Criminal Law & Procedure:

Bringing Terrorists to Justice: Can Criminal Prosecution Work?

Jennifer Daskal, Kenneth M. Karas, Stephen A. Saltzburg, Kenneth Wainstain; Moderator: Lois Haight

Lois Haight: I'm Judge Lois Haight. I'll be the moderator of the panel today. Bringing terrorists to justice: how do we do it so that we can protect our citizens, our state, our human rights, and the rule of law?

Terrorists recognize the rights of no one. They work in the dark to plan mass murders and loss of innocent life with no particular target except the State. They wear no uniform. They carry no arms in plain sight and answer to no identifiable government structure. They have struck the United States many times in the past few years, both abroad and at home, and as we sit here today they're planning more attacks, on a more deadly scale, using atomic and biological weapons -- weapons that are becoming more and more available, especially with the reluctance of the United Nations and the world community to stop their spread, certainly in Iran and North Korea. Can we deal with this question and many questions through our criminal justice system or will it shatter under the strain?

To answer these questions and many more today, I have a very distinguished panel I would like to introduce. I'll give you a little bit of the format. They'll speak for approximately 10 minutes. They will then have some time to rebut what others have said, if they are want to rebut.

First, we have Judge Ken Karas. He is United States District Judge for the Southern District of New York. He graduated from Georgetown University with the B.A., and he received his J.D. degree from Columbia University School of Law. (Due to my age, I never, ever say the date they graduated because I don't like people telling when I graduated.) He also served as an Assistant United States Attorney for the Southern District of New York and Chief of the Organized Crime and Terrorism Unit until his departure from the Office in 2004 to become a judge. While at the U.S. Attorney's Office, Judge Karas worked in numerous terrorist investigations into the associates of several terrorist groups, including Al Qaeda, Hamas, Egyptian Islamic Jihad, and the IRA. He was part of a team of prosecutors who in 2001 convicted four Osama bin Laden's followers for their role in the August 1998 bombings of the American embassies in Nairobi and Dar es Salaam. He also participated in the prosecutions of Zacarias Moussaoui, who pled guilty to being part of several conspiracies that involved the September 11 terrorist attacks. Judge Karas has been the recipient of the Distinguished Service Award and the John Marshall Award from the Justice Department, and in 2001, he was named Federal Law Enforcement Association's prosecutor of the year.

Jennifer Daskal joined the Human Rights Watch in October of 2005 as Advocacy Director of U.S. Programs. She comes from the Public Defender's Office Service in the District of Columbia, where she has argued many cases before the D.C. Court of Appeals. Her Washington, D.C. experience also includes a center, a budget and policy priorities, the Council of Economic Advisers and the Department of the Treasury. She graduated from Harvard Law School, received an M.A. in economics at Cambridge University where she was a Marshall Scholar and is a Brown University graduate. Ms. Daskal's work focuses on immigration, criminal justice, and counterterrorism policies of the United States.

And finally, we have Kenneth Wainstein. He is the First Assistant Attorney General for the National Security Division of the United States Department of Justice. He also served as United States Attorney for the District of Columbia and held two senior positions in the Federal Bureau of Investigations. He served as Chief of Staff to the Director, and he also served as General Counsel of the FBI. He is a graduate of the University of Virginia and the Boalt Hall School of Law, University of California at Berkeley. He has handled many prosecutions, and the varieties include fraud, narcotics, public corruptions, murder, federal racketeering, and violent street gangs. He also received the Director's Award for Superior Performance in the U.S. Attorney's Office in 1997

** The Hon. Lois Haight is a Superior Court Judge in County of Contra Costa, California.*

and 2000.

Please help me welcome the panelists today.

Kenneth M. Karas: Thank you, Judge Haight. Good afternoon all.

In addressing the question about the prosecution of terrorism cases in civilian court, and really the subject of whether or not this is a viable option, what I'm going to talk about is the experience I had working on terrorism cases at the U.S. Attorney's office. I worked on a number of cases—sometimes called "spit in the street" cases. We file these under what we call the Al Capone Theory: you go after people who you have some indication are members of terrorist groups, but can't reveal that information in court, and charge them with credit card fraud and all kinds of other non-terrorist crimes. I'm not going to focus on those cases because they're not actually terrorism prosecutions in the sense that terrorism charges were brought. Instead I'm going to talk very briefly about the bin Laden case (also known as the East African Embassy Bombing case) and the Moussaoui case, and go through some of the challenges we faced in those cases, because, on the one hand, it could be argued that these kinds of cases can be brought in civilian court, and on the other hand, it could be argued that they perhaps demonstrate the outer limits of what can be done in civilian court.

