

# The Implications of Trying National Security Cases in Article III Courts

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It has been about six years since President Obama promised to close Guantánamo and ignited or, perhaps, reignited the controversy about military tribunals versus Article III courts. That debate has created a certain amount of heat and perhaps not enough light. Moreover, we have had quite a bit of experience in this area, especially since President Obama's remarks in 2009. So this seems a good moment to take another look at the nitty gritty of trying national security cases in Article III courts and the implications of doing so.

I start with a disclaimer. I will not comment on the substance of any pending cases. I will not share any views about issues that are likely to come before me. I will limit my comments to matters in the public record.

## I. TERRORISM CASES HAVE BEEN TRIED SUCCESSFULLY IN ARTICLE III COURTS FOR AT LEAST TWENTY YEARS

That said, I think it is worth beginning by noting that Article III courts have been trying accused terrorists on criminal charges for quite a while, dating back long before 2009. I need look no further than my own district, the Southern District of New York. Long before the attack of 9/11, the first of two cases arising out of the first attack on the World Trade Center, which occurred in 1993, was tried before my colleague, Judge Kevin Duffy, in 1993-1994.<sup>1</sup> The so-called Blind Sheikh and others were convicted in 1995 for a scheme to commit many acts of urban terrorism in New York, including blowing up buildings, tunnels and bridges.<sup>2</sup> The so-called Bojinka Plot case – which involved a plan to blow up American airliners over the Pacific – was tried in 1996.<sup>3</sup> The second of the initial World Trade Center cases was tried in 1997-98.<sup>4</sup>

All or most of that happened before Usama bin Laden and al Qaeda were known to most Americans, but their relative obscurity ended in the 1996-1998 period. Usama bin Laden in August 1996 called upon Muslims to drive Americans out of the Arabian peninsula. In February 1998, he issued a *fatwa* that said that it was an “individual duty for Muslims who can do it[,] in any country in which it is possible[,] to” kill Americans, military and civilian. And on August 7, 1998, the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania,

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1. See *United States v. Salameh*, 152 F.3d 88, 118 (2d Cir. 1998).

2. See *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1998).

3. See *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

4. See *id.* at 135-38.

were bombed. Two hundred and twenty-four people were killed and thousands injured. That in turn has led to three trials. The first was before my colleague, Judge Leonard Sand, in 2001.<sup>5</sup> The second was the Ghailani trial in 2010-11.<sup>6</sup> And the most recent was that of Khalid al Fawwaz, which occurred in 2015.<sup>7</sup> These recent cases are not alone, even in our district. Abu Hamza, who was extradited from the United Kingdom, was convicted last year before Judge Forrest.<sup>8</sup> Judge Berman tried the Siddiqui case in 2010.<sup>9</sup> Sulaiman abu Ghayth, a son in law of Usama bin Laden, was convicted last year of conspiracy to kill Americans.<sup>10</sup> And, as an aside, it is worth noting that all of the Southern District cases I have mentioned were tried without security so obtrusive as to close down lower Manhattan, this in dramatic contrast to the predictions that accompanied the aborted plan to try Khalid Sheikh Mohammed in New York for the attacks of September 11, 2001. I should say also that all of the cases I have mentioned were tried without any circus atmosphere. And while some did attract media interest, the level of media attention has waned substantially over time. As one commentator at The Marshall Project put it during the al Fawwaz trial in a piece entitled *Khaled Who?*, “terror trials in Manhattan have become non-events.”<sup>11</sup> There was very little coverage of the al Fawwaz trial. Save for the first day or so and for a day or two right after the verdict and again after the sentencing, there was not much more in the Abu Ghayth case.

Of course, this long record – not only in my own district but in the Washington – Alexandria area and elsewhere in the United States – demonstrates that criminal cases arising out of alleged terrorist activity can be tried quite readily in Article III courts. We have been doing it for over twenty years. And when I say that “we” have been doing it, the “we” I am speaking of is the Article III courts generally, not just the Southern District of New York.

