

Convicted Terrorists: Sentencing Considerations and Their Policy Implications

Joanna Baltes, Karen J. Greenberg, Hon. Gerald Bruce Lee,
Robert Timothy Reagan, & Stephen I. Vladeck*

Stephen Vladeck: When this symposium was organized, there was a lot of consensus about the subject of the first two panels: there should be a discussion of pretrial issues, and there should be a discussion of trial issues. But sentencing was, in many ways, almost an afterthought. In many regards in post-9/11 terrorism commentary, we tend not to spend that much time talking about sentencing, partly perhaps because by that point the drama is over: the defendant has been convicted; the issues we have talked about all day have been resolved (at least temporarily pending appeal). Perhaps also partly because sentencing is so often very case-specific. But we still thought it would be useful to bring together a panel of experts to talk about patterns in these cases, how sentencing has worked in the context of terrorism trials, and what broader lessons we might take away from sentencing in terrorism cases since 9/11. Our hope for the next hour and a half or so is to have *that* conversation. Tim, I am going to start with you. If you would be so kind, can you say a bit about what kinds of patterns someone who came to these cases (and who wanted to actually figure out how sentencing in terrorism cases goes) might be divined from what we know?

Tim Reagan: Well, I can tell what I have seen. I work for the Federal Judicial Center, which as some of you may or may not know, is an agency in the federal government, but it is in the judicial branch, which is not where most federal workers work, so it is small and not necessarily well known. One of our missions is continuing education for federal judges. And one of my tasks has been to try to develop educational materials for federal judges pertaining to national security cases, and so I have what Steve referred to as a collection of case studies.¹ I focus on the case management issues that do not get written up in the published decisions because everyone has access to the published opinions, so what I mostly do is talk to judges in a selection of cases. I certainly do not cover all cases, and I talk to them about what they had to do and write it down for the benefit of the next judge who gets a case. And then I also have a thinner volume called *Keeping Government Secrets: A Pocket Guide on the*

* What follows is an edited transcript of a panel entitled “Convicted Terrorists: Sentencing Considerations and Their Implications on Foreign Policy,” held as part of the *Journal of National Security Law & Policy*’s February 11, 2015 symposium on “Trial and Terrorism: The Implications of Trying National Security Cases in Article III Courts.”

1. Robert Timothy Reagan, *National Security Case Studies: Special Case-Management Challenges*, FED. JUDICIAL CTR. (6th ed. 2015), available at [http://www.fjc.gov/public/pdf.nsf/lookup/National-Security-Case-Studies-Sixth-Edition-Reagan-2015.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/National-Security-Case-Studies-Sixth-Edition-Reagan-2015.pdf/$file/National-Security-Case-Studies-Sixth-Edition-Reagan-2015.pdf).

State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers,² which are the people you heard about earlier. They work for the Justice Department in the management division, so they are separate from the lawyers. They are neutral go-betweens between the Executive branch and the courts, and thus are very important people in the process. So looking at the cases that I have studied here, there were four interesting sentencing patterns that provided me with food for thought, and we can think about what would be the next steps of thinking.

The first pattern is when the jury decides not to have the defendant executed, and there are a couple of cases where this arose. One was in the original prosecution for the 1998 bombings of our embassies in Dar es Salaam and Nairobi.³ In that original prosecution, four defendants went to trial and the government sought execution for two of them, and they had separate sentencing juries, and in both cases a hung jury resulted in the defendants' being sentenced to life, as were the other two defendants.⁴ One of the things I find interesting about that case is I do not know why the government sought execution in two of the cases and not the other two. And that helps me think about the extent to which some of our processes are very transparent, and others are not. Whether or not execution is sought is a matter of executive discretion, which is not always a transparent process; whether or not the jury voted to execute them as a part of jury deliberations is not a transparent process. Another case where the defendant was sentenced to life instead of death was Zacarias Moussaoui's case.⁵ In that one there is a fairly good record for why the government sought his execution, but my reading of the accounts of the case tells us that the fundamental point the government argued to the jury was that if he had helped us connect the dots, 9/11 would not have happened.⁶ He had this information while he was in custody, and he did not respond truthfully to inquiries, and he did not help us prevent 9/11.⁷

Now, another interesting sentencing pattern is the cases where the judge sentences the defendant to life in prison instead of a term of years, which would be of course a lesser sentence. An interesting case there was the Fort Dix case, in which the defendants were prosecuted for a plot to kill soldiers at Fort Dix and do other harm.⁸ The main defendants were three brothers, a brother-in-law to one of them, and there were two or three other defendants in that case.⁹ Now

2. Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers*, FED. JUDICIAL CTR. (2013), available at [http://www.fjc.gov/public/pdf.nsf/lookup/keeping-government-secrets-2d-reagan-2013.pdf/\\$file/keeping-government-secrets-2d-reagan-2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/keeping-government-secrets-2d-reagan-2013.pdf/$file/keeping-government-secrets-2d-reagan-2013.pdf).

3. See *United States v. Bin Laden*, 109 F. Supp. 2d 211 (S.D.N.Y. 2000).

4. *Cf. id.*

5. See generally *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004).

6. *Cf. id.*

7. See *id.*

8. See generally *United States v. Duka*, 671 F.3d 329 (3d Cir. 2011).

9. See *id.*

this case was presided over by Judge Bob Kugler in Camden, New Jersey¹⁰ who made a very special effort to make this trial as transparent as possible. For example, the moment anything was entered into evidence, it went on the Internet. He also posted trial transcripts on the Internet immediately. I'll note that he was running up against the proprietary rights of the reporters, so what he did is he just put them into a continuous scroll so you could not print them out or download them, you had to just tune in when you wanted to tune in. But now, that website is not accessible anymore. And I do not know why the four brothers were sentenced to life and the other one or two defendants were not, and that is the kind of thing that probably were the trial held a few years later I would know. Because unlike what I am going to talk about in a minute in Judge Lee's case – Judge Lee wrote a very nice thoughtful sentencing opinion, so you have a transparent disclosure of why the defendant got the sentence that he did – Judge Kugler did not write a sentencing opinion. There were sentencing hearings, but the transcripts are not on PACER. That is because the hearings happened before transcripts were generally on PACER ninety days after they had been filed, and that ninety days protects the proprietary interests of the reporters.¹¹ Judge Kaplan's case of *Ghailani* was a case where he sentenced Ghailani to life. There were 282 counts that went to the jury and the jury acquitted him on 281 counts, so as a simple box score, he did pretty well.¹² But on the single count on which he was convicted, he was sentenced to life in prison, which is the worst he could get in that case.¹³ So I kind of loved the fact that that case really shows us that sometimes we have to look at more than a simple box score. The third interesting pattern is when the court of appeals vacates the district court's sentence because the district judge's sentence was too lenient.

Gerald Lee: Are you saying you never saw any where they say the district judge sentence was too high?

Tim Reagan: Well, I did not see any here.

Judge Lee: I wonder why.

Stephen Vladeck: I am also not aware of any such decisions.

Tim Reagan: So that is interesting. One of the original defendants in the embassy bombing case, he was not actually tried with the other four because shortly before trial he stabbed a guard in the guard's eye, into the brain, and caused serious permanent brain damage.¹⁴ The fellow's attorneys may have been a target, they certainly were witnesses, and that interfered with their ability to represent him going forward, so he was severed from the trial. And then he

10. *See id.*

11. *See* Joe Ryan, *Three convicted in Fort Dix terror plot are sentenced to life in prison*, THE STAR-LEDGER (Apr. 28, 2009), http://www.nj.com/news/index.ssf/2009/04/judge_sentences_fort_dix_defen.html.

12. *See generally* United States v. Ghailani, 733 F.3d 29 (2d Cir. 2013).

13. *See id.*

14. *See* United States v. Salim, No. S1 01 CR. 02 (DAB), 2001 WL 963998 (S.D.N.Y. Aug. 23, 2001).

was tried for stabbing the guard; he pleaded guilty, and Judge Deborah Batts sentenced him to thirty-two years.¹⁵ She declined to apply a terrorism enhancement to this case which was the stabbing of a guard,¹⁶ but the court of appeals decided she should have,¹⁷ and so Judge Batts re-sentenced him to life.¹⁸ José Padilla was arrested as “the dirty bomber,” or he was arrested on a material witness warrant.¹⁹

Stephen Vladeck: Or both.

Tim Reagan: And the Supreme Court became involved, and he ended up being added to an already-filed indictment in the Southern District of Florida, and he was tried with two other fellows down there. At the end of that case, he was sentenced by Judge Marcia Cooke to seventeen years and four months.²⁰ The other two sentences were more than twelve but less than sixteen years.²¹ The court of appeals decided that that sentence was too lenient,²² because Judge Cooke undercounted Padilla’s criminal history, undercounted the likelihood of recidivism among terrorists, and over-counted harsh conditions of pretrial confinement.²³

Stephen Vladeck: And also incorrectly credited his time in military detention.²⁴

Tim Reagan: Yeah, so I think the conditions of confinement struck me as a very interesting part of the mix because that is something about which the district judge is going to know considerably more than the court of appeals. The court of appeals is going to have a cold record and the district judge is going to have much more than that. Judge Cooke re-sentenced Padilla on September 9 of last year to twenty-one years.²⁵

Judge Lee had the *Abu Ali* case in which, as I mentioned earlier, he gave a very thoughtful sentencing opinion.²⁶ This defendant was detained by Saudi Arabia officials in Saudi Arabia as part of an investigation of a 2003 bombing in Riyadh. Maybe he had a coerced confession of some kind, that sort of issue was more or less presented to the jury in a sense, certainly the case was not dismissed for the hint of that. And then he was found guilty, and Judge Lee gave

15. See *United States v. Salim*, 287 F. Supp. 2d 250 (S.D.N.Y. 2003).

16. *Id.*

17. See *United States v. Salim*, 549 F.3d 67 (2d Cir. 2008).

18. See *United States v. Salim*, 690 F.3d 115 (2d Cir. 2012).

19. Archive of Articles about José Padilla, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/p/jose_padilla/index.html.