To start with the Embassy Bombing, there were a number of things about that case were quite unique. It involved, as a percentage, a tremendous amount of foreign evidence: evidence that was collected abroad, evidence that required witnesses from foreign nations to authenticate the exhibits. This meant that we did not have the use of subpoena power, we really couldn't use the grand jury. And we really relied on the good graces of our allies to provide not only the evidence but the information. I'll talk more about this later, but suffice it to say that terrorism has become a hybrid in this country, part criminal and part national security. Back in the mid '90s, with the World Trade Center Bombing cases, the Justice Department saw terrorism as a law enforcement matter, and we worked with the criminal agents in the FBI, not the intelligence agencies. But outside the United States, terrorism was treated as a national security matter. So, we would have to go begging for evidence abroad, not dealing so much with law enforcement, but rather security services, the intelligence branches and so forth.

I can't tell you the number of people who broke out in hives when we asked for witnesses to introduce evidence into an American court and explained that these witnesses would have to be cross-examined; that we had to turn over certain discovery. We had to explain to them the openness of our court system. I remember speaking to the head one security service who spoke a language I did not. I did not know what he was saying, but I knew the word "no" in his language; that was emphatically driven home to me. So, this aspect of the case obviously complicated things; and it does, I think, present an issue with any case that involves truly international crimes.

The second thing to note about the Embassy Bombing case, which I think is going to become more common, was the production of classified discovery. There were a number of items we had to produce because of the *Brady* obligation: the obligation to turn over information that might be exculpatory (material to the defense). Because it was a capital case, this included not only be information that would perhaps exculpate the defendants, but also information that the defendants could use in mitigation of the death penalty. For example, one mitigating factor that is often used is the circumstance of equally culpable, or more culpable, individuals not getting the death penalty. Lawyers who feel that their client was less involved than these accomplices but nonetheless still facing the death penalty obviously want to get that information. So, you can imagine the amount of classified information generated about Al Qaeda, even back in the late 90s, that didn't at all exculpate the defendants, but in fact inculpated others who arguably might not have been up for the death penalty.

Other classified items we hoped to use once they were declassified. But anything we wanted to use, we had to turn over pursuant to Rule 16 allegations. That brought on an interesting issue about security clearances for lawyers. Some of the lawyers who were court-appointed, and excellent lawyers, for very understandable reasons did not want FBI agents running around their neighborhood asking very personal questions about them for a security clearance. To get the clearance, they had to fill out the same form we filled out—that anybody in the government has to fill out—the SF86. That got litigated. Judge Sand, the judge who presided over

the Embassy Bombing case, ultimately ruled that it did not violate the defendants' choice of counsel to require that the lawyers get a security clearance, nor did it violate the lawyers' personal rights. But that is one district court opinion in what may be many others. The added dimension certainly introduces complication.

A couple of other issues unique to that case—really, to all these cases: There was evidence that we introduced that was, at the time it was collected, the product of a foreign intelligence collection operation. Subsequently, the fruits of that operation were declassified and we were allowed to use them. It was a house search in Kenya involving electronic surveillance. The wrinkle was that the house was occupied by a naturalized American citizen, and the authority to search came under Executive Order 12333. Section 2.5 allows that kind of operation to take place with the permission of the Attorney General. Once the intelligence was declassified, there was tremendous litigation over whether the fruits of such operations should be allowed in. Whether there was in fact a warrant, there is a foreign intelligence collection exception to the Warrant Clause in the Fourth Amendment. Judge Sand ruled that, because the U.S. government had sought Attorney General Reno's permission, the exception applied. To the extent there was intelligence collected before the Attorney General's authorization, he found such evidence not in compliance with the Fourth Amendment requirement, but then nonetheless allowed it to come in because the Exclusionary Rule did not apply. (The Exclusionary Rule says that to the extent that law enforcement officers engage in an illegal search or seizure, such evidence may not be entered. But there is caselaw out there that holds that if the motivation to collect this evidence is not for use in criminal court, there's no point to the deterrent value of the Exclusionary Rule.) And so, ultimately, all the information came in. But there again, it's a single district court opinion.

