2006

Issues in Article III Courts

Debra A. Livingston
Columbia Law School, livinstn@law.columbia.edu

PANEL REPORT: ISSUES IN ARTICLE III COURTS

*Debra A. Livingston**

INTRODUCTION

Cases implicating classified information can pose difficult legal issues for Article III courts, and these issues may well grow more complicated and arise more frequently as the global war on terror continues. The manner in which these issues are resolved has profound implications for the national security, for the procedural rights of litigants, and for the public's ability to scrutinize legal proceedings. Indeed, the expanded use of secret evidence in Article III courts may raise questions about the very character of the courts themselves. Is there a point at which the demands placed upon these courts, pushing them in the direction of considering evidence and submissions from both adversaries in less than a fully adversarial and public way, threaten the courts' essential character or even their constitutional role? Are Article III courts equipped to deal with terrorism-related cases that implicate national security information?

The panel convened to discuss the use of secret evidence in Article III courts was expert in every sense of the word. Presenting the judicial perspective on these issues was Judge Gerald E. Rosen from the United States District Court for the Eastern District of Michigan. Judge Rosen has presided over a number of cases implicating classified evidence, including most prominently the prosecution of Karim Koubriti, Ahmed Hannan, and Abdel-Ilah Elmardoudi, for conspiracy to provide material support to terrorists, conspiracy to engage in document fraud and document fraud. Following the defendants' convictions in this highly publicized, post-September 11 case, the Government, confessing error, moved to dismiss the terrorism-related charges and acquiesced in a new trial on the document fraud charges, based upon the prosecution team's failure to produce material exculpatory information. Judge Rosen found that the Justice Department's prosecution team had materially misled the court, the jury and the defense as to the nature, character and com-

* Paul J. Kellner Professor of Law, Columbia University Law School, J.D., Harvard Law School. Professor Livingston served as the panel's moderator and, in that capacity, has prepared this summary.

plexion of critical evidence. The prosecution had withheld classified material that was "clearly and materially exculpatory," in Judge Rosen's words. *Koubriti*, the first major terrorism-related case tried to jury verdict post-September 11, ended up in its post-trial phase presenting the court with "a confounding maze of complicated and interrelated issues" that required Judge Rosen to sift through large amounts of classified material in his effort to assess how the nondisclosure of secret evidence had undermined the trial process.[1]

The next speaker, offering the prosecution's perspective, was Andrew C. McCarthy, a senior fellow at the Foundation for the Defense of Democracies and a prolific and oft-cited commentator on counterterrorism issues in *National Review*, *Commentary*, and numerous other publications. Mr. McCarthy was an Assistant United States Attorney in the Southern District of New York for eighteen years, during which time he was centrally involved in each of the major terrorism cases prosecuted by that office in the decade before September 11. Mr. McCarthy led the successful 1995 prosecution of Sheik Omar Abdel Rahman and his eleven co-defendants for their roles in connection with the 1993 World Trade Center bombing and a conspiracy to destroy the Lincoln and Holland tunnels as well as to launch simultaneous attacks on the United Nations headquarters, the George Washington Bridge, and the FBI headquarters in New York. Following the September 11 attacks, he supervised the Southern District's Command Post near Ground Zero. Mr. McCarthy also served as a Special Assistant to Deputy Secretary of Defense Paul Wolfowitz.

Joshua Dratel spoke about secret evidence from the perspective of the criminal defense lawyer. Mr. Dratel has practiced criminal defense law in New York City for over twenty-four years. He served as President of the New York State Association of Criminal Defense Lawyers in 2005; he is also co-chair of the National Association of Criminal Defense Lawyers' Select Committee on Military Tribunals. Mr. Dratel was a lead defense attorney in the Southern District of New York prosecution of al Qaeda conspirators involved in the 1998 bombings of the American embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. He has written and lectured widely on terrorism-related issues, including issues connected to the Classified Information Procedures Act ("CIPA"),[2] the principal law governing the use of classified evidence in

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[1] United States v. Koubriti, 336 F.Supp.2d 676 (E.D. Mich. 2004).

