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## TRYING TERRORISTS

Brian S. Carter-Stiglitz<sup>†</sup>

Trying terrorists in Article III courts presents a host of complications and problems. As terrorism cases come before civilian courts, prosecutors have had to wrestle with these challenges. The most significant challenge may be the tension between protecting national-security secrets and prosecuting those who threaten national security in open court. The Classified Information Procedures Act (CIPA) is the main litigation tool for dealing with these challenges.

Two cases, both with Minnesota roots, demonstrate the challenges that face civil prosecution in terrorism cases. Mohammed Abdullah Warsame, a largely unknown name, is being tried in the District of Minnesota on material support charges. Michael Ward, a former assistant U.S. Attorney (AUSA) for the District of Minnesota, initially led Warsame's prosecution.<sup>1</sup> The complications caused by CIPA have already prolonged Warsame's prosecution for four years—with no end currently in sight. Zacarias Moussaoui is the other example. Moussaoui was discovered in Minnesota when flight school officials notified the FBI of his suspicious behavior. Moussaoui was arrested in Minnesota and subsequently tried in the Eastern District of Virginia. Robert Spencer, former AUSA for the Eastern District of Virginia, led Moussaoui's prosecution.<sup>2</sup> The Moussaoui prosecution was fraught with difficulties, but his sentencing has

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1. See E-mail from Michael Ward, former Assistant U.S. Attorney, Dist. of Minn. (Dec. 11, 2007) (on file with author). All Ward commentary emanates from this source.

2. See Telephone Interview with Robert Spencer, former Assistant U.S. Attorney for the E. Dist. of Va. (Nov. 27, 2007); Robert Spencer, Remarks at William Mitchell College of Law National Security Forum: One 9/11 Case. Five Years of Controversy (TPT television broadcast Nov. 28, 2006) (video on file with the William Mitchell Warren E. Burger Library of Law). All Spencer commentary emanates from these two sources.

provided a rare, cathartic moment for the 9/11 survivors. This essay also includes comments from Eastern District of Michigan Judge Gerald Rosen.<sup>3</sup> Judge Rosen is one of few judicial members to have visited CIA headquarters in handling CIPA concerns. In their visits to the National Security Forum at William Mitchell College of Law, and elsewhere, Michael Ward, Robert Spencer, and Judge Gerald Rosen have explicated the complications and benefits that attend trying terrorists in Article III courts.

## I. BACKGROUND: TWO TERRORISTS IN ARTICLE III COURTS

### A. *The Mini-Moussaoui*

Abdullah Warsame is not a household name, even to those who follow national security law. Warsame is a husband and father with a sociable and friendly personality. In 2003, he was excelling as a student at a community college in Minneapolis, Minnesota. A professor had even suggested him for a scholarship. At first glance, Warsame seemed a model example of an immigrant making good of the American dream.

However, on the morning of December 8, 2003, as Warsame prepared for his fall-semester finals, agents from the Federal Bureau of Investigation (FBI) knocked on his door. Soon after Warsame allowed the three agents into his small apartment, Special Agent Harry Samit began asking about Warsame's background and travels. The interrogation began "[v]ery lighthearted and very upbeat."<sup>4</sup> But when Samit pressed Warsame about whether he had ever traveled to Pakistan, Warsame "sagged in his chair."<sup>5</sup> At this point, Samit suggested that they move to a more private location.<sup>6</sup>

Warsame agreed to go with the agents, but they did not tell Warsame that they were planning to go to a deserted military base over a hundred miles away. After a long drive and a pit-stop at KFC, the group arrived at Camp Ripley. The FBI had set up two houses on the base. One house was wired with cameras and used

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3. Honorable Gerald E. Rosen, U.S. Dist. Judge for the E. Dist. of Mich., Address at William Mitchell College of Law National Security Forum: Lawfare: Terrorism and the Courts (Feb. 16, 2006) (video on file with the William Mitchell Warren E. Burger Library of Law). All Rosen commentary emanates from this source.