20. See *United States v. Jayyousi*, 657 F.3d 1085, 1092 (11th Cir. 2011).

21. *Id.*

22. See generally *id.*

23. See generally *id.*

24. See generally *id.*

25. Zachary Fagenson, *U.S. Judge Re-Sentences Jose Padilla to 21 Years on Terrorism Charges*, REUTERS (Sept. 9, 2014), <http://www.reuters.com/article/2014/09/09/us-usa-florida-padilla-idUSKBN0H41TW20140909>.

26. Sentencing Order, *United States v. Abu Ali*, No. 1:05-cr-53 (E.D. Va. Apr. 17, 2006), 2006 WL 1102835.

him credit for his youth and therefore immaturity and also gave him credit for not having directly hurt anybody, because his confession really was evidence of a desire to participate in conspiracies that would result in very serious harm.²⁷ Now the court of appeals vacated Judge Lee's sentence²⁸ and on re-sentencing, Judge Lee sentenced him to life.²⁹ The appellate opinion focused more on how Judge Lee compared this defendant to other defendants and called into question whether a judge can compare someone convicted after trial with someone who was convicted after a plea of guilty. And the whole dynamic of a court of appeals reviewing a sentence – I mean, sentencing is a messy, messy business – there is no way you are going to make it all look clean and nice, and it presents all sorts of interesting issues.

The fourth pattern that I thought was very interesting is illustrated by the Millennium bomber case, where the court of appeals not only vacated the district judge's sentence, but remanded the case for re-sentencing by a different judge.³⁰ If the judge was incompetent, this does not cure the incompetence, and if the appellate instructions were clear and they were of good faith and competent, you would not need to remand to another judge. So doing that has got to be an interesting situation where the court of appeals has doubts about whether the district judge can be objective enough to follow the court of appeals' inclination instead of the district judge's original inclination. There is a famous civil case in New York where that happened. This was a two-to-one decision; Ressay was sentenced to twenty-two years, and the facts are essentially that he was caught crossing the border into Washington state with a car full of explosives and some of it was nitroglycerin. There are the border agents trying to figure out what this "honey" is doing in this kind of thing, and there is Ressay trying to get out because he knows what's in that jar.³¹ It was very, very interesting.

The trial venue was changed to the Central District of California because they assumed he wanted to blow up the Space Needle, and it turns out that the Los Angeles International Airport was the target. So you have always got to be careful about those kinds of moves. He cooperated with the prosecution of a confederate in New York, but only up to a point, and there are all kinds of interesting suggestions that when jurisdiction over the defendant in terms of handling him moved from the west coast to the east coast, the differences in culture and personality of the two coasts caused him to reconsider his cooperation. In addition, there is the issue of whether you get credit for the cooperation up to the moment you stop cooperating, or if the fact that you are no longer cooperating as you promised to do rescinds your credit for your cooperation thus far. One judge on the court of appeals decided to give the district judge

27. *See id.*

28. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

29. *United States v. Abu Ali*, 410 Fed.Appx. 673 (4th Cir. 2011).

30. *See United States v. Ressay*, 679 F.3d 1069 (9th Cir. 2012).

31. *See id.*

discretion, but the other two judges decided that the sentence was too lenient because too much credit for cooperation was given and the case should be remanded for re-sentencing by a different judge.³² The court of appeals voted to rehear the case *en banc*.³³ (The full court votes whether or not to have it reheard, but if it is reheard, it is typically reheard by an eleven-judge *en banc* panel.) The eleven-judge *en banc* panel agreed with the first panel that the sentence was too lenient, but they decided that Judge Coughenour was more than capable of handling the remand, and he sentenced Ressam to thirty-seven years.³⁴ So again I am not a sentencing expert, but I have looked at some of these cases, and those strike me as some of the interesting patterns that present food for thought, but I do not know what the answers are.

Stephen Vladeck: Great. Well I will not put Judge Lee on the spot and ask him what the answers are, but I will ask if we can pick up, Judge, perhaps on the third thread that Tim mentioned, which is the apparent tension in some of the these cases between district courts and courts of appeals. Could you say a bit, in your perspective as a district court judge when you have one of these cases, about whether the sentencing considerations are any different in a terrorism case versus any other criminal case, and to what extent is this circuit-level jurisprudence perhaps, in your mind, frustrating?

Judge Lee: Well first of all, it is always on your mind as you start, as you go through the whole trial, about what are the facts of the case, and I think sentencing comes down to who cares. The victims and anticipated victims care. And the judge cares from the standpoint of making sure the sentence contains punishment and also takes into account forecasting. What will the future be when this person comes back home? Is he or she going to pose a risk or a danger to the public? The trial judge has heard the whole case from beginning to end and lives with the case. I lived with *Abu Ali* for nearly two years, and when I say lived with the case, I believe I had six to nine days of suppression hearings on the issue of voluntariness of his confession where I sent lawyers defense counsel, government counsel, and an interpreter to Saudi Arabia. The FBI set up an uplink for us, and we had a real-time split screen so we could see what was taking place in the courtroom in Alexandria. We heard live testimony from the witnesses who allegedly tortured the defendant in Saudi Arabia, and we heard from witnesses here in Alexandria, Virginia, and I had to make a judgment about whether or not his statements were coerced. But his trial was not just a confession – it was so many other things. But the point is, the court of appeals is looking at the record. As the trial judge, I saw the witnesses, the documents, the evidence, and I was making the judgment about sentencing. And theoretically the sentencing is supposed to be by a trial judge. That does not mean you have unfettered discretion – of course not. Congress decided on

32. See *United States v. Ressam*, 629 F.3d 793 (9th Cir. 2010).

33. See *Ressam*, 679 F.3d at 1069. (*en banc*).

34. See *id.*

sentencing guidelines that terrorism qualifies for what I will call a ten-time enhancement because of the severity of the crime. And when you think about what Abu Ali or any other terrorists hopes to do, it is mass murder, it is destruction. And then the question becomes what amount of time is sufficient from the standpoint of separating them from us, and throughout the trial, you are looking at the facts, you are looking at how much time did the offender spend in training to learn how to carry out terrorist acts, whether it is building bombs or training about carrying out plots to attack a stadium or to shoot the President of the United States. You are looking at what the training was, what information was there in the trial that informed your judgment about whether this was just an act of some misguided young person who decided they wanted to identify with a particular sect, or whether it was something that carries forward. The court of appeals in not only *Ressam*, in *Abu Ali* and *Padilla* also, took on the role of the trial judge and made a judgment about what they thought was appropriate, and they gave lip service to the standard of review being abuse of discretion. When you look at Judge Motz's dissent in *Abu Ali*, she explained why she thought the sentence I gave was correct.³⁵ But let me say this – sometimes I am right and sometimes I am wrong, and it is up to the court of appeals to make a decision about whether I was wrong. They said I was wrong, that is their judgment. All I can do is make the call that I see in front of me, and I did write an opinion, and again one of the things that Tim mentioned about the sentence, the sentence was thirty years – only in the Fourth Circuit is a thirty-year sentence and thirty years of supervised release lenient. Now the idea of supervised release is after you complete your sentence, you are subject to the supervision by the court for thirty more years. The FBI and National Security Agency have the right to surveil that person to keep track of their comings and goings, and so effectively he received a life sentence, but that was not enough for the Fourth Circuit. But again, I fully expected the three-judge court of appeals panel to reach a different conclusion. I do not want to say more right now, but the pattern is that judges at the court of appeals and at the trial level take very, very seriously the obligation to punish and to try to make predictions about the future of the individual before them. Reading about it is not the same as sitting there and seeing it and trying to decide, well, if this person is fifty years old, are they likely to come out and try to shoot up the Holocaust Museum? Are they likely to try to blow up Metro? You have to make a judgment based on what you have seen, and that is all you can do. You could explain why. Of course, reasonable minds can differ, and I expect there are many differences of opinion about that. Ultimately it is something for the judge to live with and that the court of appeals has to decide.

Stephen Vladeck: Can I ask you one follow-up? I am curious if you get another case that looks anything like *Abu Ali*, to what extent is the procedural

35. See *Abu Ali*, 528 F.3d at 269-82 (Motz, J., dissenting).

history of *Abu Ali* on your mind as you are thinking about the sentencing in that case?

Judge Lee: I think it only informs it as much as I think about the procedural history of the case. I write an opinion where I explain that I was thinking about John Walker Lindh and Terry Nichols and Timothy McVeigh, and at that time when I sentenced him, bear in mind these acts were not common, I was writing on pretty much a clean slate in terms of trying to identify comparable cases so that my sentence would not be a whimsical judgment about, well, I think it ought to be this, try to look at a spectrum of terrorist-type behavior when deciding where *Abu Ali* fell in that spectrum.