[2] 18 U.S.C. App 3, §§ 1-16.

criminal prosecutions. Mr. Dratel is co-editor, with Karen J. Greenberg, of *The Torture Papers: The Legal Road to Abu Ghraib* (Cambridge University Press 2005), a compendium of post-September 11 Government memoranda on interrogation techniques.

Nancy Hollander was the final speaker. Ms. Hollander, named as one of America's top fifty women litigators by the *National Law Journal* and listed in *The Best Lawyers in America*, is a nationally known and respected criminal defense attorney and a past president of the National Association of Criminal Defense Lawyers. For the panel, however, she focused on her significant involvement in terrorism-related civil litigation implicating secret evidence. Ms. Hollander has played a central role in the representation of Guantánamo detainees. She has also represented the Holy Land Foundation for Relief and Development in connection with its suit, against the United States, challenging the Foundation's designation as a terrorist organization and the consequent blocking of its assets. Ms. Hollander has served as counsel in numerous high-profile cases implicating secret evidence, including the defense of Wen Ho Lee. She is expert in CIPA as well as the Foreign Intelligence Surveillance Act ("FISA").[3]

I. THE PANEL PRESENTATIONS

A. *The Judicial Perspective*

Judge Rosen was the first panelist to speak. He took on the task of framing the issues for the panel as a whole. Judge Rosen began by focusing on the logistical problems that confront Article III courts when a case implicates classified information. He then went on to talk about the constitutional and evidentiary issues that can arise. At the start, however, Judge Rosen noted that cases involving national security secrets "don't come with navigational charts," so that in many instances the participants in the case "find themselves in uncharted water seemingly without a paddle."

On the subject of logistical problems, Judge Rosen began by noting that the first question to be confronted in a "secret evidence" case seems simple but is in fact quite complex—namely, the question to what extent classified information will be involved at all. "Although this may seem to be an easy issue, it's not," he noted. Even the Government may not know at the outset of a case whether classified information will be

[3] 50 U.S.C. §§ 1801-1862.

extensively employed. The case "is certainly a moving target as it develops, and certainly through discovery." Judge Rosen advised that when there is the remotest chance that classified information will be implicated, the judge should immediately convene a conference of all counsel so that potential logistical problems can be discussed.

Judge Rosen identified a range of issues to be covered at such a meeting. To what extent are counsel familiar with CIPA's provisions and obligations? Will it be necessary for members of the prosecution and defense team, as well as court staff, to obtain security clearances to review classified information? If so, this process needs to begin immediately, as it can otherwise cause delay. Another logistical issue is whether the anticipated classified information is classified at such a level that it is required to be maintained in a Secure Compartmented Information Facility ("SCIF"). When material that must be used by the court and by the lawyers in a pending case must be maintained in a SCIF, there is the potential for further delay during a SCIF's construction. There are also logistical challenges about affording sufficient access to the material. Judge Rosen advised that the parties need to develop protocols for handling classified information and for litigating privilege claims early on in the proceedings.

Judge Rosen then moved on to address the "extremely daunting" substantive and procedural issues that arise once classified information has become a part of the litigation. First, he spoke about material for which the Government may claim a national security privilege: "CIPA prescribes a privileged log approach in which the Government simply describes in a very generic sort of plain vanilla way documents for which national security privilege is claimed." Judge Rosen noted that general descriptions of this type may be necessary to protect the information for which a privilege is claimed. At the same time, the generic quality of such descriptions can make it very difficult for defense counsel or the court to evaluate the significance of the material to the case and, in particular, whether an item might constitute material exculpatory information that is required to be produced pursuant to *Brady v. Maryland*[4] and its progeny. Judge Rosen observed that the Government is also poorly positioned to evaluate whether the material falls within *Brady*'s due process command. The prosecution team cannot fully anticipate the defense case, so as to know how the classified material might potentially be used in the presentation of a defense.

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[4] 373 U.S. 83 (1963).