4. *United States v. Warsame*, 488 F. Supp. 2d 846, 851 (D. Minn. 2007).

5. *Id.*

6. *Id.*

for interviewing and housing Warsame. FBI agents and an AUSA watched the interviews on closed-circuit television from the second house.

The FBI questioned Warsame for two days. Over the course of the interviews, Warsame admitted that he immigrated to Afghanistan in 2000 and intended to stay permanently. Warsame also admitted that while in Afghanistan, he had attended two al Qaeda training camps.

On the second day, Warsame demanded he be returned to the Twin Cities. Upon returning to the Cities, Warsame refused to cooperate further, and the agents arrested him. After being held briefly as a material witness in the Southern District of New York, Warsame was charged in the District of Minnesota with conspiracy to provide material support to a designated foreign terrorist organization (FTO), providing material support to a FTO, and making false statements to the FBI.

Warsame has been in custody for over five years and his trial is nowhere in sight. An appeal concerning his motion to suppress statements is now pending before the Eighth Circuit. Warsame has generated little commentary, but it is a text-book example of the problems that attend trying terrorists in Article III courts.

#### *B. Zacarias Moussaoui*

Zacarias Moussaoui was arrested in August 2001 and finally sentenced in May 2006. Moussaoui had entered the United States on February 23, 2001, on a visa waiver. After attending a flight school in Oklahoma, Moussaoui moved to Eagan, Minnesota to attend Pan Am International Flight Academy. A flight school employee became suspicious of Moussaoui and called the local FBI. Samit and his team immediately recognized the red flags. A vigorous debate ensued between local FBI and headquarters as to whether they could obtain a warrant to search Moussaoui's possessions. In the end, headquarters won—the investigators did not get a search warrant.

Many have debated whether issuance of that warrant could have prevented the 9/11 attacks. Robert Spencer argues that a search warrant would not have unraveled the 9/11 plot. The 9/11 Commission arrived at the same conclusion. However, Michael Ward contends that the question is not so clear, suggesting that a search of Moussaoui's possessions may have prevented the 9/11 attacks.

It was not until immediately after 9/11, however, that the government unraveled the conspiracy. Even as fires still burned at ground zero in New York, the Justice Department decided to try Moussaoui in the Eastern District of Virginia for his role in the 9/11 attacks. Spencer was lead prosecutor. His experience with CIPA made him an ideal choice. He is, arguably, the only U.S. Attorney to have taken both terrorism and espionage cases to trial. The Eastern District of Virginia was equally well equipped to handle the trial. But in spite of the talent of those involved in Moussaoui's trial, commentators have called it a "circus"<sup>7</sup> and "a sad relic of the past, a modern version of Bleak House."<sup>8</sup> The case slogged on for four-and-a-half years, even though Moussaoui eventually pled guilty. Like Warsame, the *Moussaoui* case calls into question the ability of our Article III courts to handle terrorism prosecutions.

## II. CLASSIFIED INFORMATION IN PUBLIC COURTS

For both Warsame and Moussaoui, classified information severely hampered the quick expedition of the cases. If a prosecution implicates classified information, the prosecutor has three options. First, the prosecutor can seek to have the information declassified. Second, if the information is too sensitive to declassify, the prosecutor can try to prevent classified information from being relevant at trial. The third option is dismissing the charges.

Classified information creates a tension between competing policies. The government desires to keep classified information secret, to protect sources, to protect intelligence techniques and capabilities, and, on a grander scale, to protect national security imperatives. But defendants' rights to effective counsel, to confront the government's evidence, and to aid in mounting a defense counterbalance the government's interest in secrecy.

### A. CIPA Mechanics

CIPA governs the use of classified information in criminal

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7. Stephen A. Saltzburg, *A Different War: Ten Key Questions on the War on Terror*, 75 GEO. WASH. L. REV. 1021, 1037 (2007).