## II. ISSUES IN ALLEGED TERRORISM CASES

So the question arises why Article III courts have done as well as they have in dealing with these cases. The reason, I suggest, is that the principles upon which we draw in alleged terrorist cases are the same principles that we apply in many other criminal cases. We apply them in different factual contexts, to be sure, but they are principles that have stood the test of more than two centuries. I propose to demonstrate that by discussing some of the more interesting issues and problems that have arisen in my own experience with these cases.

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5. See *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93 (2d Cir. 2008).

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

7. *United States v. Fawwaz*, No. (S7) 98 Cr. 1023 (LAK) (S.D.N.Y. 2015).

8. *United States v. Mostafa*, No. 04 Cr. 356 (KBF) (S.D.N.Y. 2014).

9. See *United States v. Siddiqui*, 699 F.3d 690 (2d Cir. 2012).

10. *United States v. Ghayth*, No. (S14) 98 Cr. 1023 (LAK) (S.D.N.Y. 2014).

11. Clare Sestanovich, *Khaled Who?*, THE MARSHALL PROJECT (Feb. 2, 2015), <https://www.themarshallproject.org/2015/02/02/khaled-who>.

### A. Use of Defendants' Statements

#### 1. Statements to U.S. Authorities

One of the flash points in the debate about Article III prosecution of alleged terrorists has to do with interrogation of suspects and the use of their statements in criminal trials.

Let me begin with the matter of interrogations that take place under conditions that could be problematic in the usual criminal context – that is, where the subject has made the statements in question (a) without the advice of counsel, (b) without having been advised of *Miranda* rights, and/or (c) during coercive interrogation. I'll take the last one first.

It has been common knowledge for some time that some suspected terrorists were placed in CIA custody before 2009 and subjected to so-called enhanced interrogation techniques.<sup>12</sup> At least one of those individuals, Ahmed Khalfan Ghailani, later was prosecuted in an Article III court, the only Guantánamo detainee, incidentally, ever to be tried on criminal charges in a civilian court. You may recall also that Anas al Liby was apprehended in 2013 on the streets of Tripoli by U.S. forces, exfiltrated to a ship, and questioned aboard the ship over a number of days before being flown to New York for trial. So in both *Ghailani* and in *al Liby*, the defense presumably would have argued that any statements made in those initial interrogations had been coerced and moved to suppress them.

The principal point to be made with respect to both cases is that the Department of Justice preempted such attacks. It did not seek to use in the criminal cases any statements the defendants made to the CIA or any other interrogators in such conditions. So the policy of the Department of Justice apparently has been to avoid using custodial statements made in circumstances that could raise serious issues of voluntariness. Nor has it tried to use custodial statements made prior to *Miranda* warnings or before the defendant was given an opportunity to avail himself of the right to counsel except where the pre-*Miranda* questioning took place under the public safety exception created in the *Quarles* case.<sup>13</sup> But that is not to say that there have been no problems with respect to these sorts of interrogations, and I can tell you about one issue that I have encountered.

I refer to what some have called a “clean” or a “clean team” interrogation. A “clean” or “clean team” interrogation is one that takes place after an earlier interrogation and is conducted by personnel who were not involved in the earlier interrogation. In the “clean” interrogation, the subject is given *Miranda* warnings, an opportunity to have counsel, and all of the safeguards that must accompany custodial interrogation if a suspect's statements are to be usable in court. The “clean team” seeks to avoid anything smacking of coercion. And it

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12. *United States v. Ghailani*, 743 F. Supp. 2d 242, 248 (S.D.N.Y. 2010).

13. *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

seeks to elicit evidence from the defendant, sometimes including evidence that may have been given in the earlier, pre-*Miranda* and perhaps arguably coercive interrogation. The question then is whether statements made to the “clean team” are admissible.

