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CONFERENCE  
PROCEEDINGS

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# The Challenges of Trying Terrorists as Criminals

Proceedings of a RAND/SAIS  
Colloquium

James Renwick, Gregory F. Treverton



CENTER FOR GLOBAL RISK AND SECURITY

International Programs at RAND

The conference proceedings described in this report were co-sponsored by the RAND Corporation Center for Global Risk and Security, and by the Merrill Center for Strategic Studies of the Paul H. Nitze School of Advanced International Studies (SAIS).

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## **PREFACE**

This workshop was co-sponsored by the RAND Corporation Center for Global Risk and Security and by the Merrill Center for Strategic Studies of the Paul H. Nitze School of Advanced International Studies (SAIS) in Washington, D.C. Held in Washington in January 2008, it brought together a distinguished group of specialists, from the United States, Australia, and Britain - combining specialists in strategy and intelligence with lawyers, prosecutors, and judges - to discuss the challenges of using criminal trials as one instrument in combating terrorism.

The new Center for Global Risk and Security is part of International Programs within the National Security Research Division at the RAND Corporation. It aims to improve public policy by providing decisionmakers and the public with rigorous, objective research on critical policy issues affecting global threats and security - with a special focus on the "newer" dimensions of security that cut across traditional domains, such as strategy, technology, health, and justice.

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The Paul H. Nitze School of Advanced International Studies is a leading graduate school of international affairs, educating students for professional careers in government, business, journalism, international law, and nonprofit organizations. Founded in 1943 by Paul H. Nitze and Christian Herter, SAIS has been a division of The Johns Hopkins University since 1950.

The Merrill Center for Strategic Studies operates as an academic program at SAIS and as an independent research center. Beyond the SAIS academic program, the center has two missions: improving the quality of teaching in the national security field and bringing together historically grounded scholarship and policy analysis. To further its second mission, the Merrill Center hosts senior fellows at the school from government, academe, the military, and journalism. In 2007, the Merrill Center hosted Dr. James Renwick as a visiting scholar to organize and conduct the Terrorism Trials Colloquium. Both RAND and SAIS express their gratitude to Dr. Renwick, who was the driving force behind this colloquium.

**PROCEEDINGS OF THE SAIS/RAND TERRORISM COLLOQUIUM**

**JANUARY 2008, WASHINGTON, D.C.**

Because of the asymmetric effects of many terrorist acts, the public and the press ensure that governments place a very high value on the prevention of terrorism. But dealing with terrorists is problematic for the executive branch, charged as it is with protecting the public. As Alexander Hamilton put it in the Federalist Papers: "Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates . . . to be more safe [nations] at length become willing to run the risk of being less free." Certainly, if they consider it is not possible for terrorists to be convicted, governments will consider

- changing criminal procedures and truncating the rights of accused terrorists to facilitate convictions
- detention without trial
- rendition (in all of its senses)
- military or paramilitary solutions
- specialist courts or tribunals.

Most if not all of those responses may infringe the rule of law. Equally, there is much at stake for the judicial branch in this context. Thus, when terrorism charges are brought, courts must strive to balance the rights of the parties, particularly the accused, on the one hand and national security on the other. Special and sometimes unique questions that arise in such cases include justiciability, deference to the other branches of government, admissibility of evidence, prosecutorial duties of disclosure, and the effect on the press and on public confidence of any departure from open justice.

These issues, which are at the heart of public debate in the United States and a number of ally nations, require continued and close attention. An interdisciplinary colloquium held in January 2008 in Washington, D.C., considered some of them. A feature of the conference was the bringing together of lawyers (including judges, prosecutors, and human rights and international lawyers), strategists, terrorism experts, and intelligence, and law enforcement officials. International representatives also attended, bringing perspectives of U.S. allies, notably, the United Kingdom and Australia, to the debate. A summary of the course of discussion follows.