Stephen Vladeck: Great, thank you. Karen, let me bring you in. We have been talking so far about the pattern Tim identified, which is, I think, especially prevalent in some of the more notorious terrorism prosecutions – Ressam, Padilla, and *Abu Ali* – these are not exactly typical in the larger universe of post-9/11 cases from a factual standpoint, or with regard to the allegations against them. Many more of the terrorism prosecutions that we see that you have studied involve financial crimes, material support, and similar kinds of offenses, where the sentences still end up being fairly serious. What is your perspective on that pattern, and are we paying too much attention to these isolated cases where the district courts and the courts of appeals are disagreeing and maybe missing part of the larger story?

Karen Greenberg: No. I just want to back up a little bit, just to give a little context. First of all, we are in the middle of a study on sentencing, so you have to ask me back in a year so I can actually give you the conclusion. But there are a couple of things I want to say from the outset, and one of them goes back to Judge Kaplan's keynote address today. And that is that there are two things that seem to set the context for these cases and have since 9/11, which is why I would separate out the earlier embassy bombings trial just for purposes of understanding sentencing, and those two things are on the one hand, Guantánamo and the military commissions and secondly, the need for prevention that you and Judge Lee just mentioned. In the early cases, particularly in the high profile cases like *Moussaoui*, the idea that if these cases posed problems in federal court, they would be taken out of the federal court system presented a huge pressure on prosecutions, on defense attorneys, and on judges. And I think it affected sentencing along with other elements of the prosecution. When the *Ghailani* decision came down with acquittals on the murder charges – in fact, acquittals on 284 of 285 charges – the prospect that *Ghailani* might have been acquitted, that he might not get sentenced to life, took hold in the minds of many observers. As it turned out, he received a life sentence without parole,³⁶ but the jury's verdict nevertheless put a giant question mark over the use of the federal court system for trying terrorists. The second factor that we need to understand is the notion of prevention as an element in the prosecution of

36. See *Ghailani*, 733 F.3d at 29.

terrorists. In criminal prosecutions generally, prevention is often if not always a piece of the narrative, from the investigation by the FBI all the way through the prosecution. All the more so in terrorism prosecution. From Patrick Fitzgerald³⁷ before 9/11 until right now, in terrorism cases, prosecutors often argue that if the defendant is released, then who knows what the stakes could be? What harm might ensue? Could there be another 9/11; that is essentially the question the judge is faced with deciding. In twelve-plus years of studying these cases, that approach has not diminished. So I want to start with the fact that, when it comes to terrorism prosecutions, many of the sentences seem harsh compared to the charges on which individuals are convicted. I could list the statistics for the different kinds of charges and what kind of penalties there are, but for the most part, what you find is that given the most serious charge in a terrorism case, a charge such as murder, attempted murder, conspiracy to murder, conspiracy to use weapons of mass destruction, etc., you are going to see a long sentence and often a life sentence. One of the reasons these cases may end up with such harsh sentences is that these terrorism cases have not pled out as easily as typical criminal cases generally do. In all federal criminal cases, you see about three percent going to trial. In terrorism cases, thirty percent go to trial. That is a marked difference, one that impacts upon sentencing. When a case goes to trial, the result tends to be harsher sentences for all the reasons that you already know.

I want to mention some of the challenges the judges face. Looking at the considerations that have come out in terrorism sentencing statements, what can we see are the issues that really trouble the judges about how to make these decisions? Their sentencing opinions are a good window into the common factors weighed in these cases. After that, I will tell you where I think we are headed because I think we are turning a corner.

There was a recent sentencing in Connecticut, a trial of a man named Babar Ahmed,³⁸ one of the people who was extradited from the [United Kingdom] a couple of years ago and who was just sentenced. The judge, Janet Hall, noted that “no matter how I looked at the cases, there’s absolutely no way to rationalize the sentences that have been imposed around the country, on persons who have given material support or committed terrorists acts.”³⁹ Surveying the wide range of terrorism prosecutions, there didn’t appear to be rhyme or reason in terms of consistency when it came to the sentences – and therefore, no guidelines on how to proceed. One of the explanations is that terrorism cases tend to get amassed in one collective basket: that of a terrorism crime, usually

37. See U.S. Attorney Biography of Patrick Fitzgerald, THE U.S. DEP’T OF JUSTICE, <http://www.justice.gov/usao/iln/aboutus/patrickjfitzgerald.html>.

38. See *United States v. Ahmad*, Nos. 3:04CR301 (JCH), 3:06CR194 (JCH), 2013 WL 1899792 (D. Conn. May 1, 2013).

39. See Philip Sherwell, *Babar Ahmad Sentenced to 12.5 Years for Supporting Islamic Terrorists*, THE TELEGRAPH, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10971189/Babar-Ahmad-sentenced-to-12.5-years-for-supporting-Islamic-terrorists.html>.

involving a material support crime. In fact, there is a wide gradation of criminal behavior within the category of material support, and one of the things that we at the Center on National Security at Fordham Law are looking at is what those gradations of behaviors are so we can begin to make recommendations, or can help judges make recommendations about what appropriate and proportional terrorism sentences might be going forward. But for the past and present – Judge Hall acknowledged there has been no standard way to assess the calculus between charges and sentences.

Because it so perplexed Judge Hall, I thought I would discuss some of the statements that judges have made regarding sentencing in terrorism prosecutions. To begin with, in terrorism cases, a little over seven percent result in life sentences, which is three times the rate of generic criminal cases. One of the elements that warrants attention is the use of the defendant's criminal history. In a normal criminal justice trial, that defendant's criminal history would be taken into consideration in sentencing, in terms of how harsh the sentence would be. In terrorism cases, however, even if a defendant has no criminal history, he may be credited with one, in essence, through the addition to the sentence of "terrorism enhancements." So if you give an average terrorism defendant, a criminal history category of six – the highest available – it significantly raises the overall sentencing level, and it eliminates the notion of his actual criminal history being able to have an impact. Several judges have addressed this issue. For example, Judge O'Toole in the *Tarek Mehanna* case,⁴⁰ a case you may have followed that was held in Boston at the end of 2011; it received more attention than most terrorism prosecutions. I think Judge O'Toole put it well. He did not seem to have particular sympathy for the defendant, but he was concerned about unfairness when it came to the terrorism enhancement. "Moreover, the automatic assignment of the defendant to a Criminal History Category VI," he said, "is not only too blunt an instrument to have genuine analytical value, it is fundamentally at odds with the design of the Guidelines. It can, as it does in this case, import a fiction into the calculus. It would impute to a defendant who has had no criminal history a fictional history of the highest level of seriousness. It's one thing to adjust the offense level upward to signify the seriousness of the offense. It is entirely another to say that a defendant has a history of criminal activity that he does not, in fact, have."

Overall, it seems that judges are truly uncomfortable with this circumstance because the reality is that when a defense attorney argues that a terrorism defendant does not have a criminal history, and that he was a law-abiding citizen, who got involved in the crime he is charged with, and shouldn't have, there is no place for the no-prior-criminal-history argument for the judges to take into account.

This brings me to another, related issue that has already been raised here, which is how to think about the issue of potential recidivism – a burden placed

40. See *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013).

on the judge to ensure that this defendant will not return to terrorist activity, and one that is quite profound in its impact. In the recent sentencing of Abu Hamza al-Masri (Mustafa Kamel Mustafa)⁴¹ in New York, Judge Katherine Forrest talked at great length about the prospect of recidivism. She struggled with the fact that she believes that the defendant, no matter what he says, is going to return to terrorist activity. It does not matter that he is middle aged. No matter what, he should not be released. The reason she gives is that his belief system compels him, in her mind, to violence. As she explains, the defendant, now convicted, has been committed to supporting and participating in violence “in the name of what is misguided religious duty in this court’s view or belief in that; and that you have participated in and supported others in very extreme acts of violence; and you have conveyed a vision of violence as an obligation, as a duty, more than something that’s the byproduct of a struggle simply for an end, it is an affirmative duty.” Summing up, the judge is clear in her own mind that the defendant will always pose a threat to society. “I don’t have any reason to believe that you’re remorseful for your actions.”

Further, Forrest senses no remorse in the defendant. “I do believe that you believe your actions were proper when you undertook them and that you have not had a change of heart since. So I have every reason to believe that if you were free, you would do it again; and the “it” might be open to some question, but it is to support and inspire others to acts of violence.” With this reasoning, Judge Forrest gives Abu Hamza a life sentence with a clear sense of prevention of future acts of terrorism. “Evil comes in many forms but doesn’t always show itself immediately in all of its darkness . . . I have tried to determine whether or not, if there was a point in time that you would be essentially incapable of, at an age, of doing any harm, was there a point when I could see a release for you? . . . But I could not think of a time when I did not believe that you would not try to, yet again, inspire others to do that which perhaps you would not yourself be able to do, and that those acts could well result in death or harm to others, and that they certainly, in my view, would be directed at trying to have those results. In terms of general deterrence, it is obviously extremely important that individuals who have engaged in similar acts understand that they will be treated with great severity.” This failure that a convicted terrorist will not turn back to the crime of terrorism seems to come hand in hand with the accusation of terrorism.

