REMARKS PREPARED FOR DELIVERY BY

CHIEF JUDGE LORETTA PRESKA
U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CITIZENS CRIME COMMISSION BREAKFAST FORUM
FEBRUARY 28, 2011

As you had no doubt read, the Southern District of New York has tried and resolved numerous terrorism cases, both big and small. Indeed, it is fair to say that our Court has handled more terrorism cases than any other court in this country. The 1993 World Trade Center bombers were tried in our Court as U.S. v. Salameh. All defendants were found guilty, some receiving sentences of life plus 60 years, 240 years, 30 years and the like.

In U.S. v. Rahman, the blind sheik, Adbel Omar Rahman, and co-defendants were tried before Judge, later Attorney General, Michael B. Mukasey for conspiring to bomb a number of buildings and tunnels in New York. Some were also convicted of a murder plot against then-Egyptian President Hosni Mubarak and of the murder of Rabbi Meir Kahane. The sheik received a life sentence, and others received 57 years, 20 years and other serious sentences.

Affia Siddiqui was recently convicted of attempting to murder United States nationals, officers and employees. She grabbed an army officer's weapon in Afghanistan and fired it at other officers. Following a trial, she was sentenced to 86 years incarceration, resulting in riots in Pakistan.

Most of the perpetrators of the 1998 bombings of our Embassies in Nairobi, Kenya, and Dar-es Salaam, Tanzania, were convicted and sentenced in 2001, some to life sentences.

I conducted a trial over several weeks of Rafiq Sabir, a medical doctor, convicted of conspiring to provide material support to a terrorist organization. Dr. Sabir swore an oath to Al Qaeda and offered himself to treat wounded jihadists. He was sentenced to 25 years.

More recently, Sahid Hashmi pleaded guilty on the night before trial to conspiring to provide material support to Al Qaeda in the form of military gear, including waterproof jackets, socks, sleeping bags and the like. He was storing that equipment in his apartment in London, and our investigators learned of him from their British counterparts. He was sentenced to 15 years.

Also recently, another Embassy bomber, Ahmed Ghailani, the only Guantanamo detainee to be tried in a civilian court, was found guilty of only one of the 285 counts in the indictment—conspiracy to destroy buildings and property of the United States causing death. As you read in the newspapers, Judge Lewis Kaplan sentenced Ghailani to life imprisonment.

Also recently, Faisal Shahzad, the Times Square bomber, pleaded guilty and was sentenced to mandatory life imprisonment.

Terrorism involves both crimes and acts of war, and resolving terrorism cases involves concerns about due process, national security, international relations and other interests. These interests, together with the high level of public concern over terrorism issues, present inherent tensions that neither the civilian courts nor military tribunals can handle perfectly. I propose today to discuss with you some of the practical problems presented in resolving these cases and also to discuss briefly some of the differences between the civilian court trials and military commission trials.

Of course, before we can talk about terrorism cases, we must know what "terrorism" is. The State Department [22 U.S.C. § 2656(f)] defines terrorism as "premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents." Terrorism is not a crime in the way that bank robbery or narcotics trafficking are crimes; those crimes generally have personal, rather than political motives. For the same reason, the Somali pirate, whom I sentenced two weeks ago, is not considered a terrorist. He acted out of greed, not political motivation.

Another complication of terrorism cases is that they do not fit the traditional law enforcement model of retrospective investigation and punishment, that is, after the crime has been committed. The disastrous consequences of a terror attack require prospective intelligence gathering to prevent the crime from occurring.

All of these concerns became very concrete to me when, in November of 2009, the Attorney General announced that Khalid Sheik Mohammed and his codefendants would be brought from Guantanamo to the Southern District of New York for trial on the terrorist attacks of 9/11. Together with the United States Marshal and our District Executive, I met with judges from the relevant committees of our Court to address these concerns, and we have continued to meet as needed to address each case as it arises. I note the presence here today of the United States Marshal for the Southern District of New York, Joseph R. Guccione.

Of course the first issue to be dealt with is always security—the security of the trial participants—the judge, attorneys, and jury—and the security of courthouse staff and of the public. At the same time, however, we have to assure ease of access to the

courthouse for litigants, lawyers and members of the public who are carrying on their day-to-day non-terrorism work in other cases, both civil and criminal. As you read in the papers, following the Attorney General's announcement, the NYPD worked with our Marshal in conceiving a comprehensive plan for physical security of the courthouse and its environs. It provided for a variety of enhanced security measures in both the immediate area, that is, including the various courthouses, the US Attorneys' Office, One Police Plaza and the Metropolitan Correction Center, and in a larger perimeter area. The plan balanced security and access, and we were grateful to the Police Department for the care and concern that plan reflected.

Inside the courthouse, using the first World Trade Center and the Blind Sheik cases as models, we undertook various security upgrades to the actual courtrooms to be used.