8. A. John Radsan, *The Moussaoui Case: The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417, 1420 (2005).

proceedings.<sup>9</sup> Under a two-step process, a presiding judge must first determine whether the information must be produced by the government (discovery and disclosure) and then determine whether the information is admissible at trial.<sup>10</sup> Thus, the first step governs defendants' access to evidence. CIPA allows the government to present classified information to the court *ex parte* and *in camera*, so that the court can decide whether the information is discoverable under the Federal Rules of Criminal Procedure or must be disclosed under *Brady v. Maryland*.<sup>11</sup> Here, the evidence may retain its classified status since the defense counsel will have a security clearance. The second step determines whether the evidence may be disclosed at trial, which would necessarily destroy the classified status of the evidence.

### B. *A Three-Body Problem*<sup>12</sup>

For prosecutors, CIPA is a three-body problem involving the interplay between intelligence agencies, defendant, and judge.

#### 1. *The Prosecutor and the Intelligence Agencies*

Dealing with intelligence agencies is a particularly difficult aspect of CIPA that has received relatively little attention. Obviously, when prosecuting a terrorist, the prosecutor may have to draw on evidence collected from intelligence sources. What is not so obvious, at least at first glance, is the tension that inheres between the intelligence agency and the prosecutor. The intelligence agency may not want to disclose sensitive classified information to the cleared defense counsel, to the judge, or even to the prosecutor.

Ward describes the situation as "being fraught with peril." First, the prosecutor must tailor charges so that the classified information will be protected. Ward describes the process in the following manner: "After carefully considering [the] intelligence and its implications for their case, a prosecutor needs to draft the criminal charges very carefully and . . . narrowly . . . to avoid

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9. See 18 U.S.C. app. 3 §§ 1–16 (2000 & Supp. IV 2004).

10. See *id.* §§ 4, 6.

11. 373 U.S. 83 (1963).

12. The three-body problem is the famous physics problem of solving for the movement of three celestial bodies under their mutual gravitational attraction. It is notoriously difficult, despite the ease with which the two-body problem is solved.

allowing the more sensitive information from becoming relevant to either the charges or a potential defense.”

The *Warsame* case is a good example of this charge tailoring. As with most terrorism prosecutions, the charges against Warsame include violations of the material support statutes. Specifically, the government alleges that Warsame provided himself as personnel and gave money to al Qaeda.<sup>13</sup> But the allegations against Warsame suggest that the government could have charged him with more specific and serious crimes. For example, the allegations that al Qaeda financed Warsame’s return to Canada after training at a camp with Osama bin Laden,<sup>14</sup> and that Warsame knew Richard Reid and Zacarias Moussaoui<sup>15</sup> suggest crimes much more serious than material support. According to Ward, the charging process results in

more narrow and possibly less serious charges being prosecuted rather than the sweeping and wide ranging charges that the media and . . . public might expect. Often, it is this need to keep the charges focused on subjects that will not impinge on sensitive intelligence that limits charges rather than the lack of evidence. The media and public do not understand this reality.

Accordingly, the charges against Warsame may suggest that he is a small fish, but the reality may be something different.

The irony is that by fashioning narrow charges, the government defeats the major advantage of Article III courts: publicity. When the public looks at these material support charges it is often underwhelmed. By proceeding with watered-down charges the government fails to show the true nature of the enemy it has neutralized.

One thing that is not lost by charging material support crimes,

13. Bill of Particulars at 1–2, *United States v. Warsame*, Criminal No. 04-29 (D. Minn. Mar. 16, 2007).

14. See Brief for the United States at 3, *United States v. Warsame*, No. 07-2560 (8th Cir. Sept. 11, 2007) (alleging Warsame attended two terrorist training camps and met and dined with bin Laden); Defendant’s Reply to Government’s Response to Defendant’s Motion to Dismiss for Lack of a Speedy Trial at 2, *United States v. Warsame*, Criminal No. 04-29 (D. Minn. Dec. 27, 2006) (addressing government allegations that Warsame attended two training camps in Afghanistan and, after returning to Canada, wired \$2000, which was the cost of his return trip to Canada, back to Pakistan).