Another problem concerns the difficulties of "scrubbing"—taking classified information that cannot be revealed in court and redacting or modifying it in various ways so that it can be used. Judge Rosen noted that sometimes it is possible to redact portions of classified material so that the remainder can be employed in open court. But it is often quite difficult to do this, and it can require an enormous expenditure of time—often time spent in negotiation between the prosecution team, which may want to use the material, and various elements within the intelligence community, which may be highly skeptical that the material can be adequately "scrubbed." Judge Rosen noted that it can also be very difficult to ensure that in the process of "scrubbing," the defense team is still afforded sufficient opportunity to raise legitimate questions about the nature of the material or its source before the jury. In Judge Rosen's words, "I can tell you from my own experience that the Government sometimes has highly accurate, highly material, highly probative information which either supports its case or is exculpatory for the defendant, but which can never be disclosed." He cited one sort of circumstance in which this problem can arise: when to reveal even the fact of an intelligence relationship with some foreign government would lead inevitably to the loss of an important source of information and might even jeopardize that government's stability.

Judge Rosen then moved on to talk about the constitutional and statutory issues that can arise in cases implicating classified information. What do you do when the Constitution or a statute requires that the defendant have access to classified information and perhaps even the sources of classified information and the Government cannot find substitute evidence that might adequately protect the underlying constitutional or statutory interest while preserving the secrecy of classified material? In the prosecution of Zacarias Moussaoui, for instance, the defendant sought access to certain al Qaeda members detained by the Government who could support his claim that he was not involved in the September 11 attacks or, at a minimum, that he should not receive the death penalty upon conviction.[5] The Fourth Circuit in that case determined that the district court had the power to order production of the witnesses and had properly concluded that they could offer material testimony on Moussaoui's behalf.[6] The Government, however, refused to produce them. Judge Rosen observed that in that case, the Fourth

[5] United States v. Moussaoui, 382 F.3d 453, 458 (4th Cir. 2004).

[6] *Id.* at 465-66.

Circuit noted that wholly legitimate national security interests of the Government may still not prevail over a criminal defendant's trial rights: once the Government refuses to produce information to which the defendant is entitled, no matter how weighty its reasons, dismissal of the indictment may be the only option available.[7] In Judge Rosen's words, "If no adequate substitute can be found, the Government must decide whether it will prohibit the disclosure of the classified information, and, if it does so, the district court must impose a sanction which presumptively is the dismissal of the indictment."

The most rudimentary rules of evidence can also present complex puzzles in cases implicating classified material. Judge Rosen noted that the authentication and hearsay rules can pose serious obstacles to the use of classified material, as can the simple requirement of laying a foundation. With photographs, for example, "it's not always going to be possible to have the photographer, or somebody with first-hand knowledge of the subject of the photograph, testify in court." An electronic intercept, once translated and transcribed, may constitute "highly accurate and highly probative" evidence. But will it be possible to lay a foundation for the admission of such evidence in open court?

Judge Rosen noted that the ultimate question for the panel was whether terrorism cases and other cases seriously implicating classified material can be tried in Article III courts in such a way as to protect the criminal defendant's rights, while, at the same time, safeguarding the government's legitimate national security interests in information, intelligence relationships, and human assets. Questions like this, he suggested, "do not admit to easy answers." Judge Rosen noted that some cases may pose such intractable problems for Article III courts that they cannot be effectively prosecuted or defended within the traditional criminal justice system. In his view, however, these cases will be rare. For them, it will be necessary to find alternative procedural forms that not only provide the accused with basic procedural and substantive protections, but also afford more flexibility in terms of admitting evidence and safeguarding national security interests. Judge Rosen concluded by repeating that in the vast majority of cases he believes Article III courts will prove workable. But even in the best of circumstances, he cautioned, these cases will prove extremely difficult. "They require rigorous attention to detail and a tremendous amount of foresight and planning,

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[7] *Id.* at 474.

and even a certain amount of creativity by counsel and the court," he concluded.