Outside the courthouse security screening procedures for those entering the courthouse were reviewed. As you know, best practices dictate that security screening take place OUTSIDE the structure one is protecting so as to minimize any damage in the event an explosive device is detonated during the screening process. After years of work, planning for a security screening pavilion, separate from the courthouse, is complete, and, the budget gods willing, GSA is ready to let that contract next month. Also, in some cases, including the recent Siddiqui and Ghailani trials, additional security screening was implemented outside the actual courtroom.

Speaking about screening, trying terrorism cases requires the Court to summon an inordinate number of jurors. In the Ghailani case, over 1000 jurors were summoned, and in the first Embassy bombing trial, 1300 jurors were summoned. These trials tend to take

longer, and people are often reluctant to serve. Sometimes additional security steps are implemented, including transporting jurors to and from the courthouse. Rest assured that the Court is aware of these legitimate concerns and that we do our best to accommodate them consistent with our duty to get the cases tried.

I see a few members of the press present here today. Be assured that you are always considered in the planning for these cases. Adequate overflow courtrooms for viewing the proceedings on a real time basis are always needed, but with a case of intense public interest like KSM, and the expected throngs of reporters, the question arises who is a journalist for purposes of preferred seating in courtrooms? Is it only the journalist with NYPD press credentials who is assigned to the courthouse on a regular basis? Does it include a foreign journalist assigned to New York to cover a proceeding for the first time and who does not have NYPD press credentials? Does it include the new blogger wakes up in the morning, decides that this case sounds interesting and who takes off his pajamas and demands a seat in the front row? In 2009, we started meeting with press representatives to consider these and related questions and continue to evolve practices to maximize access.

Some well-developed substantive rights of defendants in the criminal law present particular challenges in the terrorism context. I'd like to spend a few minutes looking at some examples and, although I am by no means an expert in this area, also looking at how these rights are dealt with in military commission trials. To assist in the comparison, we have a few slides from the Congressional Research Service Report entitled "Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court."

As you probably know, military commissions have been used since the Revolution and have evolved at the time of each war in our history. Following recent litigation, Congress passed some statutes setting out procedures for military tribunals, the Military Commission Acts of 2006 and 2009, and practice under those statutes is still developing. By my count, there have been two military commission trials and one guilty plea.

[5th Amendment slide - #1]

One of the most fundamental rights of our criminal justice system is the right of a defendant not to incriminate himself. As you can see on the slide, this right arises from the Fifth Amendment. As you can also see, just as in civilian trials, in military commission trials, a defendant may not be compelled to testify against himself. Unlike in civilian courts, however, there is no prohibition in military commission trials against drawing an adverse inference from a defendant's failure to testify.

[Sixth Amendment slide - #2]

Tension can also exist between, on one hand, a defendant's Fifth Amendment right not to testify against himself and his Sixth Amendment right to counsel and, on the other hand, the nation's need for prospective intelligence to prevent terrorist attacks. In the Ghailani case, Ghailani was indicted with others in 1998 in connection with the East Africa Embassy bombings and, in 2004, was captured by a foreign nation and turned over to the CIA. The CIA interrogated him for two years seeking and apparently obtaining information for use in defending the United States. Ghailani was then transferred to DOD custody and detained at Guantanamo Bay for three more years. Finally, in 2009, he was transferred to the Southern District of New York for trial on the 1998 indictment.

For the purpose of Ghailani's motion to suppress the statements he made while in CIA custody, the Government conceded that those statements had been coerced and thus agreed not to use them at trial. One of those statements gave investigators the name of the man who said he sold Ghailani the explosives used in the bombing. The Government characterized that witness (whose name was Abebe) as "critical." Because Ghailani provided Abebe's name only through presumptively coercive interrogation tactics, the presiding judge ruled that Abebe could not appear as a witness at the trial. I observe parenthetically that because the question was whether there was a sufficient connection between Ghailani's identification of Abebe and Abebe's supposedly volunteered testimony, this determination could probably have gone either way.

There are exceptions to the right not to incriminate oneself, and one that is particularly applicable in the terrorism context is the so-called public safety exception.

You will recall that Faisal Shahzad, the Times Square bomber, was arrested at JFK as he tried to flee the country the Monday night after his Saturday bombing attempt. Agents interrogated him under the public safety exception all that night and through part of Tuesday. At some point on Tuesday, the agents informed him of his right to remain silent. In contrast, the Christmas Day bomber who tried to set off a bomb on the plane from the Netherlands to Detroit a year ago was read his rights after just under an hour of interrogation, at which time he stopped cooperating. There has been some discussion of including the public safety exception in a statute, but I have not seen any action on that idea.

As you see in the slide, a defendant in a military commission trial also has a right to counsel.