The following key points emerged:

- Radical Islamist terrorism will remain a constant threat to the West for years to come. Its protean nature challenges the West to find the right level of response. Although it is wrong to underestimate it, the threat does not warrant the same response as would be required in the case of a war of national survival. Instead, a sophisticated and long-term campaign is called for - and for democracies such as the United States, the United Kingdom, and Australia, which pride themselves on adherence to the rule of law, principled and lawful targeting, apprehension, and trial of suspected terrorists must be a centerpiece of any such strategy.
- Law enforcement and intelligence agencies have been greatly challenged in this campaign. Well-disguised terrorist cells (which tightly hold intelligence to themselves) are hard to detect before attacks. There is also enormous political pressure (stemming in part from the assumption that all attacks are preventable) to stop attacks at an early stage. These factors may lead to premature arrests or destruction of suspected terrorists, which in turn may
  - a. leave significant groups largely intact and lethal
  - b. render successful prosecution impossible



- c. limit the collection of circumstantial information of high value to the intelligence community
  - d. provoke disputes between law enforcement and intelligence agencies, both within and among nations as to which organizations' missions have primacy
  - e. and, for all of those reasons, cause significant political repercussions.
- The central legal questions to emerge at the colloquium concerned how to try suspected terrorists, against what laws, by what court or tribunal or commission system, and with what procedural and evidentiary safeguards. Significant differences on these questions emerged, as will appear below. Although the colloquium did not come to a final conclusion on these questions, all present seemed to agree that the sophisticated interdisciplinary discussion that took place on the day was both innovative and productive.

A summary of the proceedings now follows.

**Session One: Setting the Scene - The Strategic Perspective**

*Law does not operate in a vacuum but rather is part of a broader strategic approach to counterterrorism in the next decade. To understand that framework better, the colloquium began with presentations involving terrorism experts and leading strategic analysts.*

**The Nature of the Threat:** Six years ago, 19 terrorists hijacked four airplanes and changed the course of history. The West underestimated the capabilities of Al Qaeda then and continues to do so. For instance, until recently, Al Qaeda was frequently described as in retreat or, in the words of President Bush, "on the run." As the National Intelligence Estimate released in July 2007 revealed, however, nothing could be

further from the truth. Any doubt that the threat of Al Qaeda had receded was shattered in August 2006 with the arrest of 24 suspects in and near London - a fresh reminder of how vulnerable the West still is to attack.

Al Qaeda today is on the march and not on the run. It has regrouped and reorganized since the setbacks meted out by the United States and its allies after 9/11. When it was denied sanctuary in Afghanistan, it moved to a new sanctuary in Pakistan and is now marshalling its forces to continue the war Osama bin Ladin declared 10 years ago with his fatwa. In this respect, Al Qaeda is functioning just as its founders envisioned, as both an inspiration for home-grown terrorists and an organization directing terrorist attacks. It simultaneously summons a broad universe of like-minded extremists to violence, while still providing guidance and assistance for more spectacular terrorist operations.

Al Qaeda continues to display its core operational capabilities. What has been learned since the 2005 London train bombings illustrates this threat. Initially, British authorities concluded that attacks were the work of self-radicalized and self-selected British Muslims, operating entirely within their own country. It is now known that the group was in contact with other radicals and extremists in Britain before the attack, that two of the individuals were trained at terrorist training camps in Pakistan, and that they received advice and direction from jihadis in Pakistan leading up to the actual attacks. The 2005 attack was not the result of an organic, home-grown radical movement; rather, Al Qaeda involvement has become clear.

The 2006 airline plot is especially disquieting because the attack was against arguably the most hardened target - international commercial aviation - and not against a soft target such as a commuter train, as might be expected from an organization in retreat. It furthermore calls into question the ability of government policy to deter terrorist attacks. Publicly released sections of the 2006-2007 U.S. National

Intelligence Estimates got it right - the West is as vulnerable as ever. Rather than an Al Qaeda resting in peace, we face an Al Qaeda that has risen from the grave.

**Major Policy Implications:** The core nature of the struggle against terrorism is difficult to categorize. In one respect, Al Qaeda represents a backlash against globalization, and there is evidence of a global insurgency, but there also exist elements of civil war, of asymmetric warfare, and even of anarchism. At the top, bin Ladin fulfils the role of commander in chief over regional Al Qaeda franchises with loose ideological ties. These people are neither standard criminals nor standard combatants but rather a new sort of network.