B. *The Prosecution Perspective*

Mr. McCarthy began with a personal observation. Given his involvement in the major terrorism trials of the 1990s and his post–September 11 work as a writer and commentator on counterterrorism issues, Mr. McCarthy has had the opportunity to speak before a number of groups around the country on the general subject of Islamic militancy and this country's efforts to come to terms with it. He believes that civil liberties and national security are necessarily in tension in this conflict. And he has observed that the balance that people strike between the two ends up depending a great deal on an individual's perception as to whether the country is "really at war." He believes this is also the case with regard to how we tend to think about the use of classified information in terrorism-related legal proceedings.

Mr. McCarthy continued, "From my perspective, we're dealing with an enemy, a foreign international terrorist organization or network, that insinuates itself among civilian populations and seeks to mass murder them. It has struck us numerous times. It has indicated that it is determined to strike us some more." Mr. McCarthy said that in the conflict with this enemy, it has proven very difficult to obtain intelligence, or "good actionable information about the people who we are at war with." A corollary of this is that the sources of information we do have, whether they constitute our own operatives or foreign intelligence services, are precious. And it is not to be forgotten, Mr. McCarthy suggested, that the inadvertent disclosure of such sources in a legal proceeding during wartime might result in the inability of the country to protect itself against the employment of weapons of mass destruction by the enemy.

Picking up on Judge Rosen's remarks as to whether Article III courts will prove adequate to deal with terrorism-related cases, Mr. McCarthy noted that there are two perspectives one might bring to this question—a due process and a national security perspective. From the due process perspective, we ask whether it is possible to conduct trials that afford defendants a quantum of due process that measures up to our traditional standards. But from the national security perspective, we might pose a different question: whether the criminal justice system,

with its focus on individual prosecutions, is an effective tool for dealing with terrorism.

Mr. McCarthy argued that the evidence of the 1990s suggests that the criminal justice system is not adequate to deal with the threat posed by Islamic militancy. "We were attacked numerous times between 1993 and 2001, almost every year," he said. During that period, six major and three comparatively minor terrorism trials were conducted, resulting in the convictions of twenty-nine militants. But even as these defendants were convicted in trials affording them every procedural protection, al Qaeda was growing in size, ability, and influence. Relatively low-level players were incapacitated, but attacks continued, and Osama bin Laden, under indictment in the United States since 1998, remained at large. Mr. McCarthy concluded from this that an effective counterterrorism strategy must draw upon not only the capabilities of the criminal justice system, but the resources of the government as a whole.

Mr. McCarthy then moved on to focus specifically on the conduct of trials involving national security information. For the Government attorney, these cases pose a challenge because the prosecutor is charged with not only presenting the case effectively but also protecting the public by protecting the secrecy of classified information. The prosecutor must always act with an eye on the ball of what information exists, what must be disclosed and what can be protected. This is challenging enough. But to protect critical sources and methods while complying with the constitutional and statutory disclosure rules that prevail in Article III courts, the prosecutor must also be able to put himself in the posture of the defense lawyer. He must look forward at an early stage in the litigation and imagine how the other side might use the information in his possession in order to determine whether or not it must be disclosed.

Mr. McCarthy noted that the Government in a criminal prosecution must turn over, among other things, any information in its possession that is material to the preparation of the defense, prior statements of its witnesses, and the prior statements of hearsay declarants if the Government is introducing hearsay declarations. Material exculpatory information must be produced—a constitutional obligation that, Mr. McCarthy observed, often translated into a general requirement of turning over information that might be helpful to the defense. These various obligations often require the prosecutor to put on the defense lawyer's hat—to give hard consideration to how a defense attorney

might use information, in order to determine whether it should be disclosed. While this is true not only in the national security context, but in criminal cases more generally, the national security context poses particular challenges. Determinations as to whether classified material should be produced must be made at a much earlier stage than in the normal prosecution and, in some cases, with an eye to fashioning the charges in such a way as to obviate the necessity of disclosing critical sources and methods, or to minimize the harm of disclosure. Mr. McCarthy echoed Judge Rosen's admonition that these issues must be explored as early as possible in the litigation. Unexpected discovery problems that arise during the trial can be a disaster, resulting in the compromise of the case or in the unnecessary and inadvisable public disclosure of sensitive information.