Let’s return for a moment to the *Tarek Mehanna* case in this regard.⁴² Although Judge George O’Toole acknowledges the discussion of no criminal history as a problematic fiction in terrorism cases, he does not feel much sympathy toward Tarek Mehanna. Judge O’Toole admits to being “frankly, concerned about the defendant’s absence of remorse notwithstanding the jury verdict.” Mehanna’s defense was seen as a form of defiance, a factor which

41. Cf. *United States v. Mostafa*, 965 F. Supp. 2d 451 (S.D.N.Y. 2013).

42. See *Mehanna*, 735 F.3d at 32.

assumed prominence in the overall assessment of an appropriate punishment. We have seen this in some terrorist cases – cases of defendants embracing the cause of jihad. On the other hand, in many terrorism cases, there are those individuals who take the opposite stance – who say I renounce what I have done, I no longer believe in what I have done, yet are not given any particular leniency. This is something that really should be thought about, and reconciled, when it comes to terrorism cases.

One example is the case of Sabirhan Hasanoff.⁴³ Hasanoff was a naturalized U.S. citizen, arrested in the UAE in 2010, charged in the Southern District of New York with conspiracy to provide material support in the form of money.⁴⁴ He received eighteen years in prison in September 2013.⁴⁵ Judge Kimba Wood expressed her discomfort with giving this sentence. Hasanoff's defense attorney had argued that there are two different kind of terrorists: those who renounce what they have done and those who are just diehard and are going to be this way to the end. Judge Wood responded: "I am puzzled by one facet of this, which is if I were to conclude that Mr. Hasanoff has essentially turned over a new leaf, if he still believes his afterlife will be enhanced if he commits jihad, how can I believe that he can be individually deterred?"

Another issue is that in terrorism cases, sentencing are often used to send a message, perhaps more so than in the average criminal case. And this is particularly the case with sting operations such as the Fort Dix case that was mentioned before. These cases are very difficult and it really does matter who the judges are because the more they know about terrorism – like the judges here today – the more they understand the differentiation between the cases, the more the sentences in these cases are going to begin to make sense so that you do not have a judge like you have in Boston or in Connecticut asking, essentially, where do we go from here, we do not understand yet these cases in context.

Stephen Vladeck: Great, thanks. So Joanna, I want to bring you in, and I want to hopefully turn this into more of a dialogue, which is to say you have seen these issues from the inside from the civilian prosecution perspective, from the military commissions, from the deputy director's office of the FBI. What is your view of the government's approach in these cases? And if I can interject one frame for it, one of the panelists on the second panel at one point suggested, that if he were a lawyer for a terrorism suspect, he might be happier to have his client prosecuted in a military commission because the sentences are so much less strict thus far – indeed, four of the defendants in the commissions are already home. So what is your perspective on all that?

43. See *United States v. El-Hanafi*, No. S5 10 CR 162 (KMW), 2012 WL 603649 (S.D.N.Y. Feb. 24, 2012).

44. See *id.*

45. See Nate Raymond & Bernard Vaughan, *N.Y. Accountant Sentenced to 18 years in Prison for Aiding al Qaeda*, REUTERS (Sept. 30, 2013), <http://www.reuters.com/article/2013/09/30/usa-security-sentencing-idUSL2N0ET0QM20130930>.

Joanna Baltes: I hope I do not come across as too jaded, but as a federal prosecutor, I really like the federal sentencing guidelines.

Stephen Vladeck: So *Booker*,⁴⁶ not so much.

Joanna Baltes: Actually, that does not bother me personally because I do really believe in the whole sentencing process. I think judges do take extremely seriously the fact that they are sentencing an individual. They take great care, I think, in really evaluating everything before them. So that is not necessarily an issue, and I think it comes up less in some of the terrorism cases, but just a couple of points about sentencing in general. I mean, the terrorism enhancement, which is what Karen was referring to about the criminal history, and it is not as though someone is assigned a certain criminal history, it is that if – and this is something that the government has to prove – you have to allege the terrorism enhancement at sentencing, and the judge has to find it, and the judge has to actually determine that the sentencing enhancement is appropriate for that particular sentence. And so there is certainly evidence that you need to present. It is not as though you can throw it on your sentencing calculation, and then the judge is going to agree and give you that enhancement, because in most cases, what happens if you are familiar with the chart, is you are going to go low and right, to the very far right corner, and you are going to see the 360-to-life sentence, and so essentially the maximum you are going to get for that particular person is the statutory maximum for the crime. And if you are talking about a crime that someone has been convicted of that carried the possibility of serious bodily injury or death, typically that is a life sentence. Material support is a little bit different – the statutory maximum is fifteen years, and I think that is why you do see a lot of disparity in some of the material support cases, because it covers a much broader range of conduct of defendants that are being prosecuted. But I think the terrorism enhancement is important because it is not something that is just a whim of the Department of Justice or the Executive Branch. The Sentencing Commission itself was the one that determined that the sentencing enhancement was appropriate, and it was specifically based on their study that typically terrorist defendants – it reflects their belief that there is a lack of rehabilitation and a high likelihood of recidivism, and that is why you calculate it based on a high criminal history category, which is what the point of the guidelines are. If you have somebody that has a high criminal history, it reflects a belief that there is a low likelihood of rehabilitation and a high likelihood of recidivism, and that is what you see typically in the terrorism context. And that is certainly a generalization, but it was based on a lot of research that came out of the Sentencing Commission. So that certainly is a very transparent process, and the prosecution again has to put forward reasons why they believe that an enhancement is appropriate. The judge clearly does not have to apply the sentencing enhancement, although I think in *Padilla* that was one of the reasons why the circuit court sent it back to the district court judge on

46. *United States v. Booker*, 543 U.S. 220 (2005).

one occasion.⁴⁷ Also, the judge is allowed to downward depart – I mean, judges can do that for a variety of reasons, and we have all seen it happen. So even though there can be an enhancement and the prosecution could be asking for something at the top scale of the guidelines, the judge certainly can come down for any number of reasons, including the fact that the person has a great family life, they are very stable, and all the sorts of things the judges take into consideration when sentencing someone.

Stephen Vladeck: On the downward departure point – and I want to bring Judge Lee back into the discussion – I am curious about both of your perspectives on this. It strikes me that is the ideal description of how sentencing is supposed to work, but then we have these circuit court decisions that are rejecting sentences on the grounds that they are substantively unreasonable in terrorism cases where there have been downward departures, right? I am not familiar with a single circuit court opinion *affirming* a downward departure in a terrorism case, and I guess what I am trying to figure out is what kind of message does that send to trial judges in that context. So Joanna, do you want to say something first?

Joanna Baltes: I think first of all, they are not all appealed – I mean, there are plenty of cases where there is downward departure and there is no sentencing appeal on either side, so I think it is a little bit hard to look at the numbers and assume that you know a circuit court would not uphold a downward departure. I mean, I am familiar with cases that I have personally handled.

Stephen Vladeck: Fair enough. So I ask the question, why does the government appeal? In the cases in which the government presumably is either appealing or cross appealing on the ground that the sentence is substantively unreasonable, to what extent can you either speak to or at least speculate as to the thinking that goes into why the government is pursuing that appeal as opposed to say just trust them leaving it to the discretion of the district judge?

Joanna Baltes: Well, I think the government is always concerned – I mean, it is difficult to get an appeal authorized just for practical purposes, it is not as though you can, as an individual prosecutor, decide I do not like that sentence, I am going to go and seek an appeal. It goes up all the way to the Solicitor General's office at the Department of Justice typically if we want to seek a sentencing appeal, so it is not often that it happens, but I think there are concerns because terrorism cases are seen as more high profile – they get more press, people pay more attention to them even though they are not as frequent as murder cases or all sorts of other types of violent crime, there is a concern that you do not want outliers out there, so if you do feel like there is a sentence where a judge gave a significant downward departure for something that you know you as the government do not feel is warranted, or it is going to send a message to other judges that it is appropriate to make a downward departure on

47. See *Jayyousi*, 657 F.3d at 1092.

something that the government does not necessarily agree is appropriate, that might be the case where you seek an appeal.

Stephen Vladeck: Fair enough. Judge Lee?

Judge Lee: The guidelines are not based on any empirical research. There has been no study to determine how much time a terrorist should have or how much time a drug offender should have; everyone should know that. There is a book that has mathematics in it, but is not based on anything other than what is in the book, and it is math. That is all it is. There are several factors the trial court must take into account in sentencing: the nature and circumstances of the offense; history of the offender; unwarranted disparity; and whether or not the person needs treatment. I think that the prosecutor has the greatest discretion. They can decide whether to seek the death penalty or not. The prosecutors chose to seek the death penalty in the *Moussaoui* case, and did not seek the death penalty in the *Abu Ali* case. Their discretion is unreviewable. Now the idea of a guideline being something that just happens is really not true. So the exercise that the trial judge is facing is one of having to explain why he or she disagrees with the guidelines and to state why in a particular case the judge thinks they are excessive or inappropriate, or that they are not high enough. The trial judge has to take into consideration whether the cases involves manufacturing of child pornography or whether it involves material support to a terrorist organization. So, my point is that there are no one-size-fits-all cases. The trial judge must also consider the issue of the enhancements that the guidelines assess in terrorism cases – the trial judge is going to consider all those things anyway. You have to consider them.

Stephen Vladeck: Judge, can I ask a follow-up? You have been on the district bench since 1998 if memory serves, is that right?

Judge Lee: Right.