The final thing that made that case very complicated was security; physical security of people in the courtroom to be sure, but also security in the prison. It was really the first case where the special administrative measures that the Justice Department adopted in the mid '90s had been applied in full force and effect, requiring that each inmate be isolated in a cell by himself, their mail monitored, very strict restrictions on phone calls and visitors, limiting third-party calls so that every attorney would have to sign an affidavit that when they spoke to his or her client they wouldn't pass them on to somebody else. The purpose to all this was not only to promote security inside the prison, but also to make sure that any discovery that was turned over, while not classified, was still very sensitive. The defendants needed to prepare their defense; they didn't get to communicate with Al Qaeda. In the briefing, both in the Embassy case and in the Moussaoui case, the argument was made that Al Qaeda monitors very carefully what happens in court. In fact, you may remember that there was a terrorism manual found in England—Attorney General Ashcroft had it during one of the post-9/11 hearings. That was an exhibit at our trial. One of the things in the manual is communicating to the brothers on the outside anything that they learn, that's turned over in discovery, etc. So, we were very conscious of that risk. We had protective orders that the lawyers accepted, and the judge authorized. Part of the idea behind these special administrative measures was to make sure that while the government complies with its discovery obligations it doesn't give free discovery to Al Qaeda.

With respect to the Moussaoui case—two issues made that case unique. First, Moussaoui went *pro se*. Because, what do you do when there is, as there was in the Embassy case, a tremendous amount of classified discovery? Moussaoui wasn't going to fill out the SF-86. And, even if he did, he wasn't going to get a clearance. Judge Brinkman did something I thought was very creative. She appointed, over Moussaoui's objection, the original lawyers who had been appointed to represent him as standby counsel. They were in charge of everything related to classified discovery, including trying to get certain information declassified to show to Moussaoui. (This was also, incidentally, an issue that came up in the embassy bombing case. You can imagine the enormous amount of complication, logistically speaking and in making sure that nothing we did was going to undermine the broader effort against terrorism.)

The second issue, unique to the Moussaoui case, but which has also affected other cases, was the question of access to unlawful enemy combatants being held by other components of the U.S. government. Moussaoui's lawyers, the lawyers that Judge Brinkman appointed, sought access to these individuals and got the classified discovery. They

said, "This is going to exculpate Mr. Moussaoui, and it's also material to the death penalty." There was a pretrial access issue and a trial access issue. Judge Brinkman ultimately ruled no on the pretrial access, holding that the paperwork they were getting, the classified discovery, was sufficient to meet the government's obligation for pretrial access. But she did rule that there was a Sixth Amendment right to access to these individuals on Mr. Moussaoui's behalf. The government said no; that it was highly classified, part of an ongoing conflict and intelligence collection. They were not going to allow these interrogations to be disrupted and jeopardize the ability of others in the government to collect actionable intelligence.

Ultimately, Judge Brinkman ruled that the information was material, and that the substitutes that the prosecutors had proposed—permissible under this statute, called the Classified Information Procedure Act—were insufficient. She held that they were not enough to provide Moussaoui with the same substantial defense. (That's what the language is in CIPA. CIPA does not allow judges to tell the government they must declassify. The government has the authority to say no. But the judge has the authority to impose a sanction.) At this point, the defense requested to dismiss the case. Brinkman rejected the request, but said she would forbid the government from seeking the death penalty and from arguing that Moussaoui had any involvement in the 9/11 plot; only that he was generally trying to kill Americans.

That went up to the Fourth Circuit, and two to one, the Fourth Circuit reversed. They agreed with Judge Brinkman that the information was material to Moussaoui, but they disagreed with her on the substitutions; finding, at least in the abstract, that substitutions could provide substantially the same defense to Moussaoui. The circuit remanded Judge Brinkman to work out the logistics of the substitutions, which she did; everybody, I think, knows, the case ultimately did go to a sentencing phase.

Anybody who worked on these cases from the defense side—any of the judges, any of the prosecutors—will tell you that this sort of case is very difficult. It presents a lot of very novel legal issues. There's a tremendous amount of logistics that have to be worked out. You have to become a part-time diplomat. You have to engage lawyers from all over the U.S. government and think very creatively, no matter which table you sit on. As these international terrorism cases get prosecuted—(and they are truly international crimes)—these problems are bound to come up again. One of the most troublesome limitations, I think, is going to be how much foreign evidence is used. If the case against a terrorist depends—as 80 percent of the cases do—on evidence collected from a foreign government—especially a foreign government that is just not going to cooperate, hand over the witness you need to authenticate this document or that telephone intercept—then, what do you do? The same problem arises with use of classified information.