Mr. McCarthy further observed that, in these cases, it can often be a problem that the intelligence community is loathe to give the prosecutor the information necessary for him or her to fashion a prosecution in such a way as to preserve secrets while maximizing the probability of conviction. The thought of conveying sensitive information to a prosecutor "is just anathema" to people in the intelligence community, he said, "because they truly do look at the prosecutor as somebody who's just a conduit of sort"—who takes information and pushes it along to the defense. Intelligence community members must be persuaded that informing the prosecutor about sensitive information is part of the process of protecting it—of putting the prosecutor in a place where he or she can bring a charge that can be fully litigated, rather than one that can not because of the need to protect secret material.

Finally, Mr. McCarthy noted that the demands of these cases make it imperative that the prosecutor retain the confidence of the court. If the judge presiding over the case "comes to believe that the government lawyer is not in control of the situation, that the government lawyer does not have a good handle on what information is known to the government, that the government lawyer hasn't thought through the various ways defense counsel could use information," this can be a disaster. "Every trial has a rhythm of its own, every trial has a dynamic of its own," he said. When the court comes to doubt whether the prosecutor is honest or whether the prosecutor has thoughtfully considered the defense's need for information in these complex cases, they can become impossible to manage to a successful conclusion.

C. *The Defense Perspective*

Mr. Dratel began with an anecdote from the trial of the al Qaeda defendants who were ultimately convicted in connection with the simultaneous bombings of the American embassies in Nairobi and Dar es Salaam. A principal Government witness in that case had walked into an American embassy in 1996 and volunteered to provide information about al Qaeda. Due to certain political sensitivities, it was agreed at the trial that the identity of the country in which this embassy was located would not be revealed—that all the lawyers would examine the witness without alluding to the embassy's specific location. Unfortunately, the witness himself mistakenly blurted out the name of the country in open court. The next day the prosecutor informed the court that the transcript would need to be scrubbed. At this point the court reporter gasped, and disclosed that the transcript was already in the hands of CNN. But as it turned out, the episode had a happy ending: the court reporter had gotten the country wrong in any event.

Mr. Dratel noted that, for him, the threat posed by terrorism is in no way abstract. He lived only a block from the World Trade Center in 1993, on the occasion of the first attempt to destroy it, and was in the same residence in 2001, when he was forced to evacuate from his home and returned to find it covered in ash. Mr. Dratel was also in New York's Metropolitan Correctional Center in 2000 to visit his client in the embassy bombing case when another defendant in that case stabbed a corrections officer in the eye with a knife fashioned out of a comb. Mr. Dratel noted that he fully recognizes what is at stake in these cases, and that it is not about some abstract balancing of civil liberties against national security. At stake, instead, is the depth of our commitment to adversarial trial processes and rule of law values even in difficult circumstances.

Mr. Dratel noted that when he first became involved in cases with classified material, he wondered why certain issues and certain sources were classified. Over time, he came to recognize the need for classification of some of these pieces of information. But he also came to appreciate that, to a significant extent, CIPA can and does work to protect the secrecy of classified material that is implicated in a criminal case.

That said, Mr. Dratel noted two ways in which CIPA doesn't work, from the defendant's point of view. Mr. Dratel first charged that the Government uses its declassification authority in a selective way to gain tactical advantage in criminal cases. Mr. Dratel alluded to a case

that he had been involved with in Boise, Idaho. In this case, the Government had about 100 e-mails and 135 telephone conversations involving the defendant, all intercepted pursuant to FISA, that it wanted to use as evidence at trial. This material was declassified. Some 20,000 additional e-mail messages and 10,000 telephone conversations of the defendant, however, that the Government did not plan to use, remained classified. Cleared defense counsel had access to this material (which was all in Arabic), but it could not be shared with the defendant in the case. The Government refused to declassify the material so that the defendant might read his own e-mail and listen to his own conversations, translating them for his lawyers. This posed an enormous obstacle for the defense: imagine the task of obtaining a qualified Arabic interpreter who can be cleared for access to classified material and who is willing to live in Boise for a year to help prepare the case. The defense could not in fact get an interpreter cleared before the trial was scheduled to begin. The defense continued to press for declassification—which finally came, but only two days before trial. Similar tactics were used, Mr. Dratel said, in the prosecution of Sami al-Arian in the Middle District of Florida.

