



Closing the Guantanamo Detention Center: Legal Issues

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Summary

Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which granted the President the authority “to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks” against the United States. Many persons subsequently captured during military operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station at Guantanamo Bay, Cuba, for detention and possible prosecution before military tribunals. Although nearly 800 persons have been held at Guantanamo at some point since early 2002, the substantial majority of Guantanamo detainees have ultimately been transferred to another country for continued detention or release. Those detainees who remain fall into three categories: (1) persons placed in non-penal, preventive detention to stop them from rejoining hostilities; (2) persons who face or are expected to face criminal charges; and (3) persons who have been cleared for transfer or release, whom the United States continues to detain pending transfer. Although the Supreme Court ruled in *Boumediene v. Bush* that Guantanamo detainees may seek *habeas corpus* review of the legality of their detention, several legal issues remain unsettled.

In January 2009, President Obama issued an Executive Order to facilitate the closure of the Guantanamo detention facility within a year. This deadline has not been met, but the Administration has repeatedly stated its intent to close the facility as expeditiously as possible. Efforts to close Guantanamo have been hampered by a series of congressional enactments limiting executive discretion to transfer or release detainees into the United States, with the most significant limitations being established by the Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA, P.L. 111-383). By prohibiting military funds from being used to transfer or release detainees into the United States, or assist in the transfer or release of detainees into the country, the act seems to ensure that the Guantanamo detention facility remains open at least through the 2011 fiscal year, and perhaps for the foreseeable future. Moreover, the measure appears to make military tribunals the only viable forum by which Guantanamo detainees could be tried for criminal offenses, as no civilian court operates within Guantanamo, unless efforts to close the facility are successfully renewed. Upon signing the 2011 NDAA into law, President Obama issued a statement describing his opposition to the legislation’s restrictions on the transfer of Guantanamo detainees, and asserted that his Administration will work with Congress to mitigate their effect. In March 2011, President Obama issued a new Executive Order that establishes a process to periodically review whether the continued detention of a lawfully held Guantanamo detainee is warranted, potentially resulting in some of these detainees being cleared for release from U.S. custody and transferred to a foreign country.

The closure of the Guantanamo detention facility raises a number of legal issues with respect to the individuals formerly interned there, particularly if those detainees are transferred to the United States. The nature and scope of constitutional protections owed to detainees within the United States may be different from the protections owed to aliens held abroad. The transfer of detainees to the United States may also have immigration consequences. This report provides an overview of major legal issues likely to arise as a result of executive and legislative action to close the Guantanamo detention facility. It discusses legal issues related to the transfer of Guantanamo detainees (either to a foreign country or into the United States), the continued detention of such persons in the United States, and the possible removal of persons brought into the country. It also discusses selected constitutional issues that may arise in the criminal prosecution of detainees, emphasizing the procedural and substantive protections that are utilized in different adjudicatory forums (i.e., federal civilian courts, court-martial proceedings, and military commissions).

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Introduction

Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which granted the President the authority “to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks” against the United States.¹ As part of the subsequent “war on terror,” many persons captured during military operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station at Guantanamo Bay, Cuba, for detention and possible prosecution before military tribunals.

Although nearly 800 persons have been transferred to Guantanamo since early 2002, the substantial majority of Guantanamo detainees have ultimately been transferred to a third country for continued detention or release.² Detainees who remain fall into three categories:

- Persons who have been placed in preventive detention to stop them from returning to the battlefield (formerly labeled “enemy combatants” by the Bush Administration³). Preventive detention of captured belligerents is non-penal in nature, and must be ended upon the cessation of hostilities.
- Persons who, besides being subject to preventive detention, have been brought or are expected to be brought before a military or other tribunal to face criminal charges, including for alleged violations of the law of war. If convicted, such persons may be subject to criminal penalty, which in the case of the most severe offenses may include life imprisonment or death.

¹ P.L. 107-40.

² For a detailed description of the Guantanamo detainee population, see Andrei Scheinkman et al., “The Guantanamo Docket,” *New York Times*, <http://projects.nytimes.com/guantanamo> [hereinafter “Guantanamo Docket”]; “Names of the Detained in Guantanamo Bay, Cuba,” *Washington Post*, <http://projects.washingtonpost.com/guantanamo/>. See also Benjamin Wittes and Zaahira Wyne, *The Current Detainee Population of Guantánamo: An Empirical Study*, Brookings Institute, December 16, 2008 [hereinafter “Brookings Report”]. Updates to the Brookings Report that track developments in the Guantanamo detainee population are available at http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx (last updated October 21, 2009) [hereinafter “Brookings Report Update”].

³ In March 2009, the Obama Administration announced a new definitional standard for the government’s authority to detain terrorist suspects, which does not use the phrase “enemy combatant” to refer to persons who may be properly detained. The new standard is similar in scope to the “enemy combatant” standard used by the Bush Administration to detain terrorist suspects. Like the former standard, the new standard would permit the detention of members of the Taliban, Al Qaeda, and associated forces, along with persons who provide support to such groups, regardless of whether such persons were captured away from the battlefield in Afghanistan. However, in contrast to the former standard, the new definition specifies that persons may be detained on account of support provided to Al Qaeda, the Taliban, or associated forces only if such support is “substantial.” Department of Justice, “Department of Justice Withdraws ‘Enemy Combatant’ Definition for Guantanamo Detainees,” press release, March 13, 2009, <http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html>; In re Guantanamo Bay Detainee Litigation, Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held At Guantanamo Bay, No. 08-0442, filed March 13, 2009 (D.D.C.). In October 2009, Congress modified rules for military commissions pursuant to the Military Commissions Act of 2009, enacted as part of the National Defense Authorization Act for Fiscal Year 2010, including by providing commissions with jurisdiction over alien “unprivileged enemy belligerents.” P.L. 111-84, § 1802 (amending, *inter alia*, 10 U.S.C. §§ 948a-948b). Commissions previously could exercise jurisdiction over alien “unlawful enemy combatants.” 10 U.S.C. § 948c (2008). Despite the difference in nomenclature, the two terms are used to refer to similar categories of persons. In January 2010, a three-judge panel of the D.C. Circuit Court of Appeals held that, at minimum, the executive’s authority to detain persons in the conflict with Al Qaeda and the Taliban covered those persons subject to the jurisdiction of military commissions. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