There are many risks to the West in its war with Al Qaeda. It is at risk of major direct attacks, including attacks with weapons of mass destruction. Radical jihadists threaten the West with innovative use of conventional means to cripple Western economies and societies. There is also a danger that Western societies might become exhausted in their fight against terrorism and that Western civilization itself might become discredited if its tactics and strategy alienate foreign countries, especially in the developing world, leading to conditions more favorable to the establishment of a caliphate and new terrorist strongholds.

The three main (counterstrategy) options might be described as neo-maximalism, neo-minimalism, and neo-realism. Neo-maximalism presumes that terrorism is the West's most dire threat and that it needs to strike terrorists and terrorist-supporting states globally until they are defeated. There are problems with this approach. The standard tool security kit is poorly suited for this strategy; neither conventional armed forces nor police responses are ideal. There are also difficulties in sustaining an intensive struggle of such high intensity, especially in maintaining public support. There is a danger of exhaustion, especially regarding Western society's willingness to accept casualties.

A second strategy, neo-minimalism, is the idea that terrorism does not pose a threat to the West's existence; because in the end it cannot lose the battle with jihadists, the West should be more sanguine and let its soft power work. There are problems with this approach as well. The threat of new terrorist attacks is real, and very serious new attacks are probable, perhaps even certain. Soft power has a role, but it needs to be sharpened and tailored to deliver meaningful effects in destabilized or failing states and is best employed in partnership with other instruments. Furthermore, most of the world is looking to the West for leadership in responding to global terrorism.

There is then the middle ground of neo-realism, the idea that terrorism is a serious threat but one to be managed by working with state and nonstate actors to marginalize terrorist perpetrators and then arrest or destroy them. This will be a long struggle with the possibility of exhaustion. To enact a responsive and vigorous long-term strategy, both whole-of-nation security planning and operational responses that cut across bureaucratic boundaries are needed. Operations need to be information(media)-led, and much of the Western effort needs to be focused on building up and enabling local allies to win, while minimizing the Western faces in front-line roles in Islamic states. Campaigns themselves will need to be tailored closely to fit local circumstances.

If neo-realism is the right response, the tools and instruments that will be most appropriate are

- intelligence-led operations
- information (media) operations
- coalition and capacity - building with a focus on cooperation at all levels
- (often) law enforcement led with military back-up
- where appropriate, nation-building with wide ranges of civil skills on tap under local command, such as construction,

education, health, banking, business, and public administration.

How then to develop and sustain an effective counter-offensive? First, the core nature of the threat must be clarified and a global campaign plan developed and explained. In states that are under threat, cultural and language skills in key theaters must be acquired, and personal relationships with local figures must be strengthened. Whole-of-nation campaign commanders must be trained and task forces established with a view to tailoring regional and local campaigns to local circumstances, while coordinating with close allies and friends.

#### **Session Two: The Intelligence and Police Perspective**

*Although both intelligence and law enforcement agencies strive to prevent terrorist acts, their methods and subsidiary aims sharply diverge and do so in a way that can have consequences for later trials. This session involved leading intelligence and law enforcement officials discussing the ways in which the new threat of Al Qaeda differed from the Cold War "main enemy" threat (the Soviet Union) and the difficulties that poses for intelligence agencies, the imperfect relationship between police and intelligence agencies, and the compromises that must be made between liberties and security as democracies battle this threat.*

Al Qaeda differs greatly from the Cold War adversary that the modern intelligence community was designed to face. The Soviet threat was stationary, observable, and conventional, and its tools included tanks, planes, missiles, and bombs. Al Qaeda, on the other hand, is agile, unconventional, and stealthy and wages war with Microsoft, machetes, AK-47s, and tribal drums. Its threat is exacerbated by three global trends: increasing urbanization, demographic trends that include a growing Muslim population and a declining European one, and the quickening pace of cheap, easily accessible technological development that empowers individual actors.