Another issue I have not raised, but which came up in the Embassy case, is *Miranda*. In the Embassy case, a lot of the defendants were interrogated while in Kenyan and South African custody. Under Kenyan law, there is no requirement that *Miranda* rights be provided; they were in Kenyan custody and had no right to counsel. So, when the FBI agents went to interrogate some of the suspects, there was a bit of a conundrum. What do you tell them? The Justice Department advised us to tell them that when they got back to the States they would have a right to counsel. But you can invoke a right to silence and the other *Miranda* warnings. That got us in a lot of trouble with Judge Sand.

Fortunately, there came a point where my colleague Pat Fitzgerald, the prosecutor, Mirandized. The South Africans have their own Miranda warning, (which is almost word-for-word to the American Miranda warning); so, we were able to rely on that evidence. But as you can see, the international component of these things is very tricky. So, to conclude, there are challenges in these cases. Sometimes they're foreseeable; sometimes they're not. But they do push the limits of what can be done in civilian court.

Jennifer Daskal: Good afternoon. I'm going to shift the topic a little bit and talk about the alternative justice system that was set up first by the Bush administration and then by Congress, when it asked passed the Military Commissions Act this fall.

The title of this talk is "Can criminal prosecution work?" Just recently, the Department of Justice issued a press release proudly announcing that they had successfully convicted and prosecuted close to

300 terrorism or terrorism-related cases in Article III courts since September 2001. Looking at those numbers—the DOJ's own statistics—it seems that there is a simple answer to the question posed this panel. Yes, criminal prosecutions do work.

By comparison, in the more than four years since the military commissions were set up by President Bush in 2002, no one has been convicted. [Note: Since the time of this talk, one man—David Hicks—has pled guilty to one count of providing material support and sentenced to a suspended sentence of seven years, with just nine months to serve. By comparison, John Walker Lindh and Richard Reid, two of Mr. Hicks' alleged compatriots, received 20 years and life imprisonment, respectively, in US federal court.]

Now, to be fair, the commissions *couldn't* convict anyone. They were bogged down in litigation, and ultimately struck down by the Supreme Court this summer in *Hamdan*. Just this fall, Congress passed a Military Commissions Act authorizing a new set of commissions that have been heralded as the way forward—the system that will finally put the alleged masterminds of 9/11 on trial and give them their due. But it's my guess that these commissions, with a new set of rules and a new set of procedures, will also be the subject of controversy and court challenge; further delaying the day that some of the suspected leaders of the worst terrorist attack in U.S. history are brought to justice. And while I, like everyone here, want these individuals brought to justice. I also think that there are good reasons for some of these court challenges and for concerns about these commissions. My talk will focus on what two of the biggest concerns about these commissions: the underlying justification for them and their jurisdiction.

I want to start with a very basic premise: that the procedural protections provided in criminal protections, and to a large extent mandated by the Constitution, serve a very important societal interest. They protect society from getting it wrong—from imprisoning and potentially executing innocent men. The procedures may at times be onerous, as we've heard from Judge Karas. They may be cumbersome. They may slow down convictions. But they prevent, to a large extent, major miscarriages of justice. They check executive overreaching. And they keep the government honest.

The arguments in favor of the commissions first set up by the President and now authorized by Congress start from a very different premise. They assume that the executive has gotten in right; that the detainees in Guantanamo Bay (for whom the commissions are primarily designed) are the "worst of the worst," and that the only job of the commissions is to marshall the evidence—which is assumed to exist—against these men, showcase their guilt, and publicly punish them for their horrific crimes. In the words of President Bush, The men at Guantánamo Bay, who these commissions were largely designed for, are "suspected bomb makers, terrorist trainers, recruiters and facilitators, potential suicide bombers." If these men are who the government says they are—guilty, horrible people—the cumbersome procedural protections are unnecessary impediments to swift justice.