- Persons who have been cleared for transfer or release to a foreign country, either because (1) they are not believed to have been engaged in hostilities, or (2) although they were found to have been enemy belligerents, they are no longer considered a threat to U.S. security. Such persons remain detained at Guantanamo until their transfer may be effectuated.

The decision by the Bush Administration to detain suspected belligerents at Guantanamo was based upon both policy and legal considerations. From a policy standpoint, the U.S. facility at Guantanamo offered a safe and secure location away from the battlefield where captured persons could be interrogated and potentially tried by military tribunals for any war crimes they may have committed. From a legal standpoint, the Bush Administration sought to avoid the possibility that suspected enemy combatants could pursue legal challenges regarding their detention or other wartime actions taken by the executive. The Bush Administration initially believed that Guantanamo was largely beyond the jurisdiction of the federal courts, and noncitizens held there would not have access to the same substantive and procedural protections that would be required if they were detained in the United States.⁴

The legal support for this policy was significantly eroded by a series of Supreme Court rulings permitting Guantanamo detainees to seek judicial review of the circumstances of their detention. Although Congress attempted to limit federal courts' jurisdiction over detainees through the enactment of the Detainee Treatment Act of 2005 (DTA, P.L. 109-148, Title X) and the Military Commissions Act of 2006 (MCA, P.L. 109-366), these efforts were subject to judicial challenge. In 2008, the Supreme Court ruled in *Boumediene v. Bush* that the constitutional writ of *habeas corpus* extends to noncitizens held at Guantanamo, and found that provisions of the DTA and MCA eliminating federal *habeas* jurisdiction over Guantanamo detainees acted as an unconstitutional suspension of the writ.⁵ As a result, Guantanamo detainees may seek *habeas* review of the legality of their detention. Nonetheless, several legal issues remain unsettled, including the scope of *habeas* review available to Guantanamo detainees, the remedy available for those persons found to be unlawfully held by the United States, and the extent to which other constitutional provisions extend to noncitizens held at Guantanamo.⁶ In October 2009, the Supreme Court granted certiorari to hear the case of *Kiyemba v. Obama*,⁷ potentially setting the stage for the Court to make a definitive ruling regarding some of these issues. However, in light of changes in the circumstances surrounding some of the *Kiyemba* petitioners, the Court remanded the case to the D.C. Circuit for further consideration.⁸

⁴ Memorandum from the Office of Legal Counsel, Department of Justice, for William J. Haynes, General Counsel, Department of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba*, Dec. 28, 2001.

⁵ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

⁶ For background, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Michael John Garcia; CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia; and CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees' Right to Habeas Corpus*, by Michael John Garcia.

⁷ *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 130 S.Ct. 458 (Oct. 20, 2009), *vacated*, 130 S.Ct. 1235 (2010), *reinstated, as modified*, by 605 F.3d 1046 (D.C. Cir. 2010).

⁸ 130 S.Ct. 1235 (2010). The *Kiyemba* case involves several Guantanamo detainees who, despite no longer being considered enemy combatants, have not been returned to their home country of China because of concerns that they would be subjected to torture. Two of the petitioners have been resettled in Switzerland, and Palau has agreed to take five others, although the five have not accepted Palau's offer. Because the Supreme Court had granted certiorari on the understanding that no remedy was available for the petitioners other than release into the United States, it returned the case to the D.C. Circuit to review the ramifications of the new circumstances. The D.C. Circuit thereafter reinstated its earlier decision, as modified to take into account subsequent congressional enactments limiting the use of funds to (continued...)

On January 22, 2009, President Barack Obama issued Executive Order 13492, requiring that the Guantanamo detention facility be closed as soon as practicable, and no later than a year from the date of the Order.⁹ Any persons who continue to be held at Guantanamo at the time of closure were to be either transferred to a third country for continued detention or release, or transferred to another U.S. detention facility. The Order further provided that specified officials would review all Guantanamo detentions to assess whether the detainee should continue to be held by the United States, transferred or released to a third country, or be prosecuted by the United States for criminal offenses.¹⁰ Reviewing authorities were required to identify and consider the legal, logistical, and security issues that would arise in the event that some detainees are transferred to the United States. The Order also mandated that the reviewing authorities to assess the feasibility of prosecuting detainees in an Article III court. During this review period, the Secretary of Defense was required to take steps to ensure that all proceedings before military commissions and the United States Court of Military Commission Review are halted. On the same day that the Executive Order to close the Guantanamo detention facility was issued, President Obama issued two other Executive Orders which created separate task forces—the Special Task Force on Detainee Disposition and the Special Task Force on Interrogation and Transfer Policies—charged with reviewing aspects of U.S. detention policy, including the options available for the detention, trial, or transfer of wartime detainees, whether held at Guantanamo or elsewhere.¹¹ Although these task forces are distinct from the task force responsible for reviewing Guantanamo detentions, their work and recommendations may have implications on U.S. policy with respect to Guantanamo.