These developments have further shaped the ways the intelligence community thinks about its targets. These intelligence targets have shrunk from armored divisions moving in Eastern Europe to small packets of data traveling across cyberspace. In the Cold War, the issue for agencies was a shortage of data; now there is a glut (every few hours the National Security Agency collects enough electronic data to fill the Library of Congress), making it difficult to separate the wheat from the chaff, the meaningful signals from the background noise. The level of secrecy of the new adversary has also increased, making Al Qaeda terrorist cells (which are compartmentalized, each involving only a few individuals) difficult to penetrate, especially when compared to the potentially thousands of Eastern Bloc diplomats, technicians, soldiers, and officials who all had access to sensitive information during the Cold War and were far more visible intelligence targets. The information that is collected also must be more precise than before, since the tip of the spear (the military response) that intelligence helps aim against the adversary has been sharpened tremendously; instead of B-17s, the United States launches precision-guided cruise missiles or small Delta Force Teams.

The goals of intelligence agencies regarding terrorists are detection, prevention, and disruption. The intelligence necessary for such operations thus differs from the evidence required for the pursuit of criminal convictions. Although the Federal Bureau of Investigation assembles information accurate enough to be used as evidence in a court of law, intelligence agencies cannot provide such certainty; rather, they aim to assemble information that is accurate enough to be used to detect patterns and produce more intelligence. A "natural tension" thus exists between police work and spy craft. Intelligence officials also find themselves in cases requiring quick decisions for which they may not have time to consult legal authorities; for example, should a suspicious terrorist target be permitted to board a commercial plane?

Just as the intelligence agencies are engaged in post-Cold War reform, police agencies are also moving from reactive policing (arresting

criminals after a crime is committed) to prevention. Nevertheless, for many police, terrorism simply remains a crime and its endgame is prosecution.

But there remains tension between the aims of prevention and prosecution, the most acute of which is when to make arrests when a terrorist group is under observation and is planning an attack. Obviously, the great risk in letting the planning go forward in the hope of learning as much as possible about a particular group is that the attack may succeed. Yet when authorities rush to prevent the attack with early arrests, they not only may have missed out on identifying the rest of a terrorist cell, they also may only have a circumstantial case against those arrested, and one that may fail in court. All the while officials face huge pressure from the unrealistic expectation of the public and the press that police agencies can both prevent and prosecute successfully all terrorists.

Another difficult facet of prosecuting terrorism cases is the evidence itself, which is usually staggering in volume, encrypted or in a foreign language, and often sensitive if not classified material, especially intelligence that the police agencies do not have the authority to share. In some cases, evidence from third nation agencies could not be shared for fear of risking key operational relationships.

Solutions were suggested to help the handling of this sensitive material and increase the judicial system's understanding of the difficulties involved. The working relationship between law enforcement and intelligence agencies needs constant work, along with guidelines clearly delineating responsibilities. Capabilities of the judicial system for handling material must also be increased, including more education for judges and prosecutors and new, more secure courthouses. The media also plays a crucial role here and should be better engaged to manage leaks. The relationship between the intelligence community and the police and prosecutors is essential, although in truth they are not naturally compatible partners.

The fight against terror can place liberal democracies in ethically difficult positions. One irony is that, in this fight, democracies have become more dependent on third party countries operating under laws that they would criticize under different circumstances, such as the strict internal security laws of some Asian nations with which civil liberties-minded Western nations would otherwise take issue. Liberal democracies must ask themselves whether they should themselves enact laws to better detect and then convict terrorists, while accommodating the challenges that come with the risk of the abuse of new powers conferred by those laws, or whether they value their own sense of purity more and decline to confer new powers and hope terrorists are captured elsewhere. The struggle against terrorists clearly requires the development of tough laws empowering security agencies to better accomplish their mission, although these must include tight accountability arrangements. Intelligence agents want to do their job well and they yearn for clarity in what they are able to do. These are difficult issues for any democracy, but the time to engage with them is now in this quiet period where some time has passed since the last terror attack. Those concerned with civil liberties must know that laws passed in the aftermath of an attack will be much more extreme than the practical and well-reasoned security laws passed during the calm before it.

### **Session 3: The Prosecutors' Perspective**

*In deciding whether to charge suspected terrorists, and in conducting their trials, prosecutors have difficult choices to make while maintaining proper standards of conduct. The first question, however, is how and in what context terrorists should be prosecuted. Powerful arguments exist for both the creation of specialized courts, or military commissions, to try only international terrorists or, alternatively, for denying terrorists the special status that such specialist fora would afford them.*



**The Case for Specialized Terrorist Courts in the United States:** Many pre-9/11 terrorist cases were successfully prosecuted in the civilian criminal justice system, notably in the cases of the first World Trade Center bombing, the U.S. embassies bombed in East Africa, and the disrupted Day of Terror and Manila air plots. Despite this remarkable success rate, trying terrorists as ordinary criminals, particularly those captured on foreign battlefields, is not an effective counterterrorism strategy. Terrorist prosecutions involve specific challenges that the U.S. civilian criminal justice system is ill-equipped to address and that can be more effectively dealt with by a specialized court.