The simplest form of this problem was presented in *al Liby* and has been seen in other cases including *Abu Ghayth* and *Warsame*. Al Liby, as I’ve mentioned, was extracted from Libya and interrogated aboard ship. There was no suggestion that he was read his *Miranda* rights and afforded a right to counsel. Al Liby then was turned over to FBI agents who had not been involved in the shipboard interrogation and flown to New York. During the airplane flight, the agents advised al Liby of his rights. He signed a *Miranda* waiver. The agents gave him time to pray, offered him food, and let him sleep when he wished. But the agents questioned al Liby for several hours during which al Liby made statements that the government sought to use against him at trial.

Al Liby moved to suppress the statements he made to the FBI agents on the ground that his treatment aboard the ship and some of the circumstances aboard the aircraft, such as the use of restraints, were such that he had not knowingly and voluntarily waived his *Miranda* rights. In any case, he suggested, his statements during the plane ride were products of a deliberate, two-step strategy used by law enforcement to obtain a post-*Miranda* warning confession.

There was a suppression hearing, but al Liby died of natural causes before his motion was decided. Had he lived, it is likely that the decision would have followed from established principles. Whether there had been a knowing and voluntary waiver and whether the subsequent statements were voluntary would have depended, under well settled authority, on a factual assessment of the totality of the circumstances. These would have included, among other things, the characteristics of the defendant, the conditions of the interrogation, and the conduct of the interrogators.<sup>14</sup> Similarly, the determination whether the “clean team” practice itself made the statements inadmissible would have been informed by the Supreme Court’s decision in *Missouri v. Seibert*,<sup>15</sup> which suggests that the answer would have depended on whether the post-*Miranda* statements were products of a deliberate two-step strategy used by law enforcement to elicit those statements and, if so, whether they nevertheless were voluntary.<sup>16</sup>

To be sure, the Supreme Court has not yet ruled on the admissibility of statements made to a “clean team” in a terrorism context, at least in circumstances in which *Miranda* warnings were given, there was a knowing and intelligent *Miranda* waiver, and the statements were voluntary in the usual sense. But there are cases in the context of other criminal prosecutions, and the

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14. *E.g.*, *United States v. Taylor*, 745 F.3d 15, 23 (2d Cir. 2014); *United States v. Lynch*, 92 F.3d 62, 65 (2d Cir. 1996).

15. 542 U.S. 600 (2004).

16. *See United States v. Capers*, 627 F.3d 470, 476 (2d Cir. 2010).

question appears to yield to similar analysis in both situations. So the bottom line is that the al Liby suppression motion likely would have been decided in accordance with principles identical to those that would have controlled in any other sort of criminal case presenting similar issues.

## 2. Statements to Foreign Authorities

The use of defendant statements in alleged terrorist cases arises in a second context. There can be extensive cooperation among U.S. law enforcement and intelligence officers and the law enforcement and intelligence personnel of other countries. Sometimes, defendants make statements in interrogations by foreign authorities in circumstances that might not satisfy U.S. standards if the statements had been made in this country to U.S. law enforcement. The question therefore arises whether those statements are admissible in a U.S. prosecution.

A case in point is *United States v. Bary*,<sup>17</sup> involving a defendant who ultimately pled guilty to conspiring to kill Americans, among other charges, and was sentenced in 2015. Bary was arrested by British police in the wake of the 1998 Embassy bombings in East Africa. He was questioned during brief periods over three days. His solicitor was present throughout. The British police gave him the customary British warnings, but they arguably were not precisely the same as those required in the United States by *Miranda*. Bary then was extradited to the United States after a fourteen-year court battle in the United Kingdom and Europe. When he got here, he claimed that his statements to the British police should be suppressed in his U.S. case because they had been involuntary and, in any case, because he had not received *Miranda* warnings. And it is the *Miranda* argument that I want to mention.

To be sure, “statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary.”<sup>18</sup> But there is an exception to this rule known as the joint venture doctrine. Where U.S. “law enforcement agents actively participate in questioning conducted by foreign authorities,”<sup>19</sup> it appears that *Miranda* applies. It applies as well, at least in the Second Circuit, where “American and foreign authorities . . . [engage in a] willful attempt to evade . . . *Miranda*” or where U.S. officials “use[ ] foreign officials as instruments” to question suspects.<sup>20</sup> So Bary’s motion put in issue what had taken place between U.S. and British authorities.