Since the issuance of the Executive Order to close Guantanamo, only one detainee formerly held there has been transferred to the United States. In June 2009, Ahmed Ghailani was transferred to the United States to face criminal charges in federal civilian court for his alleged role in the 1998 bombings of U.S. embassies in Tanzania and Kenya (the transfer occurred shortly before

(...continued)

release any Guantanamo detainee into the United States. 605 F.3d 1046 (D.C. 2010), *petition for en banc rehearing denied*, Sept. 9, 2010. It remains to be seen whether the D.C. Circuit’s ruling will be reviewed by the Supreme Court.

⁹ Executive Order 13492, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities,” 74 *Federal Register* 4897, January 22, 2009 [hereinafter “Executive Order”].

¹⁰ *Id.* at § 4. The Order specifies that the review shall be conducted by the Attorney General (who shall also coordinate the review process), the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, as well as other officers or full- or part-time employees of the U.S. government (as determined by the Attorney General, with the concurrence of the relevant department head) with intelligence, counterterrorism, military, or legal expertise.

¹¹ Executive Order 13491, “Ensuring Lawful Interrogations,” 74 *Federal Register* 4893, January 22, 2009; Executive Order 13493, “Review of Detention Policy Options,” 74 *Federal Register* 4901, January 22, 2009. On July 20, 2009, the Special Task Force on Detainee Disposition, which was required to issue a final report by July 21, 2009, “unless the Co-Chairs determine that an extension is necessary,” extended by six months the period in which the Task Force will conduct its work and submit a final report. The Task Force issued a preliminary report, which has been made publicly available, on the use of military commissions to try wartime detainees (including those held at Guantanamo) and the process for determining the appropriate forum for trials of suspected terrorists. Special Task Force on Detainee Disposition (Detention Policy Task Force), “Preliminary Report,” July 20, 2009, available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/law-of-war-prosecution-prelim-report-7-20-09.pdf>. The Special Task Force on Interrogation and Transfer Policies established by Executive Order 13491, which also was required to issue a final report by July 21, 2009, unless the Task Force determined an extension was appropriate, extended the deadline for its final report by two months. The Task Force issued recommendations to the President on U.S. interrogation and transfer policies that August. Department of Justice, “Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President,” press release, August 24, 2009, <http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html>.

Congress enacted the first of several restrictions on the use of appropriated funds to bring Guantanamo detainees to the United States¹²). Ghailani was convicted and sentenced to life imprisonment for his part in the conspiracy.¹³

On October 28, 2009, the National Defense Authorization Act for FY2010 (P.L. 111-81) was signed into law, and modified rules governing military commissions. Soon thereafter, the Departments of Justice and Defense made an announcement regarding the forums in which 10 other Guantanamo detainees, who had previously been charged before military commissions, would be tried.¹⁴ The Attorney General and Secretary of Defense determined that military commission proceedings against five Guantanamo detainees may be resumed¹⁵ However, the Department of Justice stated that it intended to bring charges against five detainees in the U.S. District Court for the Southern District of New York for criminal offenses related to the 9/11 terrorist attacks,¹⁶ and the charges brought before these individuals before military commissions were withdrawn without prejudice in January 2010.¹⁷

The decision to try some Guantanamo detainees in federal civilian court proved controversial. Plans to bring charges in federal court against Khalid Sheik Mohammed, the alleged mastermind of the 9/11 attacks, have reportedly been placed on indefinite hold, but it remains to be seen whether charges will be reintroduced against him before military commissions.¹⁸ The November 2010 conviction of Ahmed Ghailani for one of the more than 280 charges he faced in connection to the 1998 embassy bombings has fueled the debate over terrorism trials. While some have characterized Ghailani's conviction as demonstrating that federal civilian courts serve as an appropriate forum for the prosecution of some Guantanamo detainees, others view Ghailani's acquittal of most charges as evidence that civilian courts are an inappropriate forum for the criminal prosecution of wartime detainees.

On January 22, 2010, the Guantanamo Task Force issued its final report concerning the appropriate disposition of each detainee held at Guantanamo. The Task Force concluded that 36 detainees remain subject to active criminal investigations or prosecutions; 48 detainees should remain in preventive detention without criminal trial, as they are "too dangerous to transfer but

¹² The Supplemental Appropriations Act, 2009 (P.L. 111-32), which was enacted within weeks of Ghailani's transfer to the United States, restricted the subsequent use of funds to transfer any detainee into the United States, except for prosecution or detention during legal proceedings, provided that the executive fulfilled a 45-day reporting requirement prior to any such transfer occurring.

¹³ Benjamin Weiser, "Ex-Detainee Gets Life Sentence in Embassy Blasts," *Washington Post*, January 25, 2011.

¹⁴ Department of Justice and Department of Defense, "Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees," press release, November 13, 2009, <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html> [hereinafter "DOJ Announcement"].

¹⁵ DOJ Announcement, *supra* footnote 14. In a legal brief filed with the D.C. Circuit in January 2010, the government noted that the Attorney General decided that the prosecution of an additional detainee should occur before a military commission, and the convening authority of military commissions must now decide whether to refer charges against the detainee to a military commission. A copy of this brief is available at http://a.abcnews.go.com/images/Politics/Final_Brief.pdf.

