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Article III Courts v. Military Commissions: A Comparison of Protection of Classified Information and Admissibility of Evidence in Terrorism Prosecutions

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ARTICLE

ARTICLE III COURTS V. MILITARY COMMISSIONS: A COMPARISON OF PROTECTION OF CLASSIFIED INFORMATION AND ADMISSIBILITY OF EVIDENCE IN TERRORISM PROSECUTIONS

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Introduction.....	788
I. Protection of Classified Information.....	789
A. Classified Information Procedures Act.....	789
B. “Silent Witness” Rule.....	792
C. Secret Exculpatory Testimony.....	794
II. Admissibility of Evidence in Military Commissions.....	798
A. Advantages (On Paper).....	798
B. Additional Obstacles.....	800
III. Miscellaneous Misconceptions/Issues.....	803
A. <i>Miranda</i> & <i>Quarles</i> in Terrorism Prosecutions.....	803
B. Article III Judges v. Military Judges.....	805
IV. Conclusion.....	807

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INTRODUCTION

Discussion of the use of military commissions in terrorism prosecutions no longer dominates the headlines to the same degree as it did during the early days of the Obama Administration. The debate, however, over whether military commissions or Article III courts should be the preferred venue for terrorism prosecutions continues with passionate advocates on both sides. On one hand, proponents of the Article III court system argue that the Department of Justice has managed to obtain convictions in nearly every major case it has brought in civilian court, and the sentences for cases actually based on terrorism or material support charges have been lengthy.¹ Additionally, they argue the slow pace of trial progress in military commissions, which remains bogged down by various procedural challenges and open, unresolved constitutional questions, coupled with escalating costs and perceived lack of legitimacy by outside parties, make military commissions an increasingly unfavorable venue for terrorism prosecutions.²

On the other hand, proponents of the military commissions system argue that, even with the many evidentiary and procedural reforms that the commissions system has undergone to bring its protections close to those granted by Article III courts, terrorist detainees ought not to be given the rights that criminal defendants are given in the United States.³ They argue that military commissions, adhering to the rules promulgated after the Military Commissions Act of 2009, strike the appropriate balance of due process on important evidentiary and procedural issues, eliminate the risk

1. See Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851, 879–80 (2007) (stating “[o]f the twenty-eight defendants whose [terrorism-related] charges have proceeded to disposition, twenty have been convicted on at least one [terrorism-related] charge . . . [T]he mean [sentence imposed] falls to 80.09 months”).

2. See Devon Chaffee, *Military Commissions Revived: Persisting Problems of Perception*, 9 U.N.H. L. REV. 237, 258 (2011) (“[M]ilitary commissions will continue to be dogged by the same continuous growing pains, missteps, legal uncertainties, and lack of credibility that they have encountered since 2001 [P]olicymakers [should be prompted] to examine more closely the viability of the commission system beyond select cases of detainees currently in U.S. custody”).

3. See Michael T. McCaul & Ronald J. Sievert, *Congress's Consistent Intent to Utilize Military Commissions in the War Against Al-Qaeda and Its Adoption of Commission Rules that Fully Comply with Due Process*, 42 ST. MARY'S L.J. 595, 605 (2011) (“Congress passed the legislation with the realization that ‘the way to balance the interests of our need to protect ourselves and to adhere to the rule of law is to apply the law of armed conflict, not criminal law.’” (quoting 152 CONG. REC. 19,973 (daily ed. Sept. 27, 2006) (statement of Sen. Graham))).

of irrational jurors sabotaging any given case, and significantly mitigate the risk of unauthorized or inappropriate release of classified information.⁴

Although this article does not seek to argue for the complete preference of one system over the other, it does aim to show that on the whole, the evidentiary advantages for the government in military commissions as opposed to Article III courts have been greatly overstated by critics of evidentiary standards for terrorism prosecutions in Article III courts. Given the existing protections for classified information in Article III courts, and unclear constitutional foundations for even the slightest departure from Article III court evidentiary standards, this article argues that, on balance, Article III courts are just as evidentiarily favorable, if not more so, than military commissions for terrorism prosecutions at this time.

The first section begins with a discussion of the various Article III courts' protections for classified information, starting with the Classified Information Procedures Act ("CIPA"), followed by the "Silent Witness" rule articulated best in *United States v. Rosen*,⁵ and closes with an examination of access to secret exculpatory testimony by terrorism prosecution defendants in terrorism prosecutions. Next, the article examines some of the proffered reasons why evidentiary standards for the admission of certain types of evidence in military commissions are superior to those in Article III courts, and argues that those advantages may not be as great as they seem when weighed against some of the evidentiary open questions that remain unresolved. Finally, the article addresses miscellaneous misconceptions relating to evidence in Article III courts and concludes with an analysis of how an understanding of the evidentiary benefits and drawbacks of Article III courts vis-a-vis military commissions fits into the big-picture debate on the appropriate forum for terrorism prosecutions.

I. PROTECTION OF CLASSIFIED INFORMATION

A. *Classified Information Procedures Act*

The Classified Information Procedures Act was passed in 1980 to address the practice of greymailing, whereby defendants threaten to disclose classified information during a trial and thereby attempt to coerce the

4. *Id.* at 643–44.