Mr. Dratel noted that this tactical use of the declassification authority has not been the practice of prosecutors in the Southern District of New York, where FISA intercepts of the defendants have been declassified at the very beginning of the case, or at least shortly thereafter. But when such tactics are employed, they obviously make an enormous difference in the defense counsel's ability to prepare a case, and especially to prepare a defendant to testify. Can you imagine preparing a client to testify, Mr. Dratel asked, when you know there exists a voluminous amount of his communications that you haven't seen?

The prosecutor's statutory and constitutional disclosure obligations do not provide much assurance that pertinent classified material will be disclosed, Mr. Dratel continued, because much of this material may never reach the prosecutor. In a typical case involving foreign intelligence intercepts, a voluminous number of foreign language intercepts of the defendant may exist. These intercepts are listened to by a language specialist. The language specialist does not listen to every conversation, but only a small fraction of the universe of interceptions. This specialist then makes a summary of those conversations that the specialist deems pertinent. Mr. Dratel noted that the language specialist is given a mandate by an agent or a prosecutor, so that the specialist is only two or

three steps removed from the person who knows the most about the criminal case. But is this specialist fully aware of the prosecutor's disclosure obligations? If the language specialist does not include material in his or her summary, no one else knows about it. If the specialist does not listen to the conversation in the first place, no one knows what was said in that conversation. The agent or a prosecutor reviews the summaries prepared by the language specialist; based on these summaries, they select some conversations for transcription. So what this process involves, Mr. Dratel argued, is the distillation of an insignificant fraction of the totality of the defendant's own conversations.

Mr. Dratel next moved on to talk about Section 4 of CIPA. Section 4 permits the Government to go to the judge ex parte and to obtain an authorization to delete specified items of classified information from documents to be made available to the defense in discovery, to substitute a summary of the information for such classified document or to substitute a statement admitting relevant facts that the classified information would tend to prove. These deletions and substitutions take place without the participation of the defense even though defense counsel is cleared for access to classified material. Mr. Dratel argued that from the defense lawyer's perspective, neither the court nor the prosecutor has the information necessary to judge whether substitute evidence will suffice. "Particularly at the beginning of a case when a judge is making this determination pretrial," Mr. Dratel said, "the judge has no idea about the defense or how it's going to shake out during the Government's case."

Mr. Dratel concluded by saying that he believes CIPA can work to protect national security information in criminal cases while also affording the defendant an adequate opportunity to put forward a defense. But this requires that the defense be a full participant in the CIPA process. The defense attorney must have access to the classified information so that he or she can take advantage of it for the client's benefit. The lawyer must participate in decision making about substitute evidence, so that the court has the benefit of the defense's view on whether such evidence can adequately substitute for the classified material to be kept out of the case. Otherwise, the defendant will be disadvantaged because information is classified—contrary to what Congress intended in enacting CIPA and to the case law that has developed since CIPA's enactment.

D. *The Civil Litigator's Perspective*

Ms. Hollander suggested in her remarks that the problems posed by "secret evidence," however challenging in the criminal context, may be even greater in the context of civil litigation. A civil litigant in a terrorism-related case may be an organization challenging its designation as a foreign terrorist organization, or "FTO." The civil litigant may be a petitioner detainee at Guantánamo Bay seeking habeas relief. A lawyer representing a client in a case such as these cannot turn to CIPA to gain access to classified information, since CIPA applies only in criminal proceedings. Nor can she rely upon the Confrontation Clause. This poses special challenges that Ms. Hollander illustrated by reference to specific examples.