¹⁶ These detainees are Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi.

¹⁷ Dept. of Defense, "Military Commission Charges Withdrawn In Sept. 11 Case," press release, January 22, 2010, <http://www.defense.gov/releases/release.aspx?releaseid=13262>.

¹⁸ Peter Finn and Anne E. Kornblut, "Opposition to U.S. Trial Likely to Keep Mastermind of 9/11 Attacks in Detention," *Washington Post*, Nov. 13, 2010.

not feasible for prosecution”; and the remaining detainees may be transferred, either immediately or eventually, to a foreign country.¹⁹

In December 2009, President Obama issued a memorandum directing the Attorney General and Secretary of Defense to take steps to acquire the Thomson Correctional Facility in Thomson, IL, so that at least some Guantanamo detainees may be relocated there for continued internment.²⁰ Thus far, however, the Administration has been unable to obtain necessary appropriations to purchase the Thomson facility and renovate it to house transferred detainees. Congress has also enacted legislation barring military funds for the 2011 fiscal year from being used to construct or modify a facility in the United States to house detainees who remain under the custody or control of the Department of Defense (DOD).²¹

Although the original deadline for the closure of the Guantanamo detention facility established by Executive Order 13492 has not been met, the Administration has stated that it still intends to close the facility as expeditiously as possible. Efforts by the executive branch to close the facility have been hampered by a series of congressional enactments limiting executive discretion to transfer or release detainees into the United States, with the most significant limitations being established by the Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA, P.L. 111-383), which was signed into law on January 7, 2011. By prohibiting military funds from being used to transfer or release detainees into the United States, or assist in the transfer or release of detainees into the country,²² the act seems to ensure that the Guantanamo detention facility remains open and at least through the 2011 fiscal year, and perhaps for the foreseeable future. Moreover, the measure appears to make military tribunals the only viable forum by which Guantanamo detainees could be tried for criminal offenses, as no civilian court operates within Guantanamo. When signing the 2011 NDAA into law, President Obama issued a statement expressing his opposition to those provisions limiting executive discretion to transfer detainees into the United States or to the custody of certain foreign governments or entities.²³ While highly critical of these provisions’ effect, President Obama’s signing statement did not allege that they represented an unconstitutional infringement upon executive authority, or claim that the executive branch was

¹⁹ Guantanamo Review Task Force, Final Report, Jan. 22, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

²⁰ Presidential Memorandum Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantanamo Bay Naval Base, *75 Federal Register* 1015, December 15, 2009. Legislation was introduced to prevent the construction or modification of a U.S. facility to house Guantanamo detainees. See H.R. 5822, Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2011 (111th Cong.) (House-passed version), § 516.

²¹ Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA), P.L. 111-383, § 1034(a)-(b).

²² 2011 NDAA, P.L. 111-383, § 1032. Congress had previously enacted several measures that barred appropriated funds from being used to release or transfer detainees into the United States, except for purposes of criminal prosecution after certain reporting requirements were fulfilled. For further discussion of these measures and the 2011 NDAA, see CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Michael John Garcia.

²³ In the statement, President Obama expressed concern that the provision limiting detainee transfers into the United States “represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees....” White House Office of the Press Secretary, Statement by the President on H.R. 6523, January 7, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523> [hereinafter “Presidential Signing Statement”]. He further stated that the provision limiting executive discretion to transfer detainees to the custody of foreign entities would “interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations” regarding the transfer of persons captured in an armed conflict.

not legally bound to comply with the provisions' requirements.²⁴ President Obama did, however, state that his "Administration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future."²⁵

On March 7, 2011, President Obama issued Executive Order 13567, establishing a process for the periodic review of the continued detention of persons currently held at Guantanamo who have either been (1) designated for preventive detention under the laws of war or (2) referred for criminal prosecution, but have not been convicted of a crime and do not have formal charges pending against them.²⁶ The Executive Order establishes a Periodic Review Board (PRB) to assess whether the continued detention of a covered individual is warranted in order "to protect against a significant threat to the security of the United States." In instances where a person's continued detention is not deemed warranted, the Secretaries of State and Defense are designated responsibility "for ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States" and relevant legal requirements. An initial review of each individual covered by the Order, which involves a hearing before the PRB in which the detainee and his representative may challenge the government's basis for his continued detention and introduce evidence on his own behalf, must occur within a year of the Order's issuance. Those persons deemed to be subject to continued detention will have their cases reviewed periodically thereafter. The Order also specifies that the process it establishes is discretionary; does not create any additional basis for detention authority or modify the scope of authority granted under existing law; and is not intended to affect federal courts' jurisdiction to determine the legality of a person's continued detention.

On the same day that Executive Order 13567 was issued, the White House also released a statement concerning matters relevant to U.S. detention policy generally and to Guantanamo specifically.²⁷ Among other things,²⁸ the statement reaffirmed the executive's commitment to close the Guantanamo detention facility. The statement also announced that the Secretary of Defense would authorize the swearing and referring of new charges to military commissions—a

²⁴ For discussion of the legal effect of presidential signing statements, see CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T. J. Halstead.

²⁵ Presidential Signing Statement, *supra* footnote 23.

²⁶ Executive Order 13567, "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to Authorization to Use Military Force," 76 *Federal Register* 13277, March 10, 2011 [hereinafter "Executive Order on Periodic Review"].