5. *United States v. Rosen*, 520 F. Supp. 2d 786 (E.D. Va. 2007).

government into dismissing the indictment or agreeing to a favorable deal.⁶ In the years following its passage, CIPA has developed into a tool to not only protect the government against greymailing, but to regulate the introduction of classified information in Article III trials generally.⁷ Under CIPA, as explained in the case of *United States v. Lee*,⁸ the procedure for introducing classified information is as follows:

[T]he defense must file a notice briefly describing any classified information that it “reasonably expects to disclose or cause the disclosure of” at trial. Thereafter, the prosecution may request an *in camera* hearing for a determination of the “use, relevance and admissibility” of the proposed defense evidence. If the Court finds the evidence admissible, the government may move for, and the Court may authorize, the substitution of unclassified facts or a summary of the information in the form of an admission by the government. Such a motion may be granted if the Court finds that the statement or summary will provide the defendant with “substantially the same ability to make his defense as would disclosure of the specific classified information.” If the Court does not authorize the substitution, the government can require that the defendant not disclose classified information. However, under [Section] 6(e)(2), if the government prevents a defendant from disclosing classified information at trial, the court may: (A) dismiss the entire indictment or specific counts, (B) find against the prosecution on any issue to which the excluded information relates, or (C) strike or preclude the testimony of particular government witnesses. Finally, CIPA requires that the government provide the defendant with any evidence it will use to rebut the defendant’s revealed classified information evidence.⁹

The rules apply in the same manner if the government wishes to introduce classified information in a substituted or summarized manner.¹⁰

6. See LARRY M. EIG, CONG. RESEARCH SERV., 89-172A, CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW (1989) (“In 1980 . . . Congress enacted . . . (CIPA) to provide a means for determining at an early stage whether a ‘disclose or dismiss’ dilemma exists in a potential prosecution or whether a prosecution may proceed that both protects information the Executive regards as sensitive to security and assures the defendant a fair trial . . .”).

7. See McCaul & Sievert, *supra* note 3, at 632 (“The statute was originally designed to prevent ‘greymail’ by defendants associated with the intelligence community, but is also applicable to all cases where the government is in possession of or seeks to introduce potentially relevant classified information.”).

8. *United States v. Lee*, 90 F. Supp. 2d 1324 (D.N.M. 2000).

9. *Id.* at 1325–26 (citations omitted).

10. McCaul & Sievert, *supra* note 3, at 632–33.

In such a situation, the government requests a hearing on use, relevance and admissibility of the evidence, and upon a court finding that the evidence is indeed admissible, the government may move to introduce a summary or substituted unclassified information, at which point the court can either grant the motion, or take one of the three courses of action specified in Section 6(e)(2).¹¹

As explained by the court in the case of *United States v. Lee*, a case in which the defendant was prosecuted on charges of espionage and the mishandling of classified information after arguing that CIPA's requirements compromised his Fifth and Sixth Amendment rights by forcing him to give the government advance notice of testimony he may have intended to present at trial,¹² "CIPA is designed to 'assure the fairness and reliability of the criminal trial' while permitting the government to 'ascertain the potential damage to national security of proceeding with a given prosecution before trial.'"¹³ Citing to the Supreme Court's observation that "it is obvious and unarguable that no governmental interest is more compelling than the security of the Nation,"¹⁴ the court noted that CIPA serves that interest "by providing a mechanism for protecting both the unnecessary disclosure of sensitive national security information and by helping to ensure that those with significant access to such information will not escape the sanctions of the law applicable to others by use of the graymail route."¹⁵

It should be noted that while the criticisms received by the Article III courts for not properly protecting classified information are plentiful,¹⁶ criticisms of CIPA as a statute are not. Indeed, in their 2011 article on the favorability of military commissions over Article III courts as the venue for terrorism prosecutions, Professor Ronald Sievert and Representative Michael McCaul concede that not only are "MCA provisions for handling

11. *Id.*

12. *Lee*, 90 F. Supp. 2d at 1326.

13. *Id.* at 1327–8 (quoting *United States v. Ivy*, 1993 WL 316215, at *4 (E.D. Pa. Aug. 12, 1993)).

14. *Id.* at 1327 (quoting *United States v. Poindexter*, 725 F. Supp. 13, 34 (D.D.C. 1989)).

15. *Id.* (quoting *Poindexter*, 725 F. Supp. at 34).

16. See McCaul & Sievert, *supra* note 3, at 599 (referencing Rep. McCaul's testimony on the House floor in 2009); Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J. (Aug. 22, 2007, 12:01 AM), <https://www.wsj.com/articles/SB118773278963904523> [<https://perma.cc/X7DU-VH5KJ>] (discussing several examples where terrorism prosecutions have unintentionally provided terrorists with a classified information).

classified information . . . specifically based on CIPA”¹⁷ but also that differences in procedure between the two forums are “picayune, obscure, and trivial”¹⁸ with “virtually no meaningful difference.”¹⁹ Their main argument, and an argument of many who favor military commissions, is that military judges with experience handling classified information are better positioned to protect classified information than Article III judges, even if the rules are the same.²⁰ We will return to this argument later in section III.B of the paper.

B. “*Silent Witness*” Rule

In the case of *United States v. Rosen*, two American Israel Public Affairs Committee (“AIPAC”) lobbyists, along with a Department of Defense employee, were charged with violating the Espionage Act for sharing classified government information with Israeli diplomats and the media.²¹ Given the highly sensitive nature of the classified information that would be used in the trial by both parties, the Government sought to apply the Silent Witness Rule (“SWR”) in addition to conventional CIPA substitutions.²² Although the Government’s first motion to utilize the SWR was denied on the basis of being overbroad, the Government’s subsequent SWR motion was successful.²³ In its opinion granting the motion, the court explained the SWR procedure as follows:

[SWR is] a procedure whereby certain evidence designated by the government is made known to the judge, the jury, counsel, and witnesses, but is withheld from the public. Under this procedure, a witness referring to this evidence would not specifically identify or describe it, but would instead refer to it by reference to page and line numbers of a document or transcript, or more commonly by use of codes such as “Person 1,” “Country A,” etc. The jury,

17. McCaul & Sievert, *supra* note 3, at 633.

18. *Id.*

19. *Id.*

20. *See id.* at 635 (crediting military judges as being more “attuned to protecting sensitive sources and methods, as opposed to a civilian judge who has no experience and may be less understanding of the tremendous damage that can be caused by the disclosure of certain items of classified information”).