The criminal justice system is not the method that should be used to combat international terrorism. A host of jurisdictional and evidentiary impediments allows American prosecutors the opportunity to reach only a very small fraction of the world's terrorists. Even in cases where U.S. courts would have jurisdiction, there will rarely be enough admissible or usable evidence to convict the accused beyond a reasonable doubt, and the U.S. civilian criminal justice system has no provision for detention of terrorist suspects unless they are awaiting trial for a criminal offence or have been convicted. (Of course, those in the United States who are not citizens may be subject to immigration detention, and even citizens may be subject to "material witness" detention.) The extremely open U.S. criminal justice system cannot afford adequate protection to the classified information necessary both to prosecute and to defend in terrorist trials. Charges are often dropped or cases dismissed entirely to protect sensitive information, and even when cases are seen through to completion, information useful to terrorists about counterterrorism methods and procedures cannot help but make its way into the public record. Further, civilian courts do not provide adequate physical security to ensure the safety of all parties involved. Finally, criminal prosecutions have an extremely limited deterrent effect on international terrorists, if such an effect exists at all.

The civilian criminal justice system is not the only fair and constitutional system conceivable. A specialized terrorist court could both be constitutional and adequately protect the interests of the accused by allowing them, for example, controlled access to information and witnesses whom, for national security reasons, they could not have engaged if they were tried in the civilian criminal justice system. Further, a specialized terrorist court could provide the increased physical and information security required to protect the parties and national security; for these reasons, specialized courts are required to ensure that these enemy combatants are brought to justice.

**The Case for Prosecuting Terrorists Within the Civilian Criminal Justice**

**System:** The alternative view, strongly supported by the English experience, is that the conventional criminal justice system can and does adequately address the problem of international terrorism. In terms of size, length, and complexity, terrorist trials are no different from other trials, including trials involving organized crime, with which the criminal justice system regularly contends. Terrorist trials do present specific challenges; however, these issues can be effectively addressed within the existing framework of the criminal justice system.

Prosecutors and law enforcement agencies do continue to face excruciatingly difficult decisions over when to disrupt a terrorist plot, balancing the need to collect as much evidence and intelligence as possible against the need to minimize the risk the plot poses to public safety. A strong trilateral relationship between prosecutors, law enforcement, and the intelligence community is therefore necessary to ensure the best possible outcome in terrorism cases.

Significant legislation has been passed in both Australia and the United Kingdom to ensure that the civilian criminal justice system can adequately address the challenges posed by terrorist trials. Although a major difficulty encountered in prosecuting terrorists is the need to ascribe criminal liability before the actual terrorist act has been

carried out, to prevent the significant destruction and loss of life that are the terrorists' objectives, laws have been passed criminalizing preparation for terrorist acts even before a final target has been determined.

New legislation has also been enacted to ensure that classified information is adequately protected. Of course, information should remain classified only if it is absolutely essential to national security; and openness in the process through which terrorists are brought to justice is essential for public confidence in the outcome. Open justice is part of the heritage of the common law system in the United States, Australia, and England.

The best way to ensure that terrorist trials are legitimate and meet with public approval is to prosecute terrorists as "ordinary" criminals within the civilian criminal justice system. Any plausible argument that terrorists have been deprived of due process of law provides them with a legitimate grievance and a justification for their actions; it also generates public sympathy for them. Affording terrorists an elevated status by prosecuting them in a specialized court also provides them with increased credibility and legitimacy in the eyes of the public. The best possible outcome in a terrorism case can be achieved by using the same methods and procedures as would be used in any other criminal case.