²⁷ White House, Office of the Press Secretary, "Fact Sheet: New Actions on Guantanamo and Detainee Policy," Mar. 7, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

²⁸ The statement also described the Administration's view regarding the 1977 Additional Protocols to the 1949 Geneva Conventions. While the United States is a party to all four of the 1949 Conventions, it has not ratified either of the 1977 Additional Protocols. The Administration announced its support for the ratification of the Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), which was submitted to the Senate in 1987 for its advice and consent but has not been agreed upon by the body. The Obama Administration also announced that, while opposing aspects of the Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I), it would nonetheless "choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict," presumably due to a belief that the principles contained in Article 75 reflect customary international law. Article 75 establishes fundamental guarantees for the treatment of persons captured by opposing forces in an international armed conflict, including rights associated with a fair trial. According the White House statement, the requirements contained in Additional Protocol II and Article 75 of Additional Protocol I are consistent with current U.S. policies and practices.

practice which had been halted following the issuance of Executive Order 13492 in January 2009. The White House statement also reaffirmed the Administration's commitment to prosecute some detainees in Article III courts, and declared that it would work to repeal legislation that bars it from transferring detainees into the country for trial before civilian courts.

The closure of the Guantanamo detention facility would raise a number of legal issues with respect to the individuals presently interned there, particularly if those detainees were transferred to the United States. The nature and scope of constitutional protections owed to detainees within the United States may be different from those available to persons held at Guantanamo or elsewhere. This may have implications for the continued detention or prosecution of persons transferred to the United States. The transfer of detainees to the United States may have additional consequences, as some detainees might qualify for asylum or other protections under immigration law. The Executive Order issued by President Obama to effectuate the closure of Guantanamo also contemplates that the Administration "work with Congress on any legislation that may be appropriate" relating to the transfer of detainees to the United States.²⁹

This report provides an overview of major legal issues that are likely to arise as a result of executive and legislative action to close the Guantanamo detention facility. It discusses legal issues related to the transfer or release of Guantanamo detainees (either to a foreign country or into the United States), the continued detention of such persons in the United States, and the possible removal of persons brought to the United States. It considers selected constitutional issues that may arise in the criminal prosecution of detainees, emphasizing the procedural and substantive protections that exist in different adjudicatory forums. Issues discussed include detainees' right to a speedy trial, the prohibition against prosecution under *ex post facto* laws, and limitations upon the admissibility of hearsay and secret evidence in criminal cases. These issues are likely to be relevant not only to the treatment of Guantanamo detainees, but also to other terrorist suspects or enemy belligerents apprehended by the United States in the future.

Detainee Transfer or Release from Guantanamo

Any proposal to close the Guantanamo detention facility must necessarily address the transfer of persons currently detained there. While some detainees may be transferred to other countries for continued detention, supervision, or release, some proposals to close the Guantanamo detention facility have contemplated transferring at least some detainees to the United States, either for continued detention or, in the case of some detainees who are not considered a threat to U.S. security, possible release.³⁰

²⁹ Executive Order, *supra* footnote 9, at § 4(c)(5).

³⁰ Initially, the Obama Administration considered the possibility of releasing at least some Guantanamo detainees who are not considered a threat into the United States. See Director of National Intelligence Dennis Blair, "Media Roundtable Discussion," March 26, 2009, available at http://www.dni.gov/interviews/20090326_interview.pdf. Congress subsequently enacted a series of appropriations and authorization measures that barred funds from being used to release Guantanamo detainees into the United States or specified U.S. territories. See P.L. 111-32, § 14103(a); P.L. 111-84, § 1041(a); P.L. 111-83, § 552(a); P.L. 111-88, § 428(a); P.L. 111-117, § 532(a); P.L. 111-118, § 9011(a). Most of these restrictions concerned funds appropriated for the 2010 fiscal year. Through the enactment of a series of continuing resolutions which temporarily fund federal agencies, Congress has effectively extended the restrictions imposed by FY2010 appropriation enactments. Further, the 2011 NDAA bars military funds appropriated for the 2011 fiscal year from being used either to release a detainee into the United States, or to assist in the release of a detainee into the country. P.L. 111-383, § 1032.

Transfer/Release of Guantanamo Detainees to a Country Other Than the United States

The vast majority of persons initially transferred to Guantanamo for preventive detention have been transferred to other countries, either for continued detention by the receiving country or for release.³¹ Decisions to transfer a detainee to another country have been based upon a determination by U.S. officials that (1) the detainee is not an enemy combatant or (2) while the detainee was properly designated as an enemy combatant, his continued detention by the United States is no longer warranted.³² A decision by military authorities that the continued detention of an enemy combatant is no longer appropriate is based on a number of factors, including a determination that the detainee no longer poses a threat to the United States and its allies. Generally, if continued detention is no longer deemed necessary, the detainee is transferred to the control of another government for his release.³³ The DOD has also transferred enemy belligerents to other countries for continued detention, investigation, or prosecution when those governments are willing to accept responsibility for ensuring that the transferred person will not pose a continuing threat to the United States and its allies.³⁴

On March 7, 2011, President Obama issued Executive Order 13567, which establishes a process to periodically review whether the continued detention of a lawfully held Guantanamo detainee is warranted. The Order provides that a Periodic Review Board (PRB), composed of officials from several departments and agencies,³⁵ shall review the grounds for the continued detention of any person currently held at Guantanamo who has either been (1) designated as being subject to detention under the laws of war (i.e., a captured enemy belligerent) or (2) referred for criminal prosecution, but has yet to be formally charged with an offense.³⁶ The Order also establishes a Review Committee, composed of relevant department heads and officials,³⁷ to annually review the sufficiency and efficacy of transfer efforts. Following the completion of the PRB's initial review of the disposition of detainees, and every four years thereafter, the Committee is also

³¹ See Guantanamo Docket, *supra* footnote 2.