21. David Johnston, *Pentagon Analyst Gets 12 Years for Disclosing Data*, N.Y. TIMES (Jan. 20, 2006), <https://www.nytimes.com/2006/01/20/politics/pentagon-analyst-gets-12-years-for-disclosing-data.html> [<https://perma.cc/JB9E-LL2U>].

22. *United States v. Rosen*, 520 F. Supp. 2d 786, 788 (E.D. Va. 2007).

23. *Id.* at 796.

counsel, and the judge would have access to a key alerting them to the meaning of these code designations; the public, however, would not have access to this key. Any recordings containing the portions designated for SWR treatment would be played in open court, but would revert to static when the portions designated to be treated under the SWR are reached; thus, the public would not hear these portions. At the same time, however, jurors, counsel, and the judge would listen on headphones to the unredacted recording. This SWR procedure is in sharp contrast to the CIPA procedure, which contemplates that any substitutions, summaries, and redactions will be made available to the public and jury in identical form.²⁴

The first question the court said needed to be resolved was whether CIPA was intended to occupy the field and preempt any further protection of classified information.²⁵ After examining CIPA's legislative history and case law utilizing the SWR or a similar procedure,²⁶ the court concluded that CIPA was not intended to occupy the field, and that "the SWR is precisely the sort of judicially-created fair solution envisioned by Congress" when it discussed the problems raised by the use of classified information in trials.²⁷

Next, the court concluded the SWR was not part of CIPA, and since it constituted at least a partial closure of the trial, the Government was required to demonstrate the requirements of the *Press-Enterprise Company v. Superior Court of California*²⁸ test were met.²⁹ As explained by the court,

Press-Enterprise requires that before a trial may be closed to the public, the proponent of the closure must demonstrate, and the court must find, (i) that a compelling interest exists to justify the closure, (ii) that the closure is no broader than necessary to protect that interest, and (iii) that no reasonable alternatives exist to closure.³⁰

24. *Id.* at 793–94 (citing Transcript of CIPA § 6(c) Hearing, *United States v. Rosen*, 1:05cr225, 94–101 (E.D. Va. Aug. 16, 2007)).

25. *Id.* at 795.

26. *See id.* at 796 (“[W]hile no court has squarely addressed this precise question, a few courts have implicitly approved the use of the SWR at trial.”).

27. *Id.*

28. *Press-Enter. Co. v. Super. Ct. of Cal.*, 464 U.S. 501 (1984).

29. *Rosen*, 520 F. Supp. 2d at 797.

30. *Id.*

These findings must be made on the record, and the court must consider whether conventional CIPA substitutions would be sufficient in the circumstances.³¹ Finally, in the interest of fairness, the use of SWR must “provide[] defendants with substantially the same ability to make their defense as full public disclosure of the evidence[.]”³² Although the Government would go on to drop the charges against the AIPAC defendants,³³ bringing the case to an end, *Rosen* remains a leading case on how the SWR might be used to protect classified information should the government find it necessary to take additional precautions.

C. *Secret Exculpatory Testimony*

In *United States v. Moussaoui*,³⁴ the Government aimed to prosecute Zacarias Moussaoui for his role in the 9/11 attacks, and sought the death penalty on several of the charges brought against him.³⁵ For his defense against these charges, Moussaoui moved for access to witnesses he knew were in United States custody, alleging they may be able to offer potentially exculpatory testimony showing he was not involved in the 9/11 attacks and as a result should not receive the death penalty.³⁶ The Government opposed his request.³⁷ The district court found the requested witnesses were material witnesses to the case, and ordered their deposition by remote video, but the Government appealed.³⁸ The Fourth Circuit remanded for the district court to determine whether any substitution existed that would place Moussaoui in substantially the same position as would a deposition, but the district court found that there was not, or that at least none of the Government’s proposed substitutions were sufficient to meet this requirement.³⁹ When the Government again refused to comply with the remote video deposition order, the district court dismissed the death notice and “prohibited the Government ‘from making any argument, or offering any evidence, suggesting that the defendant had any involvement in, or

31. *Id.* at 797–98.

32. *Id.* at 799.

33. *Steven J. Rosen*, RIGHT WEB, <https://rightweb.irc-online.org/profile/steven-j-rosen/> [<https://perma.cc/JH7T-94KZ>].

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

35. *Id.* at 457.

36. *Id.* at 458.

37. *Id.*

38. *Id.*

39. *Id.*

knowledge of, the September 11 attacks.”⁴⁰ The Government promptly appealed this decision to the Fourth Circuit.⁴¹

The case on appeal centered on the Sixth Amendment right to “compulsory process for obtaining witnesses in [the defendant’s] favor.”⁴² The court quickly dismissed the issue of the witnesses not being on United States soil, stating that the Government’s status as the “custodian” was sufficient for the district court to be able to compel the Government to provide the defendant with access to the witnesses.⁴³

The next issue the court addressed was how to deal with the Government’s claim that the district court’s order would infringe on the Executive’s war-making authority.⁴⁴ Here, the court stated that a balancing of interests must occur.⁴⁵ Citing to *Haig v. Agee*,⁴⁶ as the district court in *Lee* did, the court noted that “no governmental interest is more compelling than the security of the Nation,” and as such, the burden on the Government is entitled to great consideration.⁴⁷ However, it also noted that, given the district court’s correct finding that the witnesses would be able to offer material evidence in Moussaoui’s favor, Moussaoui had made a sufficient showing that the evidence would be “more helpful than hurtful” to his case and had a Sixth Amendment right to some form of the testimony.⁴⁸ To resolve these competing interests, the court examined case law involving “constitutionally guaranteed access to evidence” as well as the substitution procedures under CIPA, and concluded that the court’s primary balancing duty consisted of “an examination of whether the district court correctly determined that the information the Government seeks to withhold is material to the defense.”⁴⁹ The court, having already determined that the evidence was material, affirmed the district court orders.⁵⁰ However, unlike the district court, the Fourth Circuit ruled that

40. *Id.* at 459–60 (citing J.A. (30–4792) 319).