15. See Brief of Appellee at 12, *United States v. Warsame*, No. 07-2560 (8th Cir. Nov. 2, 2007) (stating that the government questioned Warsame about contacts with Moussaui and Reid).

however, is a hefty sentence. The sentences that attend material support crimes are staggering, and the Justice Department has a record of obtaining lengthy sentences.<sup>16</sup> In fact, Warsame's own defense counsel appeared not to appreciate the magnitude of the potential sentence. Over a year ago, Warsame, having already spent four years in custody, argued that he had "already served any sentence which could reasonably be imposed for such convictions."<sup>17</sup> But Warsame's material support charges could result in thirty years to life under the applicable sentencing guidelines.<sup>18</sup>

The *Moussaoui* case is also an excellent example of the interplay between intelligence agency and prosecutor. Spencer explains that the collaboration works but "the general rule is that there is always a tension." He describes it as a two-front war, battling both defendant and intelligence agency. According to Spencer, a major job of the terrorism and espionage prosecutor is to convince the intelligence agency to allow the evidence to be used as the basis for a charge. Ward also stresses the importance of gaining the intelligence agency's trust. Prosecutors must convince the agency that they value the agency's interests and are committed to protecting those interests.

Gaining and keeping the trust of an intelligence agency is not always possible, and Spencer admits that the system sometimes breaks down. A particularly vivid example involves the recent controversy over destroyed Central Intelligence Agency (CIA) tapes. While the recent tape controversy garnered significant interest, previous controversies involving CIA-interrogation tapes have received much less media attention. In October 2007, a U.S. Attorney filed a letter with both the district and the Fourth Circuit courts describing errors in factual assertions made during the *Moussaoui* case. Massaoui had sought access to recorded interrogations of certain detainees. While litigating the CIPA issues, the government had stated that the CIA did not have the

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16. For example, Hamid Hayat received twenty-four years for attending an al Qaeda training camp in Pakistan. Carol J. Williams, *Padilla Gets Unexpected Sentence*, L.A. TIMES, Jan. 23 2008, at A12. Jose Padilla received seventeen years for providing material support; prosecutors complained that the sentence was far too lenient. *Id.*

17. Defendant's Reply, *supra* note 14, at 2.

18. Surreply of the United States to Defendant's Motion to Dismiss for a Lack of a Speedy Trial at 5 n.1, *United States v. Warsame*, Criminal No. 04-29 (D. Minn. Jan. 31, 2007).



requested recordings. In fact, the CIA had tapes, perhaps courtesy of a foreign intelligence service, but told the prosecutors otherwise. The CIA eventually gave the tapes to the prosecutors, who were then required to crawl back to the courts and correct the error.

The incident is an example of a failure of cooperation between prosecutors and intelligence agencies. The CIA, and especially the clandestine service, fiercely protects the agency's interests; interests put at risk when information is provided to prosecutors who may be required to give the information to a court or defendant. According to one former CIA official, CIA operatives "believe that no one else will look out for them so they have to look out for themselves."<sup>19</sup> It is not surprising that dealing with an agency that "is almost tribal in nature" causes the prosecution headaches.<sup>20</sup>

## 2. *The Prosecutor and the Defendant*

The second body that factors into the prosecution's CIPA equation is the defendant and his or her power of graymail. Graymail is a defense tactic whereby the defendant seeks to get classified information admitted at trial in order to induce the government to drop charges. CIPA does not solve the graymail problem because it does not necessarily preserve the classified nature of evidence at trial. Instead, CIPA simply moves the graymail problem to pretrial. Thus, when the government prosecutes terrorists it may be forced to choose between the pain of disclosure and the pain of dismissal.

Graymail typically occurs when, after the security-cleared defense counsel has examined the evidence, the defendant argues that the classified information should be admitted at trial. *Moussaoui*, however, presented a unique threat because Moussaoui proceeded pro se. Giving classified information to Moussaoui was clearly unacceptable. The court eventually revoked Moussaoui's right to self-representation, relieving some of the pressure on prosecutors.