³² Declaration of Joseph Benkert, Principal Deputy Assistant Secretary of Defense for Global Security Affairs, DOD, executed on June 8, 2007, at para. 3, In re Guantanamo Bay Detainee Litigation, Case No. 1:05-cv-01220 (D.D.C. 2007).

³³ *Id.*

³⁴ *Id.* In April 2010, a federal habeas court dismissed on mootness grounds the petitions of 105 former Guantanamo detainees, including some who were transferred to the custody of a foreign country for further detention, on the grounds that such persons were no longer “in custody under or by color of the authority of the United States,” as is required for a court to exercise jurisdiction under the federal habeas statute. In re *Petitioners Seeking Habeas Corpus Relief In Relation To Prior Detentions At Guantanamo Bay*, 700 F. Supp. 2d 119 (D.D.C. 2010) (Hogan, J.). In reaching this decision, the *habeas* court placed significant weight upon government declarations that the United States relinquishes complete custody and control over detainees when they are transferred into the hands of foreign governments.

³⁵ The Executive Order provides that the PRB shall be composed of “senior officials...., one appointed by each of the following departments and offices: the Departments of State, Defense, Justice, and Homeland Security, as well as the Offices of the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff.” Executive Order on Periodic Review, *supra* footnote 26, at § 9(b).

³⁶ *Id.* at § 1(a). Accordingly, the review would not cover persons who have been determined not to be lawfully detained (e.g., those who have been ordered released by a federal *habeas* court) who remain in U.S. custody pending their repatriation or resettlement to a foreign country.

³⁷ Specifically, the Review Committee is composed of the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. *Id.* at § 9(d).

charged with assessing “whether a continued law of war detention policy remains consistent with the interests of the United States, including national security interests.”³⁸

The PRB is required to assess whether the continued detention of any person covered by the Order “is necessary to protect against a significant threat to the security of the United States.” In cases where the continued detention of a Guantanamo detainee is not deemed warranted, the Secretaries of State and Defense are charged with “ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States,” consistent with U.S. obligations not to transfer persons to countries where they may face torture.³⁹ The PRB must review the grounds for the continued detention of covered individuals within a year of the issuance of Executive Order 13567.⁴⁰ In preparation for this review, the individual will be provided with an unclassified summary of the factors and information to be considered by the PRB.⁴¹ A hearing shall be held in which the detainee, with assistance from a government-appointed representative (along with private counsel, if obtained by the detainee at no expense to the government), may argue that his continued detention is unwarranted.⁴² The detainee has a right to present a statement to the PRB, introduce relevant information, and call willing and reasonably available witnesses to provide information on his behalf.⁴³ The detainee’s representative, who generally shall be provided with all information contained in the government’s disposition recommendation to the PRB (or in certain circumstances, a sufficient substitute or summary of such information), is authorized to challenge the government’s information and present information in support of the detainee.⁴⁴ If the PRB’s initial review does not result in the individual being designated for transfer, the PRB will continue to periodically review the grounds for continued detention, through a review of case files every six months thereafter. Further, it must conduct a full review and hearing every three years following its initial review.⁴⁵ If the PRB does not reach a unanimous conclusion as to whether a detainee’s continued detention is warranted, the case shall be considered by the Review Committee for further review;⁴⁶ however, the Order does not explain the procedures used by the Review Committee in its consideration of PRB decisions, or clearly describe the effect that its review has upon the final disposition of a detainee’s case.⁴⁷

³⁸ *Id.* at § 5(b).

³⁹ *Id.* at § 4(a).

⁴⁰ *Id.* at § 3(a).

⁴¹ Executive Order on Periodic Review, *supra* footnote 26, at § 3(a)(1).

⁴² *Id.* at § 3(a)(2).

⁴³ *Id.* at § 3(a)(3).

⁴⁴ *Id.* at § 3(a)(2). The Order provides that the government-appointed representative must have appropriate security clearance. A PRB may permit a government-appointed representative to be provided with a summary or substitute for government information only in “exceptional circumstances where it is necessary to protect national security, including intelligence sources and methods.” A substitute or summary may be provided to private counsel in lieu of underlying government information in a broader range of circumstances, including when the *government*, rather than the PRB, “determines that the need to protect national security, including intelligence sources and methods, or law enforcement or privilege concerns” warrants such action.

⁴⁵ *Id.* at § 3(b)-(c).

⁴⁶ *Id.* at § 3(d). Neither the government nor the detainee is granted a right to appeal PRB rulings to the Review Committee.

⁴⁷ For example, it is unclear whether the Review Committee’s consideration of a detainee’s continued detention would necessarily result in a final determination as to whether continued detention is warranted, or whether the Committee might remand the case to the PRB for further consideration of a particular issue or piece of evidence.