41. *Id.* at 460.

42. *Id.* at 463 (quoting U.S. CONST. amend. VI).

43. *Id.* at 465–66.

44. *Id.* at 466.

45. *Id.* at 469 (citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 433 (1977)).

46. *Haig v. Agee*, 453 U.S. 280 (1981).

47. *Moussaoui*, 382 F.3d at 470 (first quoting *Haig*, 453 U.S. at 307; then citing *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002)).

48. *Id.* at 474.

49. *Id.* at 474, 476 (citation omitted) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988)).

50. *Id.* at 476.

CIPA-like substitution was possible.⁵¹ The court left the district court to oversee the exact crafting of substitutions via “an interactive process among the parties and the district court[.]” with the requirement that the jury be informed of the nature of the eventual substitution and the limitations under which they were produced.⁵²

Many have used *Moussaoui* as an example of a case where military commissions could have dealt more effectively with the difficulties faced by Article III courts.⁵³ Judge Brinkema, the district court judge in the case, even invited the Government to “reconsider whether the civilian criminal courts are the appropriate fora” for trying someone like Moussaoui,⁵⁴ although she later made clear in a talk at the University of Virginia School of Law that she believed Article III courts were well-equipped to take on the difficulties inherent in terrorism prosecutions.⁵⁵ But is *Moussaoui* really a strong case for this claim?

First, it should be noted that Moussaoui's very own counsel seemed to invite a switch to the military commissions system as opposed to the Article III system, inviting the Government to dismiss the criminal prosecution against his client and instead to proceed to a military commission to resolve the tension between Moussaoui's Sixth Amendment right and the Government's war powers.⁵⁶ One can speculate on some of the reasons for this strange position by Moussaoui's counsel; perhaps he expected the significant delays that would result from the resolution of the complicated procedural issues in the case would work in his client's favor, or that the military commissions, lacking the benefit of extensive case law on Sixth Amendment jurisprudence in Article III courts, might struggle to ascertain the exact applicability of the Sixth Amendment in the military commissions setting; or perhaps that the military commissions might be

51. *Id.* at 480.

52. *Id.* at 480, 482.

53. See McCaul & Sievert, *supra* note 3, at 600 (commenting on the discrepancy between the level of harm caused by Moussaoui and the actual punishment he was given by the court).

54. *United States v. Moussaoui*, No. CR-01-455-A, 2003 WL 21263699, at *6 (E.D. Va. Mar. 10, 2003).

55. Doug Kramer, *Federal Judge Says Courts Can Handle Gimo Cases*, CLEVELAND NEWS (Apr. 2, 2009, 11:06 PM), https://www.cleveland.com/nation/index.ssf/2009/04/federal_judge_says_courts_can.html [<https://perma.cc/QDG9-SPYA>].

56. STEPHEN DYCUS ET AL., *Secret Evidence in Criminal Trials*, in COUNTERTERRORISM LAW 723, 782 n.4 (3d ed.) (citing Brief of the Appellee at 3–4, *United States v. Moussaoui*, (4th Cir. May 13, 2003) (No. 03-4162)).

even more generous than an Article III court would be. Regardless of the exact reason, the fact that Moussaoui's counsel did not oppose this switch of systems is concerning.

Second, at the end of the proceeding, Moussaoui was sentenced to life in prison without parole, a result which Judge Brinkema applauded for depriving Moussaoui of the opportunity "to be a martyr and to die in a great big bang of glory[.]"⁵⁷ Some have criticized the proceeding for failing to conclude with a sentence of death for Moussaoui,⁵⁸ but given that convicted terrorists like Moussaoui often state that their goal is to die as martyrs, is it not counterintuitive to see a result that locks them up permanently without parole as failure? At the very least, regardless of one's opinion on the desirability of the death penalty in terrorism prosecutions, it is strange to not applaud the sentencing of a terrorist to life without parole as a job well done.

Regardless, returning to the topic of classified information, *Moussaoui* demonstrates yet another way in which Article III courts have been able to adjust to classified information challenges to protect classified information in terrorism prosecutions. Taken together, CIPA, the SWR, and the Fourth Circuit's maneuvering in *Moussaoui* to protect classified Government testimony demonstrates that Article III courts are well equipped to protect classified information that either party may seek to utilize in government prosecutions.

A couple recurrent criticisms of the protection of classified information in Article III courts are worth addressing before shifting to an analysis of the proffered evidence-related reasons for the superiority of military commissions. Although examples of classified information being leaked out of a civilian trial are exceedingly rare, two examples are brought up frequently: 1) the Government releasing a list of unindicted co-conspirators in the 1993 World Trade Center bombing trial of Omar Abdel Rahman (the "blind sheikh") and others, which included the name of Osama Bin Laden, and 2) the testimony used by the Government in its trial of Ramzi Yousef for his role in the 1993 World Trade Center bombing, as well as other bombings, to indicate they had gathered information on him and other

57. Benjamin Weiser, *Tirade Offers Insight on Would-Be Bomber*, N.Y. TIMES (July 5, 2010), <https://www.nytimes.com/2010/07/06/nyregion/06shahzad.html> [https://perma.cc/JGQ7-VYBG].