#### **Session Four: The International Lawyers' Perspective**

*International law is of considerable importance in dealing with terrorists, including the choice of whether to treat them as military targets, or to apprehend and hold them (and if so for what period of time and under what conditions), or to apprehend and try them (and if so by what method, before what tribunal or court, using what evidence, and against what standard of proof).*

**Finding a System That Works:** Today, there is a much greater understanding among the international community that criminal humanitarian rules are not well-suited to dealing with international terrorism. However, the idea of using military commissions or other specialized commissions to try terrorist subjects continues to face criticism.

One question often posed is "why are criminal courts not used to try suspected terrorists?" First, there is sometimes grave difficulty in establishing criminal jurisdiction over these individuals. Thus, the vast majority of those detained in Guantanamo Bay, for example, had not violated a law that was on the statute books at the time of their arrest. Second, there are real practical problems of trying and prosecuting terrorists who have been captured thousands of miles away. Relevant witnesses and evidence are likewise thousands of miles away, and soldiers in contrast to trained police cannot be expected to act as evidence collectors.

International law gives little guidance on how to try suspected international terrorists. Questions remain regarding what legal framework is most suitable for detaining or trying terrorist suspects.

Before November 2001, there was the expectation that Nuremberg-like trials could be held relatively rapidly, but this has not turned out to be a simple task. The use of Courts Martial was considered, but these are intended to be used against soldiers who function within a chain of command. Although military commissions have a long history in the United States, there were problems with the way they were first implemented in Guantanamo Bay. In 2006, following the decision of the United States Supreme Court in *Hamdan v. Rumsfeld* (548 U.S. 557, 2006), a law was passed that rectified a number of the particular problems with them. It has been a difficult process, but these are the growing pains of developing a system that works for this new challenge.

**The Conversation on Ethics and Morality:** New norms are evolving in the area of international law regarding the apprehension and detention of terrorist suspects. Until recently countries were considered completely sovereign, but the idea that a country can intrude on a state harboring terrorists is gaining acceptance even within the European legal community. The idea that it might be appropriate to use military force against terrorists is also gaining new acceptance.

There are moral issues regarding the detention of terrorist subjects or the use of force against them. For instance, although it is unacceptable to arrest people without probable cause, it is unclear what must be demonstrated to legitimize an attack against a terrorist combatant, especially if that combatant does not wear a military uniform. Also, even though it has long been the case that captured combatants may be detained until the end of a conflict, there is no consensus on whether nation states can hold prisoners indefinitely in a war in which there is no end in sight (and no one to negotiate a peace treaty with). Another issue is how to determine the identity of captured individuals as unlawful combatants. There is currently no trial process to determine such, and there has yet to emerge a consensus on what is an ethical, moral way to discern such identity. There will likely be dissatisfaction for those who want certainty "beyond a reasonable doubt," but we should also take care not to require an unattainable burden of proof.

Finally, there are real interoperability issues between systems. Before 9/11, only attacks on a state's own territory could be prosecuted, but arguably this has changed. There are also issues involving turning over suspects to death penalty states. However, now that the international community is realizing the extent to which they are threatened by the globalization of certain organizations, there is beginning to be some convergence of view on these issues. It is unfortunate that the debate has become politically polarized to the extent it has. The challenge to those who work in human rights organizations is to propose positive solutions.

**Administrative Detention Under a Wartime Paradigm:** International law does not tell us much about when and by what procedures a state may detain people, outside the context of detaining someone suspected of a criminal offense. The Third and Fourth Geneva Conventions and Article 75 of Additional Protocol I provide some limited procedural guidance during armed conflict but few clear rules about who may or may not be detained. In particular, there is little international law relating to the detention and trial of individuals (who are not clearly part of a national army) captured in a non-international armed conflict (including members of Al Qaeda). The International Committee of the Red Cross has acknowledged this. Nor does international law tell us much about when a state should choose to try people. In this field, international law provides most guidance about what procedures a state must use when conducting criminal trials, including rules related to due process.