The designation of a Guantanamo detainee for transfer or release does not necessarily mean that the individual's removal from the Guantanamo facility will be immediately effectuated. Domestic and international legal requirements may constrain the ability of the United States to transfer persons to foreign countries if they might face torture or other forms of persecution. Most notably, Article 3 of the U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and its implementing legislation prohibit the transfer of persons to countries where there are substantial grounds for believing (i.e., it would be "more likely than not") that they would be subjected to torture.⁴⁸ The Bush Administration took the position that CAT Article 3 and its implementing legislation did not cover the transfer of foreign persons held outside the United States in the "war on terror."⁴⁹

Nonetheless, both the Bush and Obama Administrations have stated that "it is the policy of the United States, consistent with the approach taken by the United States in implementing ... [CAT], not to repatriate or transfer ... [Guantanamo detainees] to other countries where it believes it is more likely than not that they will be tortured."⁵⁰ When the transfer of a Guantanamo detainee is deemed appropriate, the United States seeks diplomatic assurances that the person will be treated humanely by the foreign government accepting the transfer. If such assurances are not deemed sufficiently reliable, the transfer will not be executed until the concerns of U.S. officials are satisfactorily resolved.⁵¹ The use of diplomatic assurances in Guantanamo transfer decisions is similar to the practice sometimes employed by U.S. authorities when determining whether the extradition of a person or the removal of an alien by immigration authorities would comply with CAT requirements. In January 2009, President Obama issued an Executive Order creating a special task force to review U.S. transfer policies to ensure compliance with applicable legal requirements.⁵² In August of that year, the task force issued recommendations to ensure that U.S. transfer practices comply with applicable standards and do not result in the transfer of persons to face torture.⁵³ These recommendations include strengthening procedures used to obtain assurances from a country that a person will not face torture if transferred there, including through the establishment of mechanisms to monitor the treatment of transferred persons. If implemented, such measures might impede the transfer of some Guantanamo detainees to third countries. In April 2009, a D.C. Circuit panel held that a government determination that a detainee would not be tortured if transferred to a particular country is not subject to district court review in *habeas* proceedings challenging the proposed transfer.⁵⁴

⁴⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). CAT Article 3 requirements were implemented by the United States pursuant to the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277 [hereinafter "FARRA"]. For further background, see CRS Report RL32276, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens*, by Michael John Garcia.

⁴⁹ United States Written Response to Questions Asked by the Committee Against Torture, April 28, 2006, available at <http://www.state.gov/g/drl/rls/68554.htm>.

⁵⁰ Benkert Declaration, *supra* footnote 32, at para. 6. See also Guantanamo Task Force Report, *supra* footnote 19, at 15 n.11.

⁵¹ *Id.* at para. 7.

⁵² Executive Order No. 13491, "Ensuring Lawful Interrogations," 74 *Federal Register* 4893, January 22, 2009.

⁵³ Department of Justice, "Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President," press release, August 24, 2009, <http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html>. The Task Force considered seven types of transfers: extradition, immigration removal proceedings, transfers pursuant to the Geneva Conventions, transfers from Guantanamo Bay, military transfers within or from Afghanistan, military transfers within or from Iraq, and transfers pursuant to intelligence authorities.

⁵⁴ *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba IP*"), rehearing *en banc* denied (July 27, 2009), *cert.* (continued...)

Of the persons held at Guantanamo who have been cleared for transfer or release, several dozen remain at Guantanamo either because no country will accept the detainee, or because human rights concerns have caused the United States to refrain from transferring the detainee to a country willing to accept him. According to the final report of the Guantanamo Task Force, a plurality of detainees who have been cleared for transfer but remain at Guantanamo “cannot be repatriated due to humane treatment or related concerns in their home countries ... and thus need to be resettled in a third country...”⁵⁵

Additionally, a significant number of detainees could potentially be transferred to other countries for continued detention or supervision if the United States was assured that the receiving country could manage the threat they pose.⁵⁶ In January 2010, President Obama announced that, in light of the recent terrorist activities emanating from Yemen, including alleged Yemeni involvement in the failed Christmas Day bomb attack on an airplane that was landing in Detroit, the United States “will not be transferring additional detainees back to Yemen at this time.”⁵⁷ The final report of the Guantanamo Task Force identified 30 detainees from Yemen who:

were designated for “conditional” detention based on the current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.⁵⁸

Whether future diplomatic efforts will effectuate the transfer of some or all of these persons to third countries remains to be seen. It has been reported that the U.S. refusal to resettle detainees on its territory may be contributing to the reluctance of other countries to accept more detainees for resettlement.⁵⁹

Beginning with the Supplemental Appropriations Act, 2009 (P.L. 111-32), Congress has passed several appropriations or authorization measures that contain provisions barring funds from being used to effectuate the transfer of a Guantanamo detainee to a foreign State unless, 15 days prior to such transfer, the President submits a classified report to Congress concerning the identity of the detainee, the risk the transfer poses to U.S. security, and the terms of any agreement with the

(...continued)

denied, 130 S.Ct. 1880 (2010).

⁵⁵ Guantanamo Task Force Report, *supra* footnote 19, at 16.

⁵⁶ For example, the United States had negotiations with Yemen to transfer a significant number of Guantanamo detainees who are Yemeni nationals to that country. These negotiations have reportedly proven unsuccessful in part because of U.S. concerns regarding the sufficiency of Yemeni measures to minimize the threat posed by some detainees. Brookings Report, *supra* footnote 2, at 22-23; Matt Apuzzo, “‘No Progress’ on Mass Guantanamo Prisoner Transfer,” *USA Today*, July 7, 2008. In January 2010, President Obama announced that, in light of the recent terrorist activities emanating from Yemen, including alleged Yemeni involvement in the failed Christmas Day bomb attack on an airline landing in Detroit, the United States “will not be transferring additional detainees back to Yemen at this time.” White House, Office of the Press Secretary, “Remarks by the President on Security Reviews,” Jan. 5, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-security-reviews>.