Stephen Vladeck: So about half of your time was before *Booker*, half of your time since *Booker*. Has anything changed with regard to how you approach sentencing in general or in terrorism cases specifically now that the Supreme Court has said that the guidelines are not necessarily technically binding?

Judge Lee: Well, I think we have all had a lot more experience with the terrorism cases, and I have had two or three cases recently. One case involved a defendant who was going to try to put a bomb in the Metro. The government reached a plea agreement with that individual for a twenty-five-year sentence.⁴⁸ Another case involving a defendant who fired shots at the Air Force Memorial and the Marine Memorial, was videotaping himself as he did it, and the government entered a plea agreement with that person for twenty years. So the government is not necessarily being arbitrary in pursuing the death penalty or maximum sentence possible in every case nowadays. I think it is much more informed now. And in terms of the approach to sentencing, I think we all have a

48. Carol Cratty & Jim Barnett, *Guilty Plea Entered in thwarted Metro Station Bomb Plot*, CNN (Apr. 11, 2011), <http://www.cnn.com/2011/CRIME/04/11/virginia.bomb.plot/>.

lot more experience, but we are still focused on the things that Professor Greenberg just said. That is, trying to assess the risk to the public, trying to protect that, and the only thing you can look at is the experience that you have with the individual's background and the facts presented to you. And that is to say if somebody spent three months, like Ressam, in training in how to make explosives and in training camps in Yemen, you want to know about it, and that is going to affect what you do.

Stephen Vladeck: Fair enough. So Joanna and Karen, I want to come back to my question about the military commissions because it strikes me that this is a rhetorical trope that is often deployed by different groups for different political reasons that the sentences in the Article III courts, whether for better or for worse, have been much harsher than the sentences in the military commissions. Is that simply a function of a small data set in the commissions? Is that likely going to continue so long as there are questions about the commissions' legitimacy that we do not see, for example, in Judge Lee's courtroom? What should we make of that apparent disparity?

Joanna Baltes: Yes, I think a lot of it does go to the lack of data. I think there have been so few cases that, just from an empirical perspective at this point, it is difficult to make valid assumptions on why sentences have been so drastically low compared to what you would see in an Article III prosecutions. But you also have, again, a pretty wide disparity of the types of defendants that have been convicted so far in the military commission context, so I think you are comparing overall what has happened in military commissions with overall what has happened with every terrorism case in the United States, and I am not sure you are going to get great data from that. But also, the sentencing is rather different. There are no sentencing guidelines so the prosecutors will take advantage of pointing to the federal sentencing guidelines and saying, this is an appropriate way to look at this. However, military commissions are somewhat based or are a hybrid of the UCMJ process, and that in and of itself is pretty different from federal Article III practices. Cooperation in the military commission system is very different from how you can do a possible cooperation in an Article III court. Then there are just different ways that the sentence can eventually be changed because the convening authority has to approve a sentence. I just think there is not enough data to really make good comparisons other than, yes, the sentences have not been very long. But you also have not had a case go forward that I think has raised some of the significant issues that arise in plots that you either see going now or that you have seen in Article III courts.

Stephen Vladeck: I mean, certainly the 9/11 case is very different from, say, *Hamdan*.⁴⁹ But, so, let me take a very specific data point then. On the question on whether time in military detention should count toward any prison sentence, the commission in *Hamdan* said, or the jury or the members in *Hamdam* said,

49. See *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

yes, and specifically tied Hamdan's – I think it was sixty-six month sentence – to the fact that he already spent, I think it was fifty-eight or fifty-nine months, in military detention. The Eleventh Circuit in the José Padilla case repudiates Judge Cooke's ruling, which had taken into account the time José Padilla spent in military detention.⁵⁰ So should we just expect those kinds of differences on the exact same legal question, that is to say whether time in military detention should or should not count toward a prison sentence?

Joanna Baltes: I have seen it too. There are a couple of other cases too, and it is called conditions of confinement. There are a number of cases, not just in the terrorism context, where someone will allege that their time in state custody or the jail across the street is so much harsher than normal conditions that it is outside the heartland, and therefore they should get credit for that, and they should get a downward departure. But, I think we did a pretty technical analysis on a couple of cases about whether or not district court judges were actually authorized to issue a downward departure based on time in military detention, and at the end of the day, I do not think it really matters. I think district court judges say, look, the person was in custody for essentially the same thing for the same reason you are alleging . . . detention is pretty much the basis of why you are bringing a criminal prosecution, and so it seems difficult to distinguish those two, and so time and time again you have seen judges go ahead and give that credit. I think the difference in Padilla was that the district court judge did not articulate how much time they were giving, so the circuit court went back and said it looked like I think it was twenty-two months that he was in the brig in South Carolina, and I think the district court ended up giving him credit for eight years or something.⁵¹ So it was not just the time they were in military detention, it was also kind of a double for conditions of confinement.

Tim Reagan: Weren't the military commission rules changed after *Hamdan* so you can no longer give credit the same way, or am I wrong about that?

Stephen Vladeck: They are different; it is not quite so black and white. They were amended after the *Hamdan* sentence. If you are scoring at home, this is the ninth different version of military commission rules since 9/11, so good luck keeping track. Karen, do you want to jump in on this?

Karen Greenberg: Well, there are three different issues. One is military detention, and whether you get credit for that. Another is condition of confinement. Those are actually two different things that need to be weighed. We now have yet another factor which has come up in a number of the cases that are in Brooklyn and Manhattan courts right now, which is the matter of confinement abroad. So in these extradition cases the question is what about confinement when they have been in the United Kingdom for years. How are we going to assess that? How are we going to credit that?

Stephen Vladeck: Or on a U.S. military ship.

50. See *Jayyousi*, 657 F.3d at 1092.

51. See *id.*

Karen Greenberg: Right. To the issue of Guantánamo – you know I am totally disheartened when defense attorneys say they would rather their clients were in Guantánamo because I do not think indefinite detention is anything anybody actually wants.

Stephen Vladeck: I guess I was trying to ask something else, which is to say I often hear on the Hill that there are groups on the left, there are groups on the right, that will say “oh, the Article III courts are great; they send people away for life,” versus “oh, we do not need military commissions – the sentences are strong enough in the Article III courts,” or “we do not need military commissions – the sentences are too weak in the commissions.” Hamdan is back in Yemen doing whatever he is doing. I guess that is the narrative – I am trying to figure out what we do.

Karen Greenberg: Well, Guantánamo has survived that narrative no matter what, and I think the real issue here is why is it that we can tolerate that kind of result in Guantánamo? We cannot tolerate it in the Article III courts, to Judge Kaplan’s point – if everybody has to be certain that defendants are always convicted, then what kind of judicial system is that? I think that is a problem, so what you can do about that narrative is you can say that whatever system you use, it should not be about how harsh the sentence can be; rather, it should be about how fair the proceedings are. And that is why all of these issues about coerced evidence and warrantless surveillance are so important: can the system accommodate these excesses or these illegalities?

Stephen Vladeck: And can sentencing be one of the places where judges impose – I do not want to say punishment – but impose accountability for those kinds of steps?

Judge Lee: Just say punishment. But I was going to say also that I think any judge would take into account the amount of time the person has been detained, whether it was because they were an enemy combatant or in the military brig. It all counts toward their detention, toward this particular offense. I think the Ninth Circuit⁵² and the Eleventh Circuit⁵³ disagree with me, but I think a trial judge would take it into consideration anyway.

Stephen Vladeck: Well, and I think there is a question about whether the Eleventh Circuit disagreed for the reasons Joanna said, which is that Judge Cooke just did not do enough as, for example, you did in *Abu Ali* to separate out what was separate. But Joanna, let me tie this to a specific case. Folks may remember it was just three weeks ago that Ali al-Marri was sent back to Qatar. Al-Marri was the one non-citizen picked up in the United States and held as an enemy combatant for a period of years before he was subsequently returned to the criminal process. He initially had been charged with civilian crimes and then transferred to the military and then sent back to the criminal justice system. And al-Marri pled guilty to the statutory maximum for material support, which was

52. See *Ressam*, 679 F.3d at 1069 (*en banc*).

53. See *Jayyousi*, 657 F.3d at 1085.

fifteen years, I think, on the condition that his time in custody thus far count.⁵⁴

Joanna Baltes: Well, actually, the plea agreement left that an open question. He was free to argue that, you can't really bind somebody not to argue something in a plea agreement, so he was free to argue pursuant to his plea any downward departure that he wanted, which is obviously typical. But al-Marri was actually arrested in December 2001, three months after the terrorist attacks⁵⁵ in Peoria, Illinois. He was actually a student. He had arrived in the United States on September 10, 2001, a day before the attacks, on a student visa, and the FBI pretty quickly realized after 9/11 that he had actually been in contact with one of the planners of the 9/11 attacks and one of the others. There are telephone numbers that he had tried to call and tried to get in touch with, a couple of folks over the couple of months after 9/11, so he was initially picked up and initially charged with credit card fraud based on information they found on his laptop computer.⁵⁶ There was a material witness warrant out of the Southern District of New York that was also issued, and then he was in custody until May of 2003, and at that point there was information that came out that led folks in the intelligence community and the FBI to believe that he was actually part of an additional plot, a follow-on plot after 9/11, so he was declared an enemy combatant before his trial started in Peoria, Illinois, and he was sent to the brig in South Carolina where he stayed until 2009 when he was indicted back in the Central District of Illinois on material support charges.⁵⁷ And he did plead guilty, admitted that he had been sent to the United States by Khalid Sheikh Mohammed, that he had been told to get there, that he had to get there before September 11 or he would not be able to get into the United States, and that he was to wait further instructions.⁵⁸ So it was a fascinating case, and prosecutors are supposed to charge the most readily provable offense; material support was really the only thing available at that point against al-Marri because we did not have enough information about a specific plot that he had been charged with, so it was material support to al Qaeda, specifically to Khalid Sheikh Mohammed. He pled guilty, he had a pretty significant plea colloquy, and then the real kind of work started for sentencing because it was a battle about his conditions of confinement and that's essentially what the crux of the case was. The district court judge, Judge Mihm, gave him full credit for the time he had spent in the brig in South Carolina, and so he ended up getting 100

54. See Press Release, DOJ, Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda (Apr. 30, 2009), *available at* <http://www.justice.gov/opa/pr/ali-al-marri-pleads-guilty-conspiracy-provide-material-support-al-qaeda>.