Moussaoui's attorneys signed an agreement promising not to disclose the classified evidence to Moussaoui. Some have argued that such a requirement is unfair to the defendant. But even Edward MacMahon, one of Moussaoui's attorneys, agrees that

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19. Greg Miller, *CIA's Clandestine Service Called Its Own Shots on Tapes*, L.A. TIMES, Dec. 24, 2007, at A1.

20. *Id.*

classified evidence should not be given to a member of al Qaeda. Nevertheless, denying the defendant access to evidence contravenes the general CIPA position that the “defendant should not stand in a worse position because of the fact that classified information is involved.”<sup>21</sup> Perhaps this sentiment is viewed best as more aspirational than actual. The inevitable result is that the defendant will be worse off when the government’s evidence involves classified information.<sup>22</sup>

In *Moussaoui*, the government was not even willing to give cleared defense counsel access to certain information. The government, rather, produced the information to the district court *ex parte* and *in camera*. The court subsequently ordered the government to give the information to the defense. It also ordered the government give the defense access to three witnesses—all enemy combatants held abroad. The government refused, and the court struck the death penalty and all references to 9/11 in the charges. At this point, many commentators believed the government would drop criminal charges and sweep Moussaoui into the military system.

The district court’s ruling was appealed to the Fourth Circuit. In large part, the appellate court ruled against the government, holding that the witnesses were essential to Moussaoui’s defense and finding that the government’s summaries of classified evidence were inadequate.<sup>23</sup> The Fourth Circuit, however, neutralized Moussaoui’s number one graymail card: the government could fashion substitutes for access to the detained witnesses.<sup>24</sup> At this stage, Moussaoui himself may have realized that the Fourth Circuit had taken his biggest bargaining chip away. When asked why Moussaoui plead guilty, Spencer replied that Moussaoui might have realized that he had used up his other options, citing the Fourth Circuit detainee-access compromise.

This CIPA wrangling was what caused, in large part, the *Moussaoui* litigation to drag on. Spencer alluded to this: “We didn’t know . . . when we indicted the case that [Khalid Skeikh Mohammed (KSM)], Binalshibh, and Mustafa Ahmed al Hawsawi

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21. S. Rep. No. 96-823, at \*9 (1980), as reprinted in 1980 U.S.C.C.A.N. 4302.

22. When asked about this unfairness, MacMahon poignantly stated, “anytime you charge someone with a capital crime there are a lot of things that are unfair.” *One 9/11 Case*, *supra* note 2.

23. *United States v. Moussaoui*, 382 F.3d 453, 456–57, 476 (4th Cir. 2004).

24. *Id.* at 478–83.

would be captured alive and held offshore . . . and that's what hung the case up for so long."

If the prosecution could have expected the conservative Fourth Circuit as its ally in the graymail battle, it could not have expected its second major ally: The 9/11 Commission. According to Spencer, the Commission's investigation was initially an annoyance, because it distracted the agents involved in the prosecution. But Spencer acknowledges that the Commission's report led to declassifications that "permitted [the prosecution] to go forward in [an] Article III court." Without the 9/11 Commission forging the declassification trial, Moussaoui might have ended up in front of a military commission.

For Warsame, CIPA has largely meant one thing: jail time with no trial in sight. Nearly three years after Warsame's arrest, he moved to dismiss the case for a violation of his constitutional right to a speedy trial. The district court disagreed, citing CIPA complications.<sup>25</sup> The court stated that the delays were "largely inevitable given the unusual and complex nature of cases that implicate national security interests."<sup>26</sup> It reasoned that the delays were caused by "the efforts to provide discovery materials vital to the defense."<sup>27</sup>

Thus, CIPA's strictures were cited as the reason Warsame has been in custody for over five years without trial. Warsame took issue with this logic, pointing out that after three years the government had not produced a single piece of evidence through CIPA discovery. The government's "CIPA made me do it" argument is troublesome because CIPA is a statute that protects government interests. If the government cannot marshal its evidence after four years then, arguably, the government should not be allowed to proceed in an Article III court.