Holy Land Foundation, one of Ms. Hollander's clients, sued the United States to challenge Holy Land's designation as a "Specially Designated Global Terrorist" pursuant to an Executive Order issued under the International Emergency Economic Powers Act.[8]. This designation was accompanied by the freezing of all the organization's assets. Ms. Hollander and her partner have received security clearances to review classified material. But the Government in this civil case nevertheless said that the classified material underlying Holy Land's designation as a terrorist organization would not be disclosed. According to Ms. Hollander, the district court granted the Government's summary judgment motion without allowing discovery and without reviewing the relevant classified material. On appeal, the D.C. Circuit Court of Appeals considered the classified material but then upheld the grant of summary judgment at least in part on the basis of this secret evidence, which was still unavailable to the plaintiff. Ms. Hollander noted that, to this day, she has never seen the classified evidence underlying her client's designation. "We don't know what evidence was presented that caused an organization to be taken out of business immediately, caused all of its employees to suddenly lose their jobs, caused people to lose all of their health insurance, all of their retirement, some of which we've finally eked back," she said. Many people's lives were tremendously affected by an administrative designation based on secret evidence that remains unavailable to the designated entity or its lawyers.

Ms. Hollander also noted another major problem in acting as a lawyer for an organization or an individual that has been publicly desig-

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[8] 50 U.S.C. § 1701 *et seq.*

nated as a terrorist. She noted that the Treasury Department maintains a list of designated organizations and individuals on its website. The list, which includes both foreign nationals and Americans, changes on a frequent basis. "If you want to represent someone who's on this list or an organization that's on this list, you have to get a license from the Treasury Department to do so," she said. "Otherwise you could be providing, the lawyer could be providing material support" to a terrorist organization, in violation of criminal law. Ms. Hollander noted that obtaining such a license was not necessarily automatic.

In the Holy Land litigation, the Treasury Department did grant Ms. Hollander and her partner a license to use Holy Land's frozen assets in order to fund their challenge to Holy Land's designation. Her bills, however, had to be submitted to the Treasury Department—the very government agency being sued. She also came into conflict with the Treasury Department when she hired a public relations firm on behalf of her client and the Department refused to release funds to pay for this service. She was told that using the frozen funds for this purpose would violate Treasury Department rules. But she was also told that these rules were unwritten and subject to change.

Ms. Hollander then moved on to talk about the severe logistical problems that have arisen in the representation of detainees at Guantánamo. When a lawyer visits a client at Guantánamo Bay, the notes that the lawyer takes during the visit are presumed classified. Ms. Hollander noted that she has serious doubts as to whether this presumption is justifiable, given that the detainees have been at Guantánamo for years, with access only to guards, interrogators, and perhaps other prisoners. "So what conversation can he have with me that is classified? Now I'm cleared, and I might know some classified evidence in the case, which would be evidence that I've learned from classified reports. But part of being cleared is I know that I can't discuss that with him," she said.

The presumption that all notes contain classified information, moreover, imposes severe burdens on the representation of these detainees. All notes she makes during a visit to her client are sent to a SCIF in Washington, D.C., often after a long delay. "So about a month later my notes show up and then if I want to retrieve them I have to let a privilege team of prosecutors read them and then send them to me," she said. Otherwise she must fly to Washington from her home in New Mexico, go to the SCIF, and type up her notes so that she can bring them back. Ms. Hollander may not share any information she has learned from her

client and recorded in her notes with her co-counsel, a foreign national, until the notes have been cleared. All this takes a great deal of time and is particularly onerous given that she has no telephone communication with her client but must rely solely on face-to-face communication and the notes that are generated during this communication.

She noted that once a habeas petition is filed on behalf of a Guantánamo detainee, the Government's factual return, its response to the petition, will contain classified material. This material will often include statements made by the detainee. Just as in the criminal cases, the lawyer is now in possession of client statements that she cannot discuss with her client, because they are classified. This is a significant problem, since the statements may form part of the basis for the Government's assertion that the client is properly detained. Unlike the criminal case, where such material usually ends up being declassified at some point so that the case can proceed, the material in these habeas proceedings remains classified. It simply cannot be shared with the client, even though it is being used as a part of the basis for indefinite detention.