55. *See id.*

56. *Id.*

57. See Press Release, DOJ, Ali Al-Marri Indicted for Providing Material Support to Al-Qaeda (Feb. 27, 2009), *available at* <http://www.justice.gov/opa/pr/ali-al-marri-indicted-providing-material-support-al-qaeda>.

58. See Press Release, DOJ, Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda (Apr. 30, 2009), *available at* <http://www.justice.gov/opa/pr/ali-al-marri-pleads-guilty-conspiracy-provide-material-support-al-qaeda>.

months,⁵⁹ and he was just released early actually, a couple of weeks ago back to Qatar.

Stephen Vladeck: And do you consider that to be a success story?

Joanna Baltes: I think it was a success story in the sense that we were able to prosecute him. I mean, I think he had been in kind of a limbo for quite a number of years, so the fact that we could pursue an Article III prosecution and have some finality and then get him to agree to be deported. That was part of his plea agreement because he was not a citizen of the United States – he didn't have any permanent status other than the visa. He had actually lied on his visa to get into the United States the first time or in 2001. He actually had been in the United States previously as a student as well. So it was a success for the prosecution side. Fifteen years is not a really long sentence for material support in some cases. In some cases it definitely appropriately captures the conduct, but I think in other contexts, fifteen years seems like it's not necessarily long enough. And again, I'll go back to, you know, in most cases that I've been involved in or that I am aware, I have not seen a defendant showing remorse about what it is they've been charged with doing. I'm sure Karen has probably interviewed more folks than I have, but I'm not familiar – it's just not what you typically see in these cases. The defendants typically are not remorseful – they are actually proud of what they've done, they would do it again, they would stand up and do it again, and I think their defense attorneys do an admirable job of trying to walk a tight line between trying to get them to have some kind of colloquy with the judge – either at plea or at sentencing – to try and get the benefit of a lenient sentence. They do an admirable job, but in my experience, it's not typical that you would see somebody that actually feels bad or wants to kind of change their ideas about what they want to do.

Karen Greenberg: In other words if they express remorse, you don't buy it.

Joanna Baltes: I mean, I just haven't seen a lot.

Karen Greenberg: The most famous one, perhaps, is that of John Walker Lindh⁶⁰ – but he's not the only one. You might not see it in the Embassy Bombings and things like that, but you do see it. So that's why I'm asking whether you just wouldn't believe it.

Stephen Vladeck: Judge Lee?

Judge Lee: These are not the typical cases. You are not going to have anybody with a prior criminal record generally. You are not going to have somebody come in and say, "Well, I renounce my prior beliefs, and now I am prepared to go forward." These are not typical cases. And the problem with a life sentence is, in the federal system, life means a natural life – you die in prison. This means they have nothing to live for, they have no hope, and they

59. See John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, NY TIMES (Oct. 29, 2009), http://www.nytimes.com/2009/10/30/us/30marri.html?_r=0.

60. Jordan Goldman, *Remorseful Lindh Gets 20 Years*, CBS (Sept. 28, 2004), <http://www.cbsnews.com/news/remorseful-lindh-gets-20-years>.

are a danger to everyone around them because they have nothing to lose. But the other danger is if they were on the street, if they come back, are they likely to redouble their efforts to try to do something else because they want martyrdom – they want to live in infamy. It's very, very complicated.

Karen Greenberg: You referred to sentencing getting more rational and less harsh over time, and it's true. It is definitely the case that you can see more gradations and lower sentences as time goes on. But what's also happening now is that the al Qaeda that we knew, the al Qaeda that we've been trying in court and punishing for the past twenty years is no longer who we are going to be prosecuting in court. Now we have this new breed of ISIS inspired defendants – people who identify with ISIS and/or want to go to Syria – the foreign fighter category that Attorney General Holder has referred to. If you look at how law enforcement is handling these cases, they have a very different feel than the previous four hundred terrorist cases because many of these individuals do not get to the point of devising a plot. These newer defendants want to join ISIS, and they haven't necessarily figured out how or in what capacity. What we're starting to see is a leniency in the way they are charged, and a leniency in the way they are dealt with in pre-trial detention. One right now is in a halfway house. We haven't seen that before in a terrorism-related case, so I just wanted to say I think we're bracketing off a period of time that is coming.

Stephen Vladeck: So Karen, are you suggesting that we're at a tipping point from the first decade of terrorism prosecutions to the next generation?

Karen Greenberg: Yes, except in the Southern District of New York, where they're finishing up a lot of cases that could have been tried a long time ago if the defendants had been extradited – for example, they are still trying the embassy bombings case, in its third iteration.

Stephen Vladeck: So let me ask a question for perhaps all of the panelists, although I know Tim may not want to jump in too much on this. But, is sentencing broken in terrorism cases, or is it just so unmonolithic as to be beyond easy categorization? What I'm trying to ask is: is there a problem here, or is it just a whole lot of different data points, each one replete with their own idiosyncrasies?

Tim Reagan: Actually, instead of answering a question, can I throw another question into the same mix, which is – so I'm thinking about sentencing – Joanna had very interesting comments to make – I've talked to judges a lot, but I don't talk to prosecutors or people in the Justice Department nearly as often. So the judge is familiar with the case and has access to lots and lots of nuances, and that goes into the district judge or the trial judge's discretion, and the court of appeals is not going to have nearly as much access to that information. Now the prosecutor is going to have access to a lot of the same nuanced information, so what I'm curious about is the extent to which the prosecutor post-sentencing takes that into account structurally in the Department in terms of whether to appeal the sentence. Do you see any pattern of prosecutors kind of knowing that the judge sees what they are seeing, and there

really isn't a need to appeal, or to what extent are prosecutors in the system more driven by how the sentence looks objectively in terms of deciding whether to appeal? Is that a question you can address?

Joanna Baltès: I think for sentencing, as a prosecutor, you pretty much lay out as much as you can. I mean, you don't want to leave anything on the cutting room floor at sentencing – if it's part of the case, and it's about the defendant, I think you definitely want to give as complete a picture as possible to the judge, just as the defense does. It's just that, we're looking at it from two different perspectives. We're looking at it – we think this person is really bad, and we believe they've done everything they've been convicted of doing and typically more, and that will not enter into sentencing unless it's been presented at trial or there is some other reason. But so, I think we kind of swing for the fences as far as giving the judge every piece of information we possibly can to make the right sentencing decision because you typically are not going to get a second bite at the apple. I think of having a re-sentence, I mean, so I think if you don't get the sentence you were hoping for, as I mentioned before, it's pretty rare that you would actually get to appeal that sentence unless, again, there is some anomaly, and I think by and large we do not.

Stephen Vladeck: Judge Lee?

Judge Lee: I was going to say that appeals are not in the standard course of sentencing decisions in terms of the twenty-two years I've been a judge. Maybe one reversal, that was *Abu Ali* on a sentencing.⁶¹

Stephen Vladeck: That was the only one?

Judge Lee: That's the only one. So extraordinary cases, extraordinary circumstances, and I don't think there are many appeals now in the new Fourth Circuit either.

Stephen Vladeck: I'll leave that one out there. Joanna, let me ask a follow-up question, though, because Tim's question struck a chord with me. Is there ever discussion of – I mean, we heard for example this morning about some of the tactical decisions that the government will make and some of the strategic decisions the government will make about what evidence they will and will not seek to use at trial because of the consequences of putting it on the table. Is that a different conversation with regard to the potentially classified information that might be provided at sentencing?

Joanna Baltès: I think you know it may be tempting to provide additional information if you know there is other information out there, but if it wasn't part of the conduct that formed the basis of the case that you had charges against, you're not going to go down that path.

Stephen Vladeck: Karen?

Karen Greenberg: Is it broken? There needs to be some kind of formal understanding of who gets sentenced for what, and with some gradations and constancy when it comes to terrorism trials – where it doesn't all go to the far

61. See *Abu Ali*, 528 F.3d at 210.

end of the sentencing spectrum because they are labeled terrorists. I know it's hard to accept, but I think, maybe we should consider that there are different levels of involvement in terrorism. The material support statute, a broad category that has made it easier to figure out how to use the criminal justice system to prosecute terrorists, has contributed to this problem. The breadth of the material support statute reduces the need to make the kinds of careful distinctions and comparisons that would otherwise be made in criminal sentencing contexts. These cases happened so fast, with 400 cases in the system now, and 326 of them resolved. And that is why judges complain, that's why attorneys call us at CNS, that's why the Center on National Security at Fordham Law is asked regularly for sentencing statistics. The larger category of terrorism is what judges thus tend to focus on, not the distinctions between the individual crimes.