But Warsame's CIPA fight may have just begun. At the time of this writing, *Warsame* is on an interlocutory appeal to the Eighth Circuit concerning the admissibility of Warsame's initial interview statements. After this issue is resolved, the case may just end up back in the Eighth Circuit to consider the same CIPA issue presented in *Moussaoui*: the defendant's access to high-value detainees.

Warsame may just seek access to high-value detainees, e.g.,

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25. *United States v. Warsame*, Criminal No. 04-29 (D. Minn. Mar. 8, 2007).

26. *Id.*

27. *Id.*

KSM. According to the government, both Warsame and KSM were in Afghanistan in 2000.<sup>28</sup> If the government's allegation that Warsame was rubbing elbows with bin Laden is correct, then Warsame could also have been rubbing elbows with KSM. During the various interrogations of KSM, an operative may have shown KSM a picture of Warsame and asked if KSM had ever seen Warsame before. And if KSM said "no" then the evidence might be exculpatory. By now, Warsame's attorneys have likely received summaries of detainee statements (should they exist), and they may just push for access to the detainees. If this CIPA issue plays out, and one side seeks an interlocutory appeal, it could mean even more delay. Indeed, this would present the exact same situation that dragged out *Moussaoui*. The only difference is that Warsame has a four-year head start.

Trust also plays an important role in how the defendant and prosecutor navigate CIPA. In praising the abilities of the AUSAs prosecuting terrorists and his former colleagues at the Justice Department's Counterterrorism section, Ward emphasizes the importance of establishing the defense counsel's trust in handling CIPA issues:

Prosecutor[s] need[] to ensure . . . the trust of the Court and defense counsel and preserve their confidence that [the] prosecutors will faithfully uphold their ethical responsibilities and all the while act as . . . aggressive advocate[s]. Threading this needle is an extremely challenging task.

Unfortunately, judging by the tone of Warsame's briefs, the government's efforts to establish trust have not satisfied defense counsel.<sup>29</sup>

### 3. *CIPA and the Court*

The third body in the prosecutor's CIPA equation is the judge. One of the court's most important roles in CIPA issues is determining how to use substitute information and redactions. As

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28. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 149–50 (2004).

29. Indeed, some of Warsame's briefs strike an indignant (and self-defeating) tone: "To our shame, the sole reason that [Warsame] has been treated to these punitive conditions is that he is charged with a 'terrorist offense', [sic] of which he is (snicker) presumed innocent. (Sure he is.)" Defendant's Reply, *supra* note 14, at 2.

discussed above, substitutions for access to the detainees proved critical in *Moussaoui*. In *Warsame*, the district court judge stressed that substitutions and redactions are a critical step in making CIPA work. Since the judge is also responsible for reviewing evidence at the discovery stage, the judge is a major player in determining how quickly the process proceeds.

According to Judge Rosen, it is critical for the judge to quickly determine if the government's case will implicate classified information. If the government even so much as "intimates" that classified information will be involved, then the court should immediately schedule a conference to establish protocols for handling classified information. Judge Rosen warns of the "problems that can drive the courts and lawyers to distraction," namely, those associated with a government assertion of a privilege based on national security concerns. Judge Rosen, the first judge to travel to CIA headquarters to examine classified material, stresses that some information is so sensitive that it could never be sufficiently "scrubbed" to allow for disclosure at trial. The fact that the U.S. Government even has possession of certain information is, according to Judge Rosen, so sensitive that it could risk destabilizing cooperating foreign governments. Counterbalancing the government's interest is what Judge Rosen calls the "granddaddy" of all CIPA problems: ensuring the defendant's constitutional right to confrontation. Judge Rosen argues that resolving this conflict is only possible if judges think "outside of the envelope, but inside the Constitution."