In the absence of clear guidance in much of the law, it is useful to return to first principles: Why are we detaining, and why are we trying? The goals we are trying to achieve in the military commission trials at Guantanamo Bay are similar, but not identical, to the goals of ordinary criminal trials. Convictions following trials will link people to specific acts and let them defend themselves; they may provide closure for victims' families; and they will involve public condemnation of the horrific acts of which the detainees are accused. Trials also reflect an interest in keeping these individuals off the battlefield, which is a key goal of administrative detention as well. However, the U.S. legal theory of wartime detention would permit the United States to hold individuals even if they are acquitted, a controversial idea (and one that does not fit in a conflict that is not between nation states). The push to hold trials for detainees at Guantanamo Bay reflects, at least in part, a higher level of comfort with trial rules over detention rules as well as a lack of understanding or even rejection of the theory that the United States can hold anyone without trial, whether or not the person is captured in a war.

The bottom line is that military commissions may achieve some, but not all, of the goals set for them. But there will be cases in which it is not possible to try people (for example, because the only evidence is classified). For this reason, some have called for a new long-term security detention system. If that happens, we might explore those areas in which we are more comfortable with trial rules than existing detention rules and import some of those concepts into that new detention system. One would want to define tightly the category of people who might be detained. Procedurally, one might start with the core procedural detention principles in the Fourth Geneva Convention and add in a role for the courts. With such a system, it would be possible to establish careful identification procedures to link people to specific acts, provide greater transparency to the public about the rules, and close the legitimacy gap by having Congress and the federal judiciary involved.

#### **Session Five: The Judges' Perspective**

The panel on the courts concluded that terrorists (in the traditional sense, not unlawful combatants caught on foreign battlefields) could be tried in criminal courts but not without significant problems. The most practical problem is the need for classified information in these trials. United States law concerning the use of classified information provides more practical tools and procedures for the judges handling these cases than does Australian law. However, in both systems (which usually have a strong presumption of open justice), judges find themselves involved in complicated and lengthy procedures to guard sensitive information, while searching for creative ways to streamline the process.

Defendants in terror trials require access to the evidence against them to mount a credible defense. Unfortunately, this creates the danger of identifying sources and methods of intelligence to the suspect, making the use of this information the biggest practical problem with trying

terror suspects in criminal courts. Thus, complex and thorough procedures have been enacted to govern the use of sensitive information in trials, most notably in the United States through the Classified Information Procedure Act of 2001. The goal of the law is to allow courts and the parties involved to identify in advance of the trial the classified information to be disclosed at the trial so that steps can be taken to reduce the danger of its misuse by the defendant. The information to be disclosed can thus be substituted or redacted for use by defense counsel. The difficulty in this lies in the fact that both parties must identify jury arguments, tactics, testimony, etc., before the trial even begins. The government can redact information that the defendant requests, but the judge ultimately holds the power. Further complications arise in jury cases with sensitive witnesses. In one case, a judge allowed a covert operative to testify as a witness but with his identity protected by a screen and an electronic voice scrambler. For defendants who need to interview sensitive witnesses, a process involving Department of Defense lawyers as surrogate questioners has been employed.

With terror trials, circumstances often create problems beyond the control of the authorities, such as when testimony is disallowed because of the procedures by which third countries obtained it. Such issues reinforce problems that confront investigators even where these third party countries are being cooperative. Apparently innocuous material may have security implications and must be protected, creating further friction.

Australia has passed its own law governing the handling of classified information, the National Security Information (Civil and Criminal Proceedings) Act. The process thereby established still needs refinement, since the act does not mandate that issues be dealt with pre-trial; it relies instead on the goodwill of counsel to deal with issues as they arise. Defense counsel naturally want to protect their strategies and not divulge tactics and arguments before the trial. Thus, thorny issues involving classified information arise throughout



the trial, potentially grinding it to a halt, fragmenting the trial process, creating disruptive interlocutory appeals, or requiring closed court hearings, which can prejudice the jury. Australian judges thus aim to hold as much of the debate over classified information as possible before the trial. Should questions arise mid-trial, one creative solution employed to maintain the pace of the trial instead of recessing to clear every bit of sensitive information involves having classified answers to questions that arise be written down and cleared by the Attorney-General en masse. The Attorney-General, the ultimate clearer of information, can place his own counsel in court as well.

In addition to the American and Australian systems, we can look at the experience of international war crimes tribunals for help in designing and conducting terror trials. The International Criminal Tribunal for the former Yugoslavia has encountered its own difficulties and inefficiencies, especially when procedural arguments are made that could have easily been covered in pre-trial proceedings.