Judge Lee: I disagree with that. I think that there is a system. I think that the judge has to articulate the reasons for his or her decision. I think that it's all fact-driven. I would not want to have mandatory minimums that would set some established norms for every single case because every case is not the same, and that was the theory behind the sentencing guidelines and mandatory minimums – is that one size fits all. It's been a horrible experiment. It's caused unwarranted disparity, race discrimination, and it has dramatically increased the number of people in prison. I don't want that. I think that the framework we have is workable, but we're not looking for perfection anyway – I mean, it's called practice, for real, and we're making judgments about an individual's life, not broad brush, "well you have this and you get a million years." I mean the cases involve material support, and some involve financial affairs, structure, and transactions. I had several of those cases in fact last Friday: I had a guy, the lawyer said, "Judge, this is a structuring case, but it's not terrorism, it's not money laundering and in fact I've never had a client go to prison for this kind of offense – I've had many cases in this court." I said, "Well, that's a very risky argument, Mr. Smith," and ultimately I did give the guy probation because it was not a big deal, but some of these cases have to be treated differently, individually.

Stephen Vladeck: So Judge, let me ask you a question, a non-leading question. A new colleague joins the bench and is assigned a terrorism case, and you've been helping him out with the trial – you've given him some advice when he's called you for it. Now it's time for the sentencing phase, and he said, "Judge Lee, from your experience, what kinds of things should I be looking for, what kinds of things should I be thinking about?" What do you tell him?

Judge Lee: If I'm asked, you would tell them to look at all the factors. Is this an offense where there was a completed crime? How close did they come to completing a crime? What information do you have about the person's individual background in terms of relationship to organizations or activities? How old are they? What is their family background? Is there another relationship that came up at the trial? Of course, you must take into account mandatory minimum offenses, and then make the judgment. But don't feel like you have to go

with the sentencing guidelines, because they are just one factor – they are not *the* factor, and because they are in a book does not mean they are based on empirical evidence. I know there is a book called *Fear of Judging* by Judge José Cabranes,⁶² where he takes the guidelines and explains why they are just math, but they are not necessarily the best judgment about what you have.

Stephen Vladeck: And so your colleague then says, “Is there anything special I should be thinking about because this is a terrorism case?”

Judge Lee: Not special, but I think everyone thinks the risk of recidivism and protection of the public are very, very powerful considerations, and that depends on the evidence, that’s evidence-based, and that’s fact-driven.

Stephen Vladeck: So Joanna, let me ask you the same question from the prosecutor’s perspective. A junior prosecutor who I guess is not too junior to get one of these cases calls you and says, “We’re up to the sentencing phase, what do I do, what’s different about this from, say, some run-of-the-mill drug case?”

Joanna Baltes: I mean, I think terrorism defendants typically are unique, and I do think that there are unique aspects about terrorism defendants that you don’t see in some other cases, but at the same time you’re still from a sentencing perspective looking at the § 3553 factors,⁶³ and I think the biggest thing in terrorism cases is the severity of the crime – they are usually pretty serious crimes that somebody has been charged with. Now again, material support, depending on the conduct that has been charged, could be something financial, it could be that someone arranged – you know, travel – it could be that they did everything leading up to a plot, and there wasn’t quite a plot yet, so those actually I think are the most difficult cases to figure out what the appropriate sentence is.

Stephen Vladeck: I think it’s one where we see the largest range.

Joanna Baltes: I think we definitely do. The other cases where you have someone that is going to blow up a Christmas tree lighting ceremony the day after Thanksgiving, those are the kind of cases that involve such a serious crime with such serious consequences that it’s difficult for a prosecutor to think, well, why would you not argue for life or thirty-plus years in those kinds of cases. Where someone has actually pulled the trigger to blow something up, knowing that there are going to be high civilian casualties, that’s about as serious a case as you’re going to get, so I think that is what makes the cases unique is the severity of the crime, and what you’ve got if you’ve got a terrorism case that is much less severe and something that is kind of off the charts, and I think that those are pretty obvious.

Stephen Vladeck: So I want to turn to audience questions in one second. But I have one last question for Tim: Karen says it would help all of us to have better data. I guess I’m curious to what extent you see that as the Federal Judicial

62. KATE SMITH & JOSÉ A. CABRANES, *FEAR OF JUDGING* (1st ed. 1998).

63. 18 U.S.C. § 3553 (2012).

Center's mandate, and can you say a bit about the next generation of your own reporting?

Tim Reagan: Well, there is another agency in the Thurgood Marshall Federal Judiciary Building that works for the Sentencing Commission, and they are the people that would do that. So I have the fifth edition of my case studies. This was a couple of years ago. Now I'm editing the sixth edition. Every edition I add two or three more chapters, different cases and I update all the other chapters, which is why editing takes longer and longer each time. So I'm hoping to come out with that in the not too terribly distant future.

Stephen Vladeck: That's great. I guess as one follow-up, insofar as there are loud comments often made about the ability or lack thereof of federal courts to handle these cases, is it possible that your work could also stand as empirical evidence to the contrary, that in fact on a daily basis these cases are heard by federal judges without too much complexity?

Tim Reagan: Well I think Judge Kaplan's remarks are reflected in remarks by other judges as well, so I think the Article III courts to a large extent, speak for themselves. And I think that one of the things I have learned, because I picked the cases here mostly based on the cases, not based on the judge – but you can go to any single one of these cases, and you can see some of the most admirable public service you will ever see in your life, so they are doing a great job.

Judge Lee: Let me add to that. In the *Abu Ali* case, the three-judge Court of Appeals panel co-authored the decision to say that *Abu Ali* was an example of how a terrorism case should be tried in federal court. Bear in mind that witnesses were in Saudi Arabia and we were here, but he was still given the right of confrontation, access to the witnesses to support his case, and a chance to present his claim of involuntary confession, not only to a judge, but to twelve members of a jury.⁶⁴ So it can be done.

Stephen Vladeck: Great. We have some time for questions.

Speaker: I wonder if the panel could give me their thoughts on this discussion that is taking place in Europe, but is also relevant here of certain various young people who try to travel to Syria or manage to get to Syria to participate with ISIS in one capacity or another. The discussion sort of goes like, well, if they get back, are we going to try to get them back into society, or are we going to give them long prison sentences? I guess there was a report in the news that a girl here in the United States was just sentenced to four years for trying to get on a plane and head in that direction. What's your view on that, because that really seems to split both ways – I mean can you rehabilitate a person, were they really serious?

Stephen Vladeck: Let me throw that to Joanna and Karen.

Joanna Baltes: It's not so much that law enforcement is going to solve that problem; there are a tremendous number of people we call HVEs, "home-grown violent extremist" – it's very prevalent not only across Europe, but in the United

64. See *Abu Ali*, 528 F.3d at 210.

States, and we have seen a lot of travelers go over – they want to join the fight in Syria, so there is a huge concern about what is going to happen if they come back. Just as we saw ten years ago and fifteen years ago, people traveling to Afghanistan and people trying to get training in different camps over there and then coming back to the United States, I mean, there is definitely a huge concern that those folks are going to come back to the United States at some point and what are they going to do, what are they going to do here. It is a significant issue. I think it's probably something that will raise some sentencing challenges in the future because they are younger and younger, and we had a couple of arrests just over the last couple of months of folks that are really, really young that want to do that, but I don't think that it's necessarily something that law enforcement is going to be able to solve. By the time it gets to a law enforcement response, the only option is really to make an arrest, and then someone is facing pretty serious charges, so I think there is a huge effort underway by communities to try and get more involved and try and get folks on the right path and recognize some of the signs that that's happening, but that's a huge issue for not only the FBI, but for all of our law enforcement partners throughout the world right now.

Speaker: If I could just add quickly, I heard [Secretary] of Homeland Security Johnson speak on this, and how he's been reaching out to communities, true, absolutely, but I was thinking, the young woman with the four years apparently just wanted to go over there to marry a guy she met, so I was trying to make a distinction, I wasn't thinking so much of somebody goes over there to a terrorist training camp, which is sort of what you're talking about, and then participate in battles, but this whole group of people going over there for other, you know – it's support, but it's not particularly what you were mentioning.

Stephen Vladeck: Can I bring in Karen?

Karen Greenberg: So I don't know what law enforcement is doing in this regard, but they are collecting the information, a lot of the information, about these individuals. There have been twenty-nine indictments in the last year basically since ISIS appeared on the scene, and you're absolutely right these are very young kids for the most part – not all of them, but at least half of them under twenty-one – and some of them have diaries and letters, and they articulate their reasons to go there; it is, in their words, because there is a homeland, because ISIS has said, "We now have territory, you can come, too," so they see jihad, the way some people have defined it before, and it could be anywhere from cooking to being a nurse to fighting. The dangers posed by those coming back is another challenging piece of the story. The scholarship on foreign fighters from Europe and from everywhere is that when they do come back they come back trained and dangerous. However, I think the bigger worry is these kids are not going to come back. For one thing, they don't talk about wanting to come back, they talk about migrating, they talk about moving – it's got a different feel than the foreign fighters who seek training abroad only to return home to commit violent acts. I agree with you, it is going to take a lot of work

to try to talk these individuals out of wanting to go and figuring out how to deal with it.