58. See McCaul & Sievert, *supra* note 3, at 598 ("[A] signal [was sent] by this administration that the war on terror is over, that we are no longer going to treat terrorists as enemies of war . . .").

terrorists he spoke with via cell-phone tracking.⁵⁹ In both cases, the information made its way back to Al Qaeda members, who were then able to adjust accordingly and cut off channels of highly valuable intelligence for the United States.⁶⁰ Regrettable as those disclosures may have been, they were not instances in which a judge failed to protect classified information or where a defendant was able to utilize the system to place the government in a compromising position with no options. Rather, they were instances in which the government, through prosecutorial error, failed to exercise the protections available to it to ensure that the classified information needing protection was indeed protected.⁶¹ Further, as explained in this section, even more methods now exist—via the SWR or *Moussaoui*—for the protection of classified information that may have caused Article III courts greater difficulty in the past.

II. ADMISSIBILITY OF EVIDENCE IN MILITARY COMMISSIONS

A. *Advantages (On Paper)*

It would be factually incorrect to not concede, at least on paper, that military commissions seemingly bear some advantage helpful to Article III courts in terrorism prosecutions. For example, hearsay rules are drafted in a manner that provides military judges with more discretion to decide what hearsay evidence may be allowed into the proceeding than Article III judges have.⁶² The 2009 Military Commissions Act (MCA) Section 949a(b)(3)(D) provides:

59. See Mukasey, *supra* note 16 (noting two prominent examples of leaked classified information from a trial).

60. See *id.* (addressing the classified information provided to al Qaeda members).

61. See Dahlia Lithwick, *Holder Laughed: The Attorney General Tries to Sell Us on New York Terror Trials*, SLATE (Nov. 18, 2009, 6:12 PM), <https://slate.com/news-and-politics/2009/11/the-attorney-general-tries-to-sell-us-on-new-york-terror-trials.html> [<https://perma.cc/4EWY-37AK>] (discussing Attorney General Eric Holder's contention that it was the fault of federal prosecutors in failing to pursue protective orders that resulted in a list of co-conspirators of a suspected terrorist to remain unclassified); see also EDITORIAL: *Obama and Gitmo*, WASH. TIMES (Nov. 12, 2008), <https://www.washingtontimes.com/news/2008/nov/12/obama-and-gitmo/> [<https://perma.cc/THZ5-3ZZK>] (“[T]he U.S. courts gave al Qaeda valuable information about which of its agents had been uncovered.”).

62. McCaul & Sievert, *supra* note 3, at 618–21 (highlighting the increased level of discretion military judges possess in determining the admissibility of hearsay evidence).

(D) Hearsay evidence not otherwise admissible under the [traditional] rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

(i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and

(ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that—

(I) the statement is offered as evidence of a material fact;

(II) the statement is probative on the point for which it is offered;

(III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and

(IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.⁶³

Although Rule 807 of the Federal Rules of Evidence (FRE) provides judges with almost the same residual exception to consider hearsay that does not fit into the twenty-five or so specific exceptions to hearsay provided in Rules 803 and 804,⁶⁴ the reality is that judges are highly reluctant to use it, given the legislative history stating that it should be used “very rarely and only in exceptional circumstances” and the case law that cites to this history.⁶⁵

Another advantage enjoyed by military commissions—with respect to the admission of evidence—is in the greater discretion to accept evidence with

63. *Id.* at 619 (quoting Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2582 (codified at 10 U.S.C. § 949a(b)(3)(D) (Supp. III 2009))).

64. FED. R. EVID. 803–04 (listing the exceptions to the rule against hearsay).

65. *See* McCaul & Sievert, *supra* note 3, at 621 (noting the trial court’s fear of appellate reversal that follows the application of the residual exception).

an imperfect chain of custody than judges in Article III courts have. Per Military Commissions Rule (MCR) 949a(b)(3)(C):

- (C) Evidence shall be admitted as authentic so long as—
- (i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and
 - (ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in *determining the weight, if any, to be given to the evidence*.⁶⁶

Whereas Article III judges are bound by FRE Rule 901(a), which requires the prosecution to make a strong showing of authenticity in presenting or introducing evidence,⁶⁷ military commission judges are empowered (on paper) to instruct the panel of members ruling on the defendant's case to give the appropriate weight to the evidence when it is admitted, rather than being forced to exclude it entirely.

B. *Additional Obstacles*

While there are some clear evidentiary advantages military commission judges seem to have over Article III judges, challenges make the work of military commission judges very difficult and continue to handicap their ability to resolve pending cases in a timely manner. While these challengers are varied in nature, they center around one issue: uncertainty.

Consider, for example, the application of the Confrontation Clause of the Sixth Amendment to hearsay testimony in military commissions. In the prosecution of Abd al-Rahim al-Nashiri, alleged to be the mastermind behind the 2000 *USS Cole* bombing, al-Nashiri asked the judge in pre-trial motions to take judicial notice that the Confrontation Clause of the Sixth Amendment, providing the constitutional right of a defendant to be confronted with the witnesses to be used against him,⁶⁸ does apply to military commissions.⁶⁹ While some have argued with varying degrees of

66. *Id.* at 623 (emphasis added) (quoting Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2582 (codified at 10 U.S.C. § 949a(b)(3)(C) (Supp. III 2009))).

67. FED. R. EVID. 901(a).

68. *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (analyzing the protections provided by the Confrontation Clause).