Ms. Hollander noted that she understands the need to classify legitimate secrets and that she has no problem with material that is legitimately classified, even though this may result in placing certain burdens on her representation of clients. She does question, however, "when the Government arbitrarily makes decisions about what evidence will become classified and appears to do that in a way that makes it more difficult for lawyers to represent their clients." This is particularly disturbing, she added, when it seems that the only reason for the classification is the difficulty it poses for the representation.

II. THE DISCUSSION

At the conclusion of the prepared statements, the panelists took several questions from the moderator and from the audience.

The first question went to Judge Rosen, and concerned the fact that the judge in a case implicating secret evidence often makes determinations without the benefit of full participation by the defense—as in the Section 4 determinations alluded to in Mr. Dratel's presentation. How does the court compensate for the lack of full adversarial input? Judge Rosen noted that this is one of the most serious challenges that a judge faces in cases implicating classified material. "I, as the judge, certainly can't anticipate how the defense is going to develop its case, structure its defense and certainly its cross examination." Judge Rosen said

that his approach was to try to be encompassing, while at the same time to try to satisfy the Government's legitimate national security interests.

Mr. Dratel was then asked whether he believed that the role of secret evidence in criminal cases had fundamentally altered the balance between the prosecution and the defense. He said that in cases where the prosecution opts not to employ Section 4's ex parte procedure to keep classified information from the defense, but instead either declassifies the information or allows the defense a full opportunity to participate in determinations about redaction and substitution, the balance "is not changed nearly as much as when there is a lack of adversary process." Later in the discussion, he also indicated that in these cases the defense may have the opportunity to go the judge ex parte, to educate the judge about the relevance of classified information to the defense without revealing defense secrets in open court. This helps the judge understand the defense's case better and helps restore the balance between the two sides. "I think it's incumbent upon defense lawyers in these cases to actively do it, to avail themselves of the opportunity to educate the judge," Mr. Dratel urged.

In the discussion, Mr. McCarthy disagreed with the views of Judge Rosen and Mr. Dratel that Article III courts will in most instances prove adequate for dealing with the national security cases of the future. "I do think that we should be trying to put together a different way of approaching these cases," he said. Mr. McCarthy argued that the attempt to accommodate legitimate national security concerns in traditional criminal processes may have the effect of diluting procedural protections across the board—not just in terrorism cases. "I think that, ultimately, by trying to fit these cases into the criminal justice system, one of the unforeseen consequences of that is that the quality of justice across the board suffers," he observed.

Ms. Hollander expressed the opposite concern: that in the event special terrorism courts are created, such courts will come to handle not just cases involving al Qaeda, but other matters now dealt with quite ably within the existing criminal justice system. "Not everybody charged with terrorism is a foreign national," she observed. "We had a huge terrorist event in Oklahoma City." Ms. Hollander noted that the line separating crime from terrorism may prove difficult to draw. "The line, if we start to have terrorism courts," she said, "the line is going to go down. What happens if somebody goes into a school and kills five children? Is that a terrorist case or do you have to have six to make it a

terrorist case?" Mr. Dratel observed, as well, that the creation of special terrorism courts would not remove issues of secret evidence from Article III proceedings, given the dramatic increase in the use of FISA and the increasing "globalization" of crime: "Every case of any magnitude has some international aspect to it that will implicate national security at some point."

One of the final questioners asked whether it is the case that the Government has an extraordinary ability to "cheat" in these secret evidence cases—to not make information available or to set up a situation where it seems that information is more sensitive than it actually is. Judge Rosen observed that "no matter how specifically you try to write statutes, no matter how closely and precisely you try to regulate human behavior, smart people, if they are so inclined, will figure out ways around it." He concluded by noting that "in the end, any system has to depend upon the good faith and integrity of the people who act in it."