Speaker: You kind of defended your original *Abu Ali* sentencing ruling⁶⁵ today, and I was wondering since the guidelines are discretionary, not mandatory, why did you decide to re-sentence him to life?⁶⁶ What was the reasoning there?

Judge Lee: Thank you for asking that question. There were three years between the original sentencing and the appeal, I think. And I looked at what happened in those three years, and the question was whether there was any change in his outlook, whether there was any sense that he would be not a risk if he were released, and I considered his age. After hearing from defendant, and considering the fact that he had spent six to seven years in isolation and his mental state and attitude had changed, I considered that the risk was too high.

Speaker: Quick question. After today's terrorism conference, at Fordham University I talked with some people at the Department of Defense, it was a focus group of people who had served in Afghanistan and Iraq, and what they really want is for passports to be revoked. Has there been any discussion with the State Department, with the DOJ in lieu of these timely trials to do that? Just curious, thank you.

Karen Greenberg: You mean take away their citizenship?

Stephen Vladeck: Hold on a second, there are two different things: there is revoking passports, which is denying them their right to travel internationally, and there is revoking their citizenship, and those are two very different things.

Karen Greenberg: She means not allowing them to come back.

Speaker: The people I talked with do not want them to come back.

Stephen Vladeck: So I can't speak to what's going on behind the scenes – legally there is an enormous distinction between revoking a passport, which is not a right and which is an administrative determination by the Secretary of State in consultation with other branches, and de-naturalizing and expatriating someone, and 8 U.S.C. § 1481(a), which lists seven grounds for expatriating or de-naturalizing a citizen. Almost all of them require some voluntary step to renouncing citizenship and toward aligning themselves with another country, which is going to be a special problem in the context of the Islamic State, which the United States does not recognize as another country. The only one that doesn't, §1481(a)(7), is if you are prosecuted and convicted of treason, and in that context I don't think your citizenship is going to matter because you're going to spend the rest of your life in jail. So I think if we're talking about revoking passports, that one's a fairly modest step on a case-by-case basis, versus revoking citizenship, which is a much more Draconian measure.

Karen Greenberg: Do you know where the discussion stands regarding her question?

65. *United States v. Ali*, No. CRIM.A.1:05-53, 2006 WL 1102835 (E.D. Va. Apr. 17, 2006).

66. *United States v. Abu Ali*, No. 09-4705, 410 Fed. Appx. 673 (4th Cir. Feb. 1, 2011).

Stephen Vladeck: I know Senator Cruz has introduced legislation. I think there was a bill eight years ago. Senators Graham and Lieberman started this with the Terrorist Expatriation Act, and certainly “crazy” law professors tried to explain why that was patently unconstitutional, and Senator Cruz, never to be deterred from things that are patently unconstitutional, has reintroduced it.⁶⁷ I just want to say, I think it’s worth drawing the distinction because there is a huge distinction between whether you have a right to travel internationally, which is a matter of diplomatic grace, and whether you have a right to retain your citizenship, which I think is much deeper.

Karen Greenberg: Or whether you have a right to return home.

Stephen Vladeck: Right, correct. Next question?

Speaker: There were two points that were raised that I wanted to follow up on. The first was that there is sort of a shift in the way that these trials are proceeding, that we’re moving from sort of the Embassy bombings to sort of more ISIS and other kind of different trials. And the second was that deterrence really hasn’t been a big factor in considering sentencing guidelines. And I was just wondering if any of you could comment on whether you think there is or there will be or there should be a shift in whether deterrence plays a greater role given that we’re dealing with people who, like you said, are leaving for different reasons, maybe much younger, and maybe have different motivations than people who are really dedicated to jihad, and whether deterrence might or should play a greater role.

Stephen Vladeck: Judge Lee, I guess I heard you say a bit when you were talking about the § 3553 factors, that obviously the age, the degree of completion of the offense, those are factors that a judge is going to want to take into account in any case. Is it possible – I don’t want to ask you to comment on a hypothetical case, but – is it possible that a judge would look at that differently when you had someone who, all they had done, perhaps, was buy a plane ticket to perhaps travel to the Middle East, versus someone who is being prosecuted for their involvement in completed acts of terrorism?

Judge Lee: Of course. You look at the facts of the case. Actually, I’ve had a case where somebody was buying a plane ticket or something like that. I don’t think anybody treated that the same as some as the other types of offenses, and I think there was a plea agreement in that case. Again, the government is working on agreements in some of those cases.

Stephen Vladeck: Joanna, is it your experience that there might be more play in the joints in a case like that, than in a case where you have someone who is clearly in the middle of ongoing preparations for attacks?

Joanna Baltes: Yes, absolutely. I think we are seeing more and more of that with the threat that we see with ISIS. It’s just such a different landscape from the terrorism context than it was ten or fifteen years ago. It’s much more diffused, it’s not any lesser of a threat than we were facing post-9/11 or

67. S. 2779, 113th Cong. (2014).

pre-9/11 – it’s just very different. You see very different actors, different ways that people become radicalized. It can be harder to detect, and that means it’s harder to disrupt. I think everyone takes into consideration before even an arrest is made, is there something else you can do, especially when you’re dealing with a really young person, and there have been many cases actually where we’ve tried to, or agents have tried to, sit down with parents of a juvenile to say, “This is what your kid is doing, can you help out here?” So there are a lot of things you don’t necessarily see because maybe those cases aren’t brought, but there certainly is a lot of discretion, and I think people use it in the best manner possible.

Judge Lee: The question had to do with deterrence. Let me say that I don’t think we spend a lot of time thinking about deterrence anymore. That’s something we study in law school. I don’t think anybody is deterred by the sentence that somebody else receives. And also the issue of rehabilitation. I don’t think we have any rehabilitation in the federal criminal justice system to speak of. A state juvenile court might have programs and things like that, but the federal system is very constrained in resources and what they provide to inmates these days. So I’m not sure there is a whole lot of devotion of time, except in cases where you have non-violent crime and youthful offenders.

Stephen Vladeck: I think we have time for one or two more questions.

Speaker: Thank you all for coming today. So my question is about classified evidence as potential mitigation. So in cases where defendants may have limited access to classified information in presenting their defense, does that ever come into consideration when making sentencing decisions?

Judge Lee: I have not seen that, but I certainly would consider it if it were presented to me or I was aware of it.

Joanna Baltes: Yes actually I’m not sure if I’m going to answer the question or not, but I participated in cases before that are not terrorism cases, not national security cases, and yet by the time someone gets to sentencing, they have something that they want to present to the judge. It may be something classified, and we work with the defense attorneys, and we will use the framework provided to be able to get them the evidence they think they need. I mean there’s still a process to it, but classified information can still come up at sentencing.

Stephen Vladeck: But it doesn’t apply on its terms to sentencing, right?

Joanna Baltes: It can. A lot of times there is discovery just for sentencing so you would use CIPA Section 4, and then to the extent that the defense wants to use classified information to present at sentencing, you would go through the Sections 5 and 6 process as well, so it can happen. If there is classified information in the case, there may be classified [information] that is relevant for one side or the other at sentencing.

Stephen Vladeck: Yes ma’am?

Speaker: Is it possible for individuals such as yourselves to take a more critical look at our own policies, at our own toolbox that only seems to be

military and violence when something happens, and why with all that we're spending on so-called surveillance and this secret society, a lot of the people who committed even the domestic violence – the Boston bomber, the Fort Hood person – they were all on the radar screen, and there doesn't seem to be accountability, and I guess how can – what are you doing to attempt to shine a light maybe on what else we could be doing domestically and in our foreign policies to make changes that may not be politically popular in some parts of Congress?

Stephen Vladeck: I'll say this, and I think it's worth saying, and I think Jen made this point this morning on the question of the military versus the civilian paradigm – I have not been the strongest supporter of the foreign policy of this administration, but I think it is worth highlighting that they have not sent a single person to Guantánamo, and that every single terrorism suspect who has been taken into U.S. custody since President Obama came to office has received civilian process or been released, and has not been sent to a military commission or military detention. That's not an answer to your question if the question is how do we do more than just prosecute, I think that's a question more about civil society. Karen, do you have thoughts on that?

Karen Greenberg: Well let me just add, what about the constitutionality of drones with no due process?

Stephen Vladeck: Well I think that's a very different set of issues, and one that could be a whole other symposium, but I think it's worth stressing that the uses of force in military theaters and/or against military targets to me presents a very different question than what you do with individuals who may or may not be involved with these groups but who have broken U.S. laws, right? And the question is, what do you do on the ground here at home to try at least smooth some of that over. Karen?

Karen Greenberg: So our President is holding a colloquium at the White House on the eighteenth of this month to discuss just this – which is what are we going to do about what's termed CVE, Counter Violent Extremism. I know that, whatever we're going to do, we're at the very beginning of the CVE effort. I mean rehabilitation programs do not yet seem to be part of the thinking yet, at least in this carve out of terrorism, and the real question will be not just rehabilitation for people who have been convicted of these crimes, but how to catch these younger people earlier and support them rather than let them get lost. You know, there is only so much we can do, but we're certainly not doing enough, and so that's, I think, the direction of things. But who has the tools, who knows how to do it? I don't know.

Stephen Vladeck: If nothing else, it's a good reminder that sentencing is just part of a larger conversation about rehabilitation and societal reactions to these crises, so thank you so much. Please join me in thanking our panelists for a lively conversation.