[6th Amendment confrontation Slide - #3]

As you can see on the next slide, the Sixth Amendment provides that a defendant has the right to confront his accusers. There are a number of reasons behind this confrontation right, including (a) to minimize the likelihood that witnesses will lie by making them swear an oath, exposing them to risk of prosecution for perjury if they testify falsely, and (b) to force witnesses to endure cross-examination, allowing the jury to observe them in order to assess their credibility.

Thus, in civilian courts, witnesses generally have to testify from their own knowledge, not based on what someone else told them, that is, not based on "hearsay." For example, a witness could testify "I saw Shazad set off a bomb in Times Square" but could not testify "Richard told me he saw Shazad set off a bomb in Times Square."

[Sixth Amendment right to be present slide - #4]

As you see, the Sixth Amendment also provides the defendant with the right to be present at his trial—a reaction to the Star Chamber proceedings in England.

[back to Sixth Amendment confrontation slide - #3]

In contrast to the prohibition on hearsay in criminal trials, if you can read the fine print on the prior slide, in a military commission trial, hearsay may be received into evidence, if it is found to be reliable. [1]

[1] Upon notice, hearsay is admissible in military commission trials upon the judge's finding that the statement is reliable, is offered as evidence of a material fact, that direct testimony from the witness is not available OR would have an adverse impact on military or intelligence operations AND that the general purposes of rules of evidence and the interests of justice will best be served by admission of the statement into evidence. In determining reliability, the military judge may be obligated to consider 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.

Another tension presented in terrorism cases arises between, on one hand, the defendant's confrontation rights and his right to be present at trial, and, on the other hand, the Government's need to keep classified information secret. Disclosure of classified information can compromise national security concerns, such as tracking an ongoing conspiracy. Other times, it might disclose intelligence sources and methods, including foreign sources, thus implicating international relations.

A statute, conveniently called the "Classified Information Procedures Act" or "CIPA," provides procedures for handling classified information in federal courts. CIPA allows the Government to create summaries of, or substitutes for, classified evidence. These summaries or substitutes provide the jury with the necessary information while respecting the reason for classification. If there is no suitable substitute or summary that would allow the defendant to present a defense, the court may fashion remedies up to and including dismissal of the charges against him. My practical experience in these cases is that when a piece of classified information is agreed to be relevant, the Government makes a big effort to de-classify that information, if possible, so that it can be used in the ordinary course.

As you see on the slide, classified information is treated in a similar manner in military commission trials.

[Speedy Trial slide - #5]

The Sixth Amendment also provides that a defendant has the right to a speedy and public trial. The reasons behind that right are 1) to keep the Government from holding defendants indefinitely while awaiting a trial – thereby effectively treating them as "guilty" even without a trial, 2) to assure that defendants are tried while witnesses'

memories are still fresh and before evidence can be lost, and 3) to allow transparency in court proceedings, that is, to allow the public to see the evidence against the accused.

As you can see, the Sixth Amendment doesn't define "speedy." There is another statute, also conveniently named, called the "Speedy Trial Act" which generally requires that a trial in a civilian court start within seventy days after the defendant is charged with a crime. But there are lots of events that trigger extensions of that time, AND even if the time limit is exceeded, the defendant may still not be off the hook. A judge has to decide whether the facts of the case, including the length of the delay, the reason for the delay, and the prejudice to the defendant resulting from the delay, merit dismissing the charges against the defendant and letting him go.

Again, the Ghailani case illustrates this in the terrorism context. In deciding Ghailani's motion to dismiss the indictment for failure to provide a speedy trial, the Court noted that the period of delay – some five years after Ghailiani's apprehension – was lengthy but not the longest held to be reasonable. In discussing the reasons for the delay, the Court found the CIA interrogation period, during which Ghailani provided valuable intelligence, did not violate the speedy trial requirements. The Court found the Guantanamo period, which included the investigation and initial prosecution by a military tribunal, to be a closer question but resolved it in favor of the Government, finding that Ghailani was not prejudiced in his trial preparation and would have been detained as an enemy combatant in any event. Thus, Judge Kaplan denied Ghailani's motion to dismiss the indictment, and he proceeded to trial. I note that the Ghailani case is on appeal and that reversal on the speedy trial point could result in a dismissal of the indictment and perhaps Ghailani's being set free – a result that would not obtain in a military

commission trial because, as you can see from the slide, there is no right to a speedy trial under the Military Commissions Act.

To return to where I began, the Southern District of New York has resolved more terrorist cases than any other court. We have not been called upon to try KSM and his co-defendants. Where those defendants will be tried is not a decision for the Judicial branch but for the Executive branch. Whatever decision the Executive branch reaches, we in the Southern District of New York will continue to carry out our Constitutional duty and to do so with due regard for the security and other legitimate concerns of the litigants, lawyers and public we serve.