In the last analysis, the motion resulted in a two-day hearing at which members of the Antiterrorist Branch of the British police and former FBI agents testified concerning the nature and extent of the American involvement in the British operation that resulted in Bary’s arrest and interrogation. Bary’s motion

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17. 978 F. Supp. 2d 356 (S.D.N.Y. 2013).

18. *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003).

19. *Id.*

20. *United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir. 1983); *United States v. Welch*, 455 F.2d 211, 213 (2d Cir. 1972).

ultimately was denied.<sup>21</sup> But the important point for present purposes is that the issue was explored fully and decided according to established principles just as would have occurred had the charges against Bary been drug trafficking or money laundering or something else and had his statements been made to foreign narcotics investigators or other foreign law enforcement personnel.

*B. Use of Evidence Obtained in Consequence of Inadmissible Defendant Statements – “Fruit of the Poisonous Tree”*

Yet another problem that can arise in alleged terrorism cases, not to mention many other kinds of criminal cases, is the “fruit of the poisonous tree” doctrine. The doctrine goes back to *Wong Sun v. United States*.<sup>22</sup> *Wong Sun* held that the exclusionary rule requires suppression of the fruits of illegally obtained evidence unless “the evidence . . . has been come at . . . by means sufficiently distinguishable to be purged of the primary taint” that made acquisition of the original evidence illegal.<sup>23</sup> I have no intention of probing all the complexities of the “fruit of the poisonous tree” doctrine, such as whether it applies in precisely the same way in Fifth Amendment as in Fourth Amendment cases, when the “primary taint” (to use the *Wong Sun* language) is “purged” because the “fruit” inevitably would have been found in any case, and so on. Let me just focus by way of illustration on how the poisonous tree doctrine arose in the *Ghailani* case.

Ghailani was accused of complicity in the Embassy bombings. Among other things, he allegedly obtained the explosives that were used to make the truck bombs that blew up the embassies. And the government had a witness. It proposed to call a man named Abebe, a Tanzanian who claimed that he had sold the explosives to Ghailani. But the defense moved to exclude Abebe as a witness on the ground that Abebe himself was fruit of the poisonous tree. Ghailani contended that “he was coerced into making the statements that led to Abebe,”<sup>24</sup> that he made them without benefit of counsel, and that the government could not prove either that it inevitably would have discovered Abebe without benefit of Ghailani’s statements or that the alleged taint of those statements had been purged in other ways. He argued that Abebe therefore could not properly be called. This ultimately necessitated a hearing directed to exactly how the government found Abebe and the circumstances in which Abebe came to be willing to testify at trial, especially as he was not subject to any compulsory process. In the last analysis, the motion to suppress was granted.<sup>25</sup> Abebe did not testify at trial. And I am not going to go into the details of that hearing beyond saying that the outcome was very fact-specific, many of

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21. 978 F. Supp. 2d at 360.

22. 371 U.S. 471 (1963).

23. *Id.* at 488.

24. *United States v. Ghailani*, 743 F. Supp. 2d 242, 255 (S.D.N.Y. 2010).

25. *Id.* at 261.

the facts remain classified, and the details are not especially relevant to my purpose today. But one point is important here.

This of course was one occasion in which the fact that this was a national security case resulted in the matter evolving in a manner that differed from that in which a poisonous tree motion would have evolved in any other sort of criminal case. As an initial matter, the government here conceded for purposes of the motion that whatever Ghailani had said had been coerced, presumably out of an unwillingness to go into the details of what had taken place while he was in CIA custody. Moreover, the evidence that bore on the relationship between whatever Ghailani may have said under interrogation and the discovery of Abebe was classified. So portions of the hearing were closed, and parts of the final decision on the motion also remain classified. That said, however, Ghailani's claim was litigated successfully in an Article III court. It was decided in accordance with established legal principles just as would have occurred in any other criminal case. And all of that occurred without compromising national security.

