warnings to fighters who are captured on the battlefield. We agree that soldiers need not administer *Miranda* warnings in the heat of battle, but we do not believe that this scenario has significant implications for criminal terrorism prosecutions. As an initial matter, few individuals have been placed on trial following a battlefield capture; the vast majority of confessions in terrorism cases have resulted from traditional interrogation by law enforcement officers rather than soldiers. (The case of John Walker Lindh is an interesting exception that we discuss in this Paper.) Should this issue ever arise in a battlefield situation, however, we believe the courts likely would find that *Miranda* does not apply. Finally, it is worth noting that consequences of a failure to issue a *Miranda* warning arise only if a statement of the accused is sought to be introduced in a criminal trial. Thus, the failure to administer *Miranda* warnings where required will not impede interrogation for intelligence gathering purposes nor prevent the introduction at trial of other evidence.

Evidentiary and Speedy Trial Issues

Some commentators have posited that the Federal Rules of Evidence, which are applied in criminal cases, would somehow make it difficult or impossible for the government to present probative evidence in terrorism cases. Among the alleged problems are those surrounding the authentication of physical evidence, sometimes referred to as "chain of custody problems," and the alleged unavailability of witnesses who are deployed around the world. We believe that these

objections are significantly overstated. The Federal Rules of Evidence, including the rules that govern authentication of physical evidence, generally provide a common-sense, flexible framework to guide the decision whether evidence is admissible in court. We are not aware of any terrorism case in which an important piece of evidence has been excluded on authentication or other grounds. Further, the government generally can arrange for its personnel to travel long distances to court to testify if needed, and has done so in some important cases, including the *al-Moayad* case in Brooklyn.

Terrorism cases also do not present unique or insuperable speedy trial problems. It is true that some of the larger terrorism cases can drag on for years before they are resolved, but courts have repeatedly recognized that delays are permissible in complex cases. Indeed, in one important terrorism case, the *al-Arian* material support prosecution in Florida, the presiding judge overruled the defendant's speedy trial objections and established a reasonable schedule for the case.

Sentencing

In the federal criminal system, the presiding judge has the job of imposing the sentence except in capital cases. The judge possesses significant discretion, but that discretion is guided by a series of legal provisions including the Federal Sentencing Guidelines. The applicable legal principles prescribe severe sentences for many terrorism crimes, and experience has shown that terrorism defendants have generally received very stiff sentences. In general, the sentencing of terrorism defendants has not presented unique or unusual problems.

One important feature of the federal sentencing regime is that it offers leniency to defendants who choose to cooperate with the government and assist in the investigation and prosecution of others. The cooperation process is extremely well-defined in federal criminal

practice; judges and lawyers are familiar, on an everyday basis, with the proper method for approaching cooperation and for the process that a prospective cooperator must go through before he is accepted by the government. Some significant terrorism defendants have decided to cooperate, after consulting with their lawyers, in an effort to achieve leniency. This is yet another benefit of using the existing court system.

Safety and Security of Trial Participants and Others

Finally, some terrorism prosecutions present real security risks for judges, jurors, witnesses, prison guards, and others. As exemplified by a horrible attack on a prison guard in the Embassy Bombings case, some terrorism defendants are violent killers who will not hesitate to harm others if given the chance. As a result, court officers, judges, and prison officials face a challenge in maintaining a secure and safe environment for terrorism cases to proceed. However, the challenges of maintaining security are hardly unique to terrorism cases. For many years the court system has dealt with all manner of violent individuals, including gang members and others. There are well-recognized tools, such as extra security screening, anonymous juries, shackling the defendants, and out-of-court protection by the Marshals Service, that can be used to ensure security. These methods are costly and disruptive, and they are certainly not foolproof, but in general they work reasonably well in terrorism cases and many other cases where trial participants present a risk of violence.

Within the prison system, the Bureau of Prisons, upon direction of the Attorney General, has authority to impose Special Administrative Measures, or SAMs, to ensure security for highly dangerous defendants. SAMs are intended to prevent acts of violence within the prison system and also to prevent defendants from communicating with others outside of prison in a manner that may lead to death or serious injury. SAMs are inmate-specific and may be imposed only

pursuant to special procedures. They generally encompass housing a prisoner in segregation and denying him privileges such as correspondence, visits with persons other than his counsel or close family members, and use of the telephone. Courts have generally upheld the use of SAMs, although they have tended to modify the SAMs to make sure that the prisoner is able to communicate effectively with counsel. In the highly publicized Lynne Stewart case, Stewart was convicted of serious crimes after the jury found that she had violated the SAMs by helping her client, Sheikh Abdel Rahman, deliver terrorism-related messages to the news media. The Stewart case stands as a stark reminder of the government's determination to ensure strict compliance with SAMs.

Conclusion

As we look ahead to the coming years, it is a grim and undeniable reality that our country is threatened by violent extremists, claiming to act in the name of religious piety and bent on attacking our country, killing our fellow citizens, and damaging or destroying important national symbols and institutions. Confronting this threat is among the greatest challenges that we face as a nation. After 9/11, it is incontestable that the government must pursue a multi-faceted counter-terrorism strategy involving the use of military, diplomatic, economic, cultural, and law-enforcement tools. No single response can serve as "the answer" to international terrorism. However, as we strive for a vigorous and effective response to terrorism, we should not lose sight of the important tools that are already at our disposal, nor should we forget the costs and risks of seeking to "break new ground" by departing from established institutions and practices. *In Pursuit of Justice* concludes that the justice system generally deserves credit, not criticism, for the manner in which it has handled terrorism cases. Although the justice system is far from perfect, it has proved to be adaptable and has successfully handled a large number of important

and challenging terrorism prosecutions over the past twenty years without sacrificing national security interests or rigorous standards of due process and fairness.

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Full text of *In Pursuit of Justice* follows