69. Christina M. Frohock, *Military Justice as Justice: Fitting Confrontation Clause Jurisprudence into Military Commissions*, 48 NEW ENG. L. REV. 255, 256–57 (2014).

certainty that it does not,⁷⁰ others have noted that there are arguments to be made that it does. For example, some have posited that the Obama Administration's acceptance of Additional Protocol I⁷¹ as customary international law, and particularly Article 75, which grants defendants the "right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf,"⁷² may have unintentionally extended the application of the Confrontation Clause, or at least its protections, to defendants in military commissions proceedings.⁷³ Given that thus far the Trump Administration has not undone this Executive Order, this remains an open question.

Al-Nashiri's own argument is that *Boumediene*⁷⁴ and *Hamdan II*⁷⁵ favor broad constitutional application to Guantanamo cases, and thus the Confrontation Clause should be extended to military commissions.⁷⁶ While some may believe that both of these cases clearly limited their scope on constitutional protections to the specific clauses that they were discussing—i.e. the Suspension Clause and Ex Post Facto Clause—the fact remains that almost four years on, this too remains an open question.

Consider next the controversial case, *United States v. Ghailani*,⁷⁷ where the Government sought to use the testimony of a witness whom the Government had obtained only through information it had gained from the

70. See *id.* at 257 (explaining how testimonial statements are inapplicable for military commissions); Michael T. McCaul & Ronald J. Sievert, *Congress's Consistent Intent to Utilize Military Commissions in the War Against Al-Qaeda and Its Adoption of Commission Rules that Fully Comply with Due Process*, 42 ST. MARY'S L.J. 595, 624 (2011) ("The Supreme Court and appellate courts have noted that *Crawford* does not generally apply where statements have been taken in emergency situations . . .").

71. Robert Chesney, *Cully Stimson on Art. 75 and Its Implications for Hearsay in Military Commissions*, LAWFARE (Mar. 10, 2011, 10:49 PM), <https://www.lawfareblog.com/cully-stimson-art-75-and-its-implications-hearsay-military-commissions> [<https://perma.cc/KS3Z-PE6E>] ("[I]t is the policy . . . of [the Department of Defense] to comply with Article 75 [of Additional Protocol I].").

72. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3.

73. Chesney, *supra* note 71 (positing that Article 75 of API "guttled the relaxed rules on the admission of hearsay").

74. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (applying the full effect of the U.S. Constitution's Suspension Clause to Guantanamo Bay detainees).

75. See *Hamdan v. United States*, 696 F.3d 1238, 1247 (D.C. Cir. 2012) (holding the Military Commissions Act of 2006 in violation of the Ex Post Facto Clause of the U.S. Constitution).

76. Wells Bennett, *June 11 Session #7: 'It's All Hearsay'*, LAWFARE (June 11, 2013, 2:39 PM), <https://www.lawfareblog.com/june-11-session-7-its-all-hearsay> [<https://perma.cc/7T47-BHLP>].

77. *United States v. Ghailani*, 743 F. Supp. 2d 261 (S.D.N.Y. 2010).

defendant by physical and psychological coercion.⁷⁸ Although Ghailani was sentenced to prison, the outcome was decried as a “total miscarriage of justice”⁷⁹ after the district court had ruled that the testimony obtained through coercion could not be used and the jury convicted Ghailani on one count of conspiracy to commit murder while acquitting him on 280 others.⁸⁰ Yet, successes of the Article III court system in obtaining a life sentence expediently and without leaks of classified information aside, the Judge Kaplan himself noted that the idea that the testimony would not have been excluded in a military commission was questionable:

It is very far from clear that Abebe’s testimony would be admissible if Ghailani were being tried by military commission, even without regard to the question whether the Fifth Amendment would invalidate any more forgiving provisions of the rules of evidence otherwise applicable in such a proceeding. . . . [These rules] preclude or restrict the use of “statements obtained by torture or cruel, inhuman, or degrading treatment,” and evidence derived therefrom, and could require exclusion of Abebe’s testimony. Even if they did not, the Constitution might do so, even in a military commission proceeding.⁸¹

At best, considering Judge Kaplan’s explanation in *Ghailani*, this would be another open question that would need to be resolved, and likely would be subjected to appeal by the defense should a military commission judge find that the constitutional protections of the Fifth Amendment “fruits of the poisonous tree” doctrine⁸² are inapplicable and the rules of evidence of the military commissions do not bar this type of evidence.

78. *Id.* at 264.

79. Editorial, *The Ghailani Verdict*, N.Y. TIMES (Nov. 18, 2010), <https://www.nytimes.com/2010/11/19/opinion/19fri1.html> [perma.cc/2R5P-5EGW].

80. Charlie Savage, *Terror Verdict Tests Obama’s Strategy on Trials*, N.Y. TIMES (Nov. 18, 2010), <https://www.nytimes.com/2010/11/19/nyregion/19detainees.html> [perma.cc/E9CW-EFJG].

81. *Ghailani*, 743 F. Supp. 2d at 287–88 n.182.

82. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 278 (1983) (“When an incriminating statement has been obtained through coercion, the Fifth Amendment prohibits use of the statement or its ‘fruits.’”).