### C. *Classified Information*

That brings me to the more general question of the handling of classified information in alleged terrorist cases. Unlike most of the other things I've spoken about, the classified information concerns in the criminal law sphere seem to be most frequent in the alleged espionage and alleged terrorism cases, although related state secret privilege issues do arise from time to time in civil litigation of various kinds. And classified information issues in alleged espionage and terrorism cases are worthy of a symposium of their own.<sup>26</sup> But let me share with you a quick outline of the tools available to Article III courts for dealing with classified information and some of the issues that arise.

Evidence and materials to which a defendant in an alleged terrorism case is entitled in discovery frequently include at least some classified material. Except as provided in the Classified Information Procedures Act,<sup>27</sup> or CIPA, classified materials may not be disclosed except to persons with security clearances. Many, probably most, defense counsel can obtain such clearances, but some cannot. The first concern therefore is whether the presence of classified material limits the right of defendants in these cases to obtain counsel of their choice.

I have not found this to be a practical problem. Most defendants in such cases are indigent. They are entitled to competent appointed counsel, but they are not entitled to legal Dream Teams of their choice at public expense. And I have seen no difficulty in obtaining highly qualified lawyers willing to undertake these defenses under the Criminal Justice Act and who either have or readily can obtain security clearance. I suspect the same is true in the types of districts in

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26. See, e.g., S. Elisa Poteat, *Discovering the Artichoke: How Mistakes and Omissions Have Blurred the Enabling Intent of the Classified Information Procedures Act*, 7 J. NAT'L SECURITY L. & POL'Y 81 (2014).

27. 18 U.S.C. app. 3.

which cases like this have been and are likely to be prosecuted. And while I have had two defendants who engaged their own private counsel, one of the retained lawyers had or readily obtained clearance. The other lawyer, who was under indictment himself on unrelated charges, did not. But he associated with other counsel who did obtain clearance. The associated counsel handled whatever was classified. So there ultimately was no problem.

A second issue that arises with respect to classified information is that the defendant almost certainly will not have a security clearance and therefore usually may not see or be told of classified information disclosed to defense counsel. And while that at first may seem to be quite a large problem, it should not be overstated. If the government wishes to use classified information at trial, it typically declassifies what it wishes to use, at which point the defendant gets access to it.

That brings me to CIPA, which was enacted in 1980. It deals both with discovery of classified information and the use of such information at trial or in hearings.

I'll start with discovery. Under Rule 16, the defendant in a criminal case generally is entitled to disclosure of the defendant's own statements, documents in possession of the government that are material to the defense, documents that the government intends to use in its case-in-chief, and documents that were obtained from or belong to the defendant.<sup>28</sup> CIPA, however, permits the government to move for a protective order relieving the government of the obligation to produce particular documents or allowing it to substitute for otherwise discoverable documents summaries or admissions that "will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."<sup>29</sup> Such protective orders often are granted to avoid disclosure of the means and methods of gathering information, and they often are granted *ex parte*.<sup>30</sup> The typically *ex parte* nature of these applications is a matter of some concern, particularly insofar as it requires the court to determine what documents are material to the defense. That can be a problem because the court, especially early in a case, does not often know how the government intends to prove the charges or what the defense is going to be. But a useful technique for handling this has developed. At least with the consent of both parties, and perhaps without it, the court may invite the government and the defense to outline their respective cases, each out of the presence of the other and without disclosing to either anything said by the adversary. This can put the court into a much improved position with respect to making the necessary judgments about the materiality of possible discovery documents.

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28. See Fed. R. Crim. P. 16(a)(1).

29. 18 U.S.C. app. 3 §§ 3, 4, 6(c)(1).

30. *Id.* § 4 (permitting "the United States to make a request" for a protective order through an "*ex parte* showing").