But there is good reason to question that underlying premise—even with the detainees at Guantanamo Bay. There's been far too many military and intelligence experts, including former intelligence and military experts from within the Bush administration, who have questioned the administrative's narrative. We now know that US forces captured only a tiny fraction of the detainees who ended up at Guantanamo. Many now believe the Pakistani government and others turned over or sold to the U.S. a large number of insignificant Taliban fighters who are potentially even innocent people, even as it protected more important figures with connections to the Pakistani intelligence services or the money to buy their freedom. As Michael Sheuer, the special advisor of the CIA's bin Laden unit until 2004, says of those turned over by Pakistan, "[w]e absolutely got the wrong people."

And if that's true, then basic procedural protections are essential—not just for the individual detainees, but to ensure the accuracy and credibility of the US justice system, and to protect the public perception about the United States commitment to fair justice and rule of law, both in the United States and around the world.

This ties into the second point of this talk —about jurisdiction. While these commissions were designed with an eye towards prosecuting the worst of the worst, the commissions set up by Congress are authorized to try a much larger category of individuals: any noncitizen who falls within a very broad definition of "unlawful enemy combatant." In

so doing, it has blurred what is perhaps one of the most important underpinnings of the laws of war: the distinction between civilians and combatants.

Under the laws of war, there is a very important distinction between those who are combatants, such as members of armed forces and civilians who are taking part in hostilities, and civilians not actively engaged in hostilities. Deeming somebody to be a combatant has incredibly important consequences. Under the laws of war, combatants may lawfully be attacked and indefinitely detained without trial until the end of hostilities.

The Military Commissions Act expands the definition of "combatant" in a way that blurs this distinction. The definition of "combatant" includes those who have "purposefully and materially" supported hostilities, even if they have not directly engaged in hostiilites themselves. This turns ordinary civilians, such as a U.S. resident who sends money to a banned group into "combatants" who can be placed in military custody and hauled before a military commission. All those "material support for terrorism" trial cases that the Department of Justice has successfully prosecuted and involve noncitizens, could be taken out of Article 3 courts. Those individuals could be placed in military custody and subjected to trial by military commissions.

An even more disturbing and circular provision in the Military Commission Act specifies that anyone who has been determined to be an unlawful enemy combatant by what's known as a Combatant Status Review Tribunal—the military administrative boards set up to ascertain the status of the detainees at Guantanamo Bay—is an enemy combatant for purposes of the jurisdiction of the military commissions. This means that once somebody's been determined to be an enemy combatant by these administrative tribunals, that individual can no longer challenge the jurisdiction in their trial. But these administrative determinations that somebody is an enemy combatant does not in any way represent a full and fair opportunity for the individual to challenge such a designation. With the exception of the 14 detainees moved to Guantanamo from secret prision in September, all of the detainees have been before these review boards and determined to be "unlawful enemy combatants." But these determinations were made on the basis of classified evidence that the detainee has never seen, putting the detainee in the impossible situation of rebutting secreat evidence; the presumptions are all in favor of the accuracy of government's evidence; the detainees are not represented by counsel; and every detainee's request to put on witnesses was denied, unless the witness happens to also be in Guantanamo (which, by definition, makes him untrustworthy in the eyes of the military review board). The system in a nutshell: Enemy combatants are who the President or Secretary of Defense says they are; an administrative tribunal affirms this; and that this cannot be challenged.

This is an enormous expansion of government power to bypass an existing criminal justice system any time it wants to accuse a noncitizen of a terrorism-related crime.

The possibility that the United States would use these laws in this way is not just a hypothetical fear. Take the case of Ali Saleh Kahlah Al-Marri, a citizen of Qatar, who's in the United States lawfully on a student visa. He was indicted for credit card fraud, and in pretrial motions proceedings—just weeks away from trial—when, in 2003, the government declared him an unlawful enemy combatant, took him out of the Article 3 court and moved him to a military brig in South Carolina, where he was initially held incommunicado for 16 months. He was finally informed of the nature of the allegations against him almost two years after he was originally detained, as the result of a *habeas* challenge by his attorneys. The government is now arguing that the Military Commissions Act strips Al-Marri of any habeas rights, and has moved to dismiss his case, arguing that they can detain him indefinitely so long a they give him the administrative review hearing (CSRT) akin to that provided the Guantanamo Bay detainees.