### III. CIRCUS VERSUS TRIBUNAL

Shortly after *Moussaoui* was sentenced, then Attorney General Alberto Gonzales mused on the *Moussaoui* trial's problems.<sup>30</sup> He cited its high cost and long duration, and mentioned military commissions as an alternative. However, as Spencer points out, the military option has yet to be tested. In spite of the *Moussaoui* circus, Article III courts have disposed of other terrorist cases, such as the embassy-bombings case, with relative expediency.<sup>31</sup> Advocates of criminal justice for terrorists can, perhaps, explain

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30. *One 9/11 Case*, *supra* note 2.

31. The government convicted four individuals for the bombings of embassies in Tanzania and Kenya in 1998. Phil Hirschhorn, *Four Guilty in Embassy Bombings Trial*, CNN, May 30, 2001, <http://edition.cnn.com/2001/LAW/05/29/embassy.bombings.03/>.

away the *Moussaoui* and *Warsame* messes by pointing to the novel legal issues and unique evidentiary circumstances. For example, *Warsame* has raised literally every national security issue, many of which lack Eighth Circuit or Supreme Court precedent.<sup>32</sup>

In many ways, the public nature of Article III courts is an advantage over a secret military court. Publicity provides at least two important benefits. First, a public trial exposes the nature of the enemy to Americans and the world. While *Moussaoui* is a spectacular example of how a trial can become a circus, it is an equally spectacular example of the benefits of a public court. The final phase of the *Moussaoui* trial determined the presence of mitigating and aggravating factors, and the prosecution's case was mostly witness impact testimony. One juror likened the testimony to attending one funeral after another. Each gut-wrenching testimonial delighted *Moussaoui*. As Spencer put it, the trial showed the world "what the mind of a terrorist is like." Second, public trials put the American justice system out in the open. It is, ideally, a testament to the integrity of our system. But even on a bad day, exposing the messiness of the judicial process will provide a check on the system.

The interests of the defendant are conspicuously absent from this list of public trial benefits. Defendants have, of course, an interest in fair due process, but no reasonable person advocates using a military system that is not fair. And the partial secrecy of a military commission does not necessarily imply an unfair system. On balance, a public trial is not necessarily in the best interests of the defendant. In some sense, our civilian criminal justice system has sacrificed *Warsame's* right to a speedy trial at the CIPA altar. Is remaining in custody for years before trial really in *Warsame's* best interest, or would it be better to use an alternative forum that could process him quickly *and* fairly? When the legal system hammers the square terrorist peg into the round Article III court hole, it is done,

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32. *Warsame* has challenged the constitutionality of the material support statute, the Foreign Intelligence Surveillance Act, and the President's terrorist surveillance program. He has also tried to compel the government to identify its confidential sources. Aside from these national security issues, *Warsame* has filed numerous other motions, including a Motion for a Bill of Particulars, a Motion to Quash Arrest and Suppress Evidence, a Motion for Discovery, and a Motion for Release from Custody Pending Trial. Nevertheless, recall that the district court's justification for the delay is CIPA, not an inability to efficiently dispose of *Warsame's* swarm of motions.

in large part, for our benefit, not the defendant's.<sup>33</sup>

Those who advocate trying terrorists in Article III courts based on defendants' interests are, thus, a little like Miss Flite from Dickens' *Bleak House*. Miss Flite, the not-quite lucid Chancery groupie and party to the interminable Jarndyce and Jarndyce lawsuit, explains why she keeps captive birds: "I began keeping the little creatures . . . [w]ith the intention of restoring them to liberty. When my judgment should be given . . . . They die in prison, though. Their lives, poor silly things, are so short in comparison with Chancery proceedings."<sup>34</sup>

The district court did finally dispose of *Moussaoui*, and given the importance of the case, a public trial might well have merited the hassle. As for Warsame, "I expect a judgment. Shortly. On the Day of Judgment."<sup>35</sup>

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33. I have skirted several issues here—e.g., a defendant may receive more process from an Article III court than from a military commission.

34. CHARLES DICKENS, *BLEAK HOUSE* 56 (Modern Library Paperback ed. 2002) (1853).

35. *Id.* at 34 (quote by Miss Flite).