The second aspect of CIPA that I will mention relates to use of classified information at trial and in hearings. As trial approaches, a defendant who intends to use classified information is obliged to notify the government and the court of that intention.<sup>31</sup> The notice must describe the information in question. The government then may move for an order determining all questions “concerning the use, relevance, or admissibility of classified information that would otherwise be made.”<sup>32</sup> It would be reasonable to suppose that the government often argues that the classified information the defendant wishes to use would be inadmissible at trial and that its disclosure therefore should be prohibited.

In the event the court determines that any of the classified information may be used, the government then may seek to substitute for the classified information a summary of the evidence or an admission of the facts sought to be proved by the defendant that would “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”<sup>33</sup> This is parallel to the similar provision with respect to discovery. Ultimately, if the court does not go along with the government in one way or another – either by excluding on evidentiary grounds the classified information that the defendant proposes to use or by allowing a substitution for the classified information that is both adequate for the defense and satisfactory to the government, the Attorney General formally and personally may object to the intended disclosure.<sup>34</sup> If the Attorney General does so, the court must prohibit that disclosure.<sup>35</sup> Should the court do so, however, the court must dismiss the indictment or, if the interests of justice so require, impose an appropriate lesser penalty on the government such as dismissing some counts or finding against the government on the point to which the classified information pertains.<sup>36</sup>

The net of all this, I think, is this. There is no denying that the presence of classified information in alleged terrorism cases complicates life for lawyers, for defendants and for the courts. Care must be taken to avoid compromising national security while at the same time protecting the rights of criminal defendants to fair trials. But CIPA has been on the books for nearly thirty-five years. It long has provided Article III courts with adequate means of dealing with classified information in alleged terrorism cases. In my experience, it is adequate to the task when courts recognize that its purposes include protecting both national security and the rights of defendants.

### III. CONCLUSIONS

So in closing, I come to what I regard as the implications of trying alleged terrorism cases in Article III courts. I think that the implications are essentially these:

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31. *Id.* § 5.

32. *Id.* § 6(a).

33. *Id.* § 6(c)(1).

34. *Id.* § 6(e)(1).

35. *Id.*

36. *Id.* § 6(e)(2).

First, alleged terrorism cases have a great deal in common with criminal cases in general, at least the more complicated criminal cases. There are some issues in some alleged terrorism cases that arise in a context that many Article III courts do not encounter very often. But those issues rarely are different in principle than when they come up in other cases. It therefore is not surprising that Article III courts have a long track record of trying these cases properly. I cannot think of a single case in which any of the feared adverse consequences of trying these cases in Article III courts that so often have been raised by opponents of such trials actually have been realized in practice. Article III trials have not been used as terrorist propaganda platforms. They have not compromised state secrets. They have not freed guilty persons. And while a verdict of “not guilty” cannot be ruled out, the very concept of justice is that the guilty be punished and the innocent set free. No system in which a finding of guilt is preordained is a system of justice.

The second implication, I think, stems from the fact that our nation’s effort to combat terrorism should rest on our values and our ideals, not on our military and law enforcement power alone.

One of the core values of this nation, whatever our faults, is our belief that no one may be punished unless there is a fair, open, and independent judgment of guilt. We do not believe in vengeful and arbitrary beheadings and immolations or rigged show trials.

Our belief in fair and independent judgments – judgments openly arrived at on the basis of evidence that, whenever possible, all can see – gives a legitimacy to verdicts in Article III courts that is not otherwise available.

- We honor that belief every time we try an alleged terrorist before a judge who is entirely independent of the executive, of the military and of the Justice Department;
- We honor it every time guilt or innocence is decided by independent jurors drawn from every walk of life and not beholden to the government; and
- We honor it every time a prosecutor presents the evidence in a courtroom open to the world and to the world press.

And we do more than honor our ideals. We deploy an important weapon in our fight against terrorism. It is a constructive, not a destructive, weapon. It is a weapon that gains the respect and the cooperation of other nations. It is, I hope, a weapon that helps to persuade at least some who otherwise might assist or acquiesce in terrorism that ours is a better path. And it is a weapon that we should use, as we have used it for more than two decades.