This is an enormous—and I would argue terrifying—expansion of military jurisdiction over noncitizens like Al-Marri, who was on the eve of trial in an Article 3 court and arrested far from the battlefield. Under this logic, any noncitizen accused of a terrorism-related crime could be taken out of a civilian criminal system, placed in military custody, detained indefinitely, and, if tried, subjected to an entirely new system, without established rules or precedent. Even if acquitted he could continue to be detained indefinitely, until the end of what may very well be a perpetual "war" against terror.

Under this same theory, Russia could justify the arrest of an American aid worker in Chechnya on

the grounds that Chechnyans are, in the eyes of the Russians, terrorists and that the American providing this aid was providing material support to terrorism. That American could be subject to indefinite military detention, trial, and, if convicted, even execution under the Russian military justice system. This is obviously not something that the U.S. would stand for, but this is the precedent set by the laws passed by Congress.

I want to end by highlighting what the President and many members of the administration have said many times, which I agree with as well: that the fight against terrorism is to a large part a fight for hearts and minds. If, in the process of fighting terrorism, the United States jettisons the very institutions it is fighting for in the name of swift, easy justice, then to a large extent the United States will lose that fight.

Kenneth Wainstein: Good afternoon. What I thought I'd do is give a bit of an overview of our counterterrorism efforts since 9/11; "our" being the United States government's terrorism efforts. If there's a theme to take from my remarks, it's that, over the last five years, by necessity, we have had to step back and look at some of our preconceptions, and some of the paradigms we've been operating under, sometimes for generations, and rethink them. We have had to make sure that the paradigms we work under actually fit the new circumstances of this war on terror. If we find they don't, we change them. We've had to do that many times; and that raises all sorts of questions. We just heard a set of questions raised about one of the paradigms that we've dramatically changed, and that's the establishment of military commissions as a way of trying people for terrorism crimes. That's prompted all sorts of questions, and that's good. I think it's a healthy process. This is a time of change. We have to meet our national security needs. But we've got to make sure we're doing so responsibly. And I think we are.

Before I run through what we've done the last five years, I think we've got to understand where we were before 9/11. You got a taste of that from Judge Karas's remarks, from his first-hand experience with some of those high-profile terrorism cases we tried. So, I'll put this simplistically: pre-9/11, our approach had much less focus on national security matters; much less public, political attention on terrorism as a major threat to our national security. Operationally, as Judge Karas alluded to, we took an approach that law enforcement operations and intelligence operations were distinct undertakings that were done pretty much independently of each other. That was by culture and by organizational setup. As Judge Karas mentioned, we had a wall that prevented information from passing, and coordination between, our intelligence assets and law enforcement operators.

I can speak to this personally, as a long-time federal prosecutor myself. Law enforcement followed a sort of traditional, linear approach to prosecution. We'd see there'd been a crime; think about how to build a case; go to the grand jury; get the charges; put them together; and get a conviction. That conviction was the end result; we were seeking a conviction. It was a very linear approach, which works very well for most of our programs. It is not the ideal approach, though, to counterterrorism. Our prosecutions before 9/11 had a preventive element, of course. Every prosecution we undertake has prevention in mind. But 9/11 changed everything. Overnight, there was an intense focus on easing unnecessary limitations on our counterterrorism, or preventive capacity, while retaining those limitations necessary to make sure operations remained within the constitutional and legal lines. The best example is what was passed 45 days after 9/11: the PATRIOT Act, which provided us with new authority, but mainly lowered the wall and actually mandated that information be shared between our criminal and intelligence agents.

Prevention became the watchword of our counterterrorism efforts. That was not just semantics. We had always looked to prosecution as a way of deterring and preventing. But Attorney General Ashcroft made clear that prevention was paramount; that we were going to use every asset, every tool we had to incapacitate terrorists, neutralize threats, and prevent 9/11 from happening again. We were able to do that as of October 25, 2001 because we had the PATRIOT Act, which allowed us to share information between our intelligence agents and our law enforcement folks, allowed them to work closely together. Let me take a second to tell you what that means. That means that if Ken Wainstein is identified in Wichita, Kansas as having ties with terrorists overseas—that he is picking up bomb-making materials, and looks like he is a threat—we make sure that we get all the information we can from

the intelligence community about him. We learn everything that intelligence has on him. We also have a prosecutor joined at the hip with the agents trying to run down the investigation. Now, it might happen that no criminal tool is ever used; that we never use a criminal tool at all. But, if it looks like Wainstein's about to pull the trigger and set off a bomb, we've got a prosecutor who's been thinking every step of the way about getting evidence to support a criminal charge so we can incapacitate him when we need to incapacitate him. It might be that we don't pull the trigger, that we just keep surveilling him to try to get as much intelligence as possible: to find out who his confederates are, et cetera. But, we have that prosecutor. And that is a fairly new innovation since 9/11, allowed by the PATRIOT Act. This is the purpose behind the new national security division, to have the prosecutor and intelligence assets working side by side.