III. MISCELLANEOUS MISCONCEPTIONS/ISSUES

A. *Miranda* & *Quarles* in *Terrorism Prosecutions*

A significant criticism of Article III courts in terrorism prosecutions that has persisted is that the constitutional requirement of advising defendants of their *Miranda* rights upon arrest has hampered the success of terrorism prosecutions by forcing federal agents and military officers to immediately inform a defendant of his *Miranda* rights upon arrest.⁸³ A related criticism is that although a public safety exception may exist to *Miranda*,⁸⁴ the circumstances for its use remain ambiguous and confusing for federal agents and military officers.⁸⁵

These criticisms are invalid and unfair for a number of reasons. First, guidance for federal agents on the use of the public safety exception is available in clear terms in the Department of Justice and FBI's document titled "Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States."⁸⁶ This document lays out the procedure to follow when interrogating any "operational terrorists,"⁸⁷ along with the factors to weigh in deciding when or if to present an arrestee with his *Miranda* warnings and when to cease questioning.⁸⁸ While this document is not binding on the courts, it is nearly binding on federal agents and should leave them with little confusion on how to carry out their responsibilities when interrogating a terrorism arrestee.⁸⁹

83. See McCaul & Sievert, *supra* note 3, at 599 (disagreeing with the application of *Miranda* rights to suspected terrorists).

84. See *New York v. Quarles*, 467 U.S. 649, 659 n.8 (1984) (distinguishing cases in which the public safety exception did not apply).

85. See McCaul & Sievert, *supra* note 3, at 627–28 (describing the lack of clarity for when the public safety exception would apply).

86. Memorandum from Office of the General Counsel to All Field Offices of the Federal Bureau of Investigation (Oct. 21, 2010) (on file with author).

87. The term is defined in the document as "an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation." *Id.* at 2 n.2.

88. *Id.* at 2–3.

89. See *id.* at 1 ("This Electronic Communication provides guidance regarding the use of *Miranda* warnings for custodial interrogation of operational terrorists who are arrested inside the United States.").

Second, the decision to admit statements of the accused must always be decided on a case-by-case basis. Even the 2009 MCA rules on statements of the accused call for an analysis of voluntariness based on different factors, as well as an overall “totality of the circumstances” evaluation of the reliability of the evidence.⁹⁰ Notably, Article III parties and courts have the benefit of developed case law in *Quarles*⁹¹ to help guide the inquiry into what qualifies for the public safety exception of *Miranda*. In contrast, military commissions, with their short history and limited case law, do not have a similar resource to draw upon for guidance.⁹²

Finally, case law has become increasingly favorable towards a broadly flexible standard for the *Quarles* public safety exception in terrorism prosecutions. Consider the case of *United States v. Abdulmutallab*,⁹³ the case of the “underwear bomber” who attempted to ignite explosives concealed in his underwear while aboard Northwest Flight 253 as it approached Detroit.⁹⁴ There, Abdulmutallab argued that his fifty-minute conversation at the University of Michigan Hospital should be suppressed because federal agents did not inform him of his *Miranda* rights until after the conversation.⁹⁵ The court disagreed, citing to both Sixth Circuit and Second Circuit precedent applying *Quarles*.⁹⁶ The court went on to explain that the primary inquiry was whether the questions asked were calculated to obtain information that would help secure the safety of the public, and given

90. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2580 (codified at 10 U.S.C. § 948r(c)–(d) (Supp. III 2009)).

91. *New York v. Quarles*, 467 U.S. 649 (1984).

92. *See* McCaul & Sievert, *supra* note 3, at 630 (“Considering the exact wording of the [Military Commission] rule, the statement would be admissible whether it reflected an immediate threat or related to a future threat As such, the rule does not fit the exact language of *Quarles*.” (footnote omitted)).

93. *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243 (E.D. Mich. Sept. 16, 2011).

94. *Id.* at *1.

95. *Id.* at *3.

96. *Id.* at *5. Both Second Circuit cases were terrorism prosecutions. *See In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 215 (2d. Cir. 2008) (upholding the convictions of two defendants based on their involvement in the bombing of two U.S. Embassies in Africa in part because “[t]he inculpatory statements of [the defendants] obtained overseas by U.S. agents were properly admitted at trial”); *United States v. Khalil*, 214 F.3d 111, 121 (2d Cir. 2000) (holding the police’s questioning “about the construction and stability of the bombs” valid under the public safety exception).

that that was clearly the federal agent's primary motive, it fell squarely within the *Quarles* exception.⁹⁷

B. *Article III Judges v. Military Judges*

As mentioned earlier, one of the most significant reasons proponents of military commissions offer for their support of the system is the use of military judges as opposed to Article III judges.⁹⁸ Some of the reasons offered for this preference are that Article III judges often “appear reluctant to admit certain categories of evidence, even when that evidence is actually admissible under civilian rules” and “often have neither national security nor military experience[.]”⁹⁹ Additionally, according to proponents of military commissions, “rogue or irrational jurors are more likely to be encountered in civilian juries . . . as opposed to military juries where panel members are military officers who are chosen because of an established record and reputation for good judgment.”¹⁰⁰

In a sense, the debate over Article III judges versus military judges can sometimes function as a microcosm of the debate over the use of Article III courts versus military commissions in terrorism prosecutions. As such, many of the arguments made earlier with regards to the admissibility of evidence and the protection of classified information can be cross-applied here. As previously mentioned, the Government has multiple mechanisms through which to ensure the protection of classified information,¹⁰¹ and has a strong record of doing so even when an Article III judge lacks extensive military or national security experience.¹⁰² Additionally, while the admission of evidence in certain cases may be more relaxed (on paper), in other cases, such as the recently discussed admissions and statements of the accused, Article III courts are just as relaxed, if not more so.¹⁰³

97. *Abdulmutallab*, 2011 WL 4345243, at *6.

98. *See, e.g.*, McCaul & Sievert, *supra* note 3, at 638 (“As an experienced government attorney, the author readily acknowledges the preference of trying a case before a military commission rather than a civilian court . . .”).

99. *Id.* at 638–39.

100. *Id.* at 639.

101. *See id.* at 632 (“CIPA requires the defendant to advise the court beforehand if he intends to introduce classified information and allows the Government to meet with the court *ex parte* before trial to review classified information that may be material or subject to rules of discovery.”).