This approach, the preventative approach, has been very successful, I think. We haven't had an attack since 9/11. That's attributable in part to the very good work of the U.S. government. But there are still challenges. One that I'd like to focus on Judge Karas talked about, which is the difficulty of trying some of these larger terrorist cases, especially terrorists brought in from overseas, in Article 3 courts. As he mentioned, most, if not all, of these cases involve large amounts of classified information. It is a very sensitive matter, how to handle that classified information—especially when the evidence is from foreign countries. The hearsay rule is also a tremendous problem in a lot of these cases. You might recover evidence from the battlefield in Afghanistan, or maybe from an apartment in Pakistan, and under our rules here, you're going to have to have the person who recovered that piece of evidence come into court and say, yeah, I got this disk, or I found this laptop, or I found this casing diagram. That's often very difficult when you're talking about recovering evidence from a war zone, and we're operating in theaters of war now overseas, and that's creating the evidence that's the basis for a lot of these cases.

As Judge Karas said, the ability to control the proceedings—international terrorism cases have a lot of—you know, difficult characters coming through there. These defendants are looking to use that as a soapbox, to get up in that trial and propound their terrorists views. And I believe that Al Qaeda manual that was recovered back in the late '90s, I believe that actually directs Al Qaeda brothers to do exactly that. If tried, use that trial as a way of spreading their Jihadist rhetoric.

And security is a huge problem. I think the Moussaoui case is an example. I've forgotten the number, but I saw the price tag that went in to just securing the courthouse, much less all the participants, and that's a huge, huge challenge, to do these cases on a grand scale.

So a military commission, of course, is one of the answers. Military commissions came online for a number of reasons, but they do address those challenges. In terms of allowing hearsay to be used in a fair way, and giving us a better way to control the proceedings, enhance security and avoid a lot of the disruption and expenses of ensuring that these trials are done securely. And also, obviously, classified information—they have rules that allow for the use of classified information, but also maintain the fairness of the proceedings.

So the bottom line that I'd leave you with is that we have had to really take a look at all these paradigms and rethink them all along the way. I've just ticked off a few of them. We used to think that terrorists would be prosecuted in Article 3 courts. Now we're looking at another option. I don't think it's an either/or thing. It's not going to be all one way or all the other, but there is a place for both.

We used to think that there had to be a wall between law enforcement and intelligence. That wall is gone, and nobody is advocating that it be resurrected.

We used to think that law enforcement and intelligence operations couldn't be integrated, and now we have prosecutors and intelligence agents working side-by-side.

We used to think that the FBI was and should be primarily a law enforcement agency, that it should focus on the John Dillingers out there in society. Now you have an FBI with, I can't remember how many, but hundreds of analysts and reports officers, producing quality intelligence products in a way that it never did before. We used to think that the DOJ organization was set in stone; it had been set in stone for generations and would never change. Now we have a National Security Division, a radical change.

And as a prosecutor, I think I am as good an example as anybody. I always thought of the prosecution as sort of the end result. That's what you did. There was a crime, you prosecute, get a conviction, get a pat on the back, and go on to the next one. Now I see that prosecution is merely one tool in the toolbox, one weapon in our arsenal, to prevent terrorism. And whether it is using the spitting on the sidewalk approach in prosecuting someone for credit card fraud or visa fraud or something relatively minor, or if it's doing a full-blown terrorism prosecution, *a la Moussaoui*, it doesn't matter. Prosecution is a way of incapacitating someone to prevent that person from carrying out or supporting others who are carrying out attacks. And if prosecution is not the best way of doing that, then another option should be pursued.

So, these are all ways we had to rethink our approach, and I think that's been healthy. Re-examination, I think has been a creative process. It's one that we're still—that's still ongoing today as we evolve our operations to meet the evolving threat. I think it's a process that's been good for the country and good for our national security.

Thank you.