102. *See id.* at 634 n.189 (listing cases upholding the *ex parte* review of classified information).

103. *See id.* at 634 (“Civilian appellate courts have rejected defendants’ assertions that they should participate in pretrial determinations of the discovery of classified information.”).

But even accepting that military judges do have the benefit of more experience and more relaxed rules, the problem of massive uncertainty makes their work far more difficult than that of Article III judges. First, there is the problem of lack of precedent in trying domestic offenses, as Professor Steve Vladeck explains:

As *al Bahlul* helpfully explains, when it comes to precedent for trying domestic offenses in law-of-war military commissions, there isn't exactly a whole lot of reliable precedent—which is to say, there isn't *any*. As a result, in case after case, the military commission's trial judges have had to reinvent the wheel on legal issues ranging from the mundane to the momentous. . . . Whether one thinks *al Bahlul* is rightly decided or not, it's not as if the current crop of military judges has *any* experience presiding over military commission trials of domestic offenses (as compared to their Article III brethren, who, as Judge Tatel pointed out in his concurrence, have *loads* of such experience).¹⁰⁴

Second, there are still few clear answers on the application of most of the Constitution's provisions and protections on military commission proceedings. A 2011 article previewing the Khalid Sheikh Mohammed military commission proceeding highlighted these issues:

Does the requirement of an impartial jury in the Sixth Amendment apply? Does the entirety of the Sixth Amendment apply? Does the Fifth Amendment apply? Are certain crimes legally triable by military commission? I do not purport to know the answers to these questions. While the answers to these questions are unknown, they must be answered before the 9/11 trial proceeds. However, that is unlikely.¹⁰⁵

Although some Article III judges have shown the ability to handle terrorism prosecutions well, and have now built up national security experience on par with judges in the military commissions system, it is fair to note the advantages of military judges make them appear more favorably

104. Steve Vladeck, *Why I Don't "Trust" the Military Commissions (And You Shouldn't Either . . .)*, LAWFARE (June 24, 2015, 3:21 PM), <https://www.lawfareblog.com/why-i-dont-trust-military-commissions-and-you-shouldnt-either> [perma.cc/R4VR-CH2L].

105. Jonathan Tracy, *The Real Problem with Khalid Sheikh Mohammed's Military Commission*, 38 HUM. RTS. 14, 14 (2011); *see also* Vladeck, *supra* note 104 (discussing the "unclear constitutional foundation" of the military commissions at present, and highlighting the Eighth Amendment as another potential constitutional roadblock for military commissions).

positioned to handle certain cases.¹⁰⁶ Unfortunately, however, given the amount of uncertainty that persists in the military commission system, it is very difficult to say, on a macro level, that those advantages outweigh the disadvantages that currently plague the military commission system.

IV. CONCLUSION

As previously stated, the purpose of this article is not to assert that military commissions should not have a role to play in the way the United States prosecutes those accused of terrorism. Indeed, under current law, there are several alleged terrorists who cannot be prosecuted in any venue other than military commissions.¹⁰⁷ And even some of the most critical of military commissions concede that when it comes to international war crimes, military commissions are better situated to handle those cases.¹⁰⁸ Rather, the purpose of this paper is simply (1) to correct the narrative regarding Article III court's handling of classified information, and (2) to make clear that on the question of the admissibility of evidence, the advantages that military commissions hold over Article III courts are not as superior as they are often made to seem.

Additionally, before the publication of this article, the DC Circuit handed down *In re Abd Al-Rahim Hussein Muhammed Al-Nashiri*,¹⁰⁹ commonly referred to as *Al-Nashiri III*. The opinion discusses the non-recusal of Judge Spath and the harmful impact that this error had on proceedings.¹¹⁰ While the opinion does not focus on the admissibility of evidence or the protection of classified information, it is yet another example of the many issues and uncertainty that the military commissions system is fraught with while also reinforcing this article's conclusion that Article III courts are the significantly superior forum for terrorism prosecutions at this time.

As for the big picture, it is important to note that there are other non-evidentiary questions still unresolved in the military commission system,

106. See McCaul & Sievert, *supra* note 3, at 635 (discussing how military judges are more receptive to protecting classified information).

107. See Benjamin Wittes, *Thoughts on Al Nashiri II*, LAWFARE (Aug. 31, 2016, 10:38 AM), <https://www.lawfareblog.com/thoughts-al-nashiri-ii> [perma.cc/A7AS-9CWB] (“Al Nashiri cannot be tried in federal court, because he cannot be brought to the U.S. for trial.”).

108. See Vladeck, *supra* note 104 (“[T]ruly understanding war crimes requires a keen understanding of—if not experience in—war itself, something Article III courts—and their juries—often lack.” (emphasis omitted)).

109. *In re Abd Al-Rahim Hussein Muhammed Al-Nashiri*, No. 18-1279, 2019 WL 1601994, (D.C. Cir. 2019).

110. *Id.* at *1.

such as whether military commissions can try non-international war crimes, whether they can try pre-9/11 crimes, and whether their jurisdiction can be extended to citizens. These questions are likely to continue to delay bringing terrorists in the military commissions to justice.

As such, for cases involving non-international war crimes, it would be wise to utilize the Article III courts to dispose of the majority of terrorism prosecution cases until the many open questions in the military commissions system are resolved. Article III courts, though far from perfect in their record with terrorism prosecutions, have shown the ability to bring terrorists to justice and protect classified information at the same time. Hopefully, in the near future, as the military commission system resolves more of the constitutional and procedural questions it currently faces, it will be able to take on a larger role in terrorism prosecutions and become a fair and efficient forum for bringing certain terrorists to justice alongside the Article III court system.