⁵⁷ White House, Office of the Press Secretary, “Remarks by the President on Security Reviews,” Jan. 5, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-security-reviews>.

⁵⁸ Guantanamo Task Force Report, *supra* footnote 19, at ii.

⁵⁹ Carol Rosenberg, “How Congress helped thwart Obama’s plan to close Guantánamo,” *Miami Herald*, January 22, 2011, online edition.

receiving country concerning the acceptance of the individual, including any financial assistance related to the agreement.⁶⁰

Despite President Obama's objections,⁶¹ the 2011 NDAA places more significant restrictions on detainee transfers. The act provides that, except in cases when a detainee transfer is done to effectuate an order by a U.S. court or tribunal,⁶² a detainee may only be transferred to the custody or control of a foreign government or the recognized leadership of a foreign entity if, at least 30 days prior to the proposed transfer, the Secretary of Defense certifies to Congress that the foreign government or entity: (1) is not a designated state sponsor of terrorism or terrorist organization; (2) maintains effective control over each detention facility where a transferred detainee may be housed; (3) is not facing a threat likely to substantially affect its ability to control a transferred detainee; (4) has agreed to take effective steps to ensure that the transferred person does not pose a future threat to the United States, its citizens, or its allies; (5) has agreed to take such steps as the Secretary deems necessary to prevent the detainee from engaging in terrorism; and (6) has agreed to share relevant information with the United States related to the transferred detainee that may affect the security of the United States, its citizens, or its allies.⁶³

The act also contains a one-year prohibition on the transfer of any detainee to the custody or control of a foreign government or entity if there is a confirmed case that a former Guantanamo detainee who was transferred to that government or entity subsequently engaged in terrorist activity.⁶⁴ However, this prohibition is subject to waiver by the Secretary of Defense if he fulfills the certification process described in the preceding paragraph and also determines that the transfer is in the security interests of the United States.⁶⁵ The prohibition also does not apply in cases where a transfer is done to effectuate an order by a U.S. court or tribunal.

Transfer of Detainees into the United States

Most proposals to end the detention of foreign belligerents at Guantanamo contemplate the transfer of at least some detainees into the United States, either for continued preventive detention, prosecution before a military or civilian court, or in the case of detainees who are not deemed a threat to U.S. security, possible release. As mentioned earlier, several appropriations and authorization measures enacted by Congress have barred funds from being used to effectuate the release of Guantanamo detainees into the United States. Moreover, Congress has enacted several measures barring funds for being used to transfer detainees into the United States or its territories or possessions; the most significant being the 2011 NDAA, which bars military funds appropriated during the 2011 fiscal year from being used to transfer detainees into the United States for any purpose.⁶⁶ It remains to be seen whether future legislative enactments will extend or modify existing limitations on the transfer or release of Guantanamo detainees.

⁶⁰ P.L. 111-32, § 14103(e); P.L. 111-83, § 552(e); P.L. 111-88, § 428(e); P.L. 111-117, § 532(e); P.L. 111-118, § 9011(e).

⁶¹ See Presidential Signing Statement, *supra* footnote 23.

⁶² This would presumably include a federal *habeas* court order that a detainee must be released from military custody.

⁶³ P.L. 111-383, § 1033(a)-(b).

⁶⁴ *Id.*, § 1033(c).

⁶⁵ *Id.*

⁶⁶ *Id.*, § 1032.

The transfer of detainees into the United States may have implications under immigration law. The Immigration and Nationality Act (INA) establishes rules and requirements for the entry and presence of aliens in the United States, and provides grounds for the exclusion or removal of aliens on account of certain activities. The INA generally bars the entry into the United States or continued presence of aliens involved in terrorism-related activity.⁶⁷ Under current law, most persons currently detained at Guantanamo would generally be barred from admission into the United States on terrorism- and other security-related grounds under normal circumstances. Even if a detainee is not inadmissible or removable (“deportable”) on such grounds, he may still be inadmissible or removable under other INA provisions.⁶⁸ Accordingly, even in the absence of recent legislative enactments barring the use of funds to release Guantanamo detainees into the United States, the INA would generally preclude most detainees from being released into the country, as such aliens would be subject to removal under immigration law.

The INA’s restrictions upon the entry of certain categories of aliens do not appear to necessarily bar executive authorities from transferring wartime detainees into the United States for continued detention or prosecution. During World War II, reviewing courts did not consider an alien prisoner of war’s involuntary transfer to the United States for purposes of military detention to constitute an “entry” under immigration laws.⁶⁹ Although immigration laws have been amended since that time to expressly apply to certain categories of aliens involuntarily brought to the United States (e.g., those individuals apprehended in U.S. or international waters),⁷⁰ these modifications do not directly address the ability of the United States to intern alien enemy belligerents in the United States. Additionally, it could be argued that the 2001 AUMF, which grants the President authority to use all “necessary and appropriate force” against those responsible for the 9/11 attacks, impliedly authorizes the President to detain captured belligerents in the United States, even though such persons would generally be barred from entry under the INA.⁷¹

⁶⁷ 8 U.S.C. § 1182(a)(3); 8 U.S.C. § 1227(a)(4). For background, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

⁶⁸ See 8 U.S.C. § 1182 (grounds for alien inadmissibility); 8 U.S.C. § 1227 (grounds for deportation).

⁶⁹ See *United States ex rel. Bradley v. Watkins*, 163 F.2d 328 (2nd Cir. 1947) (alien involuntarily brought to the United States by U.S. warship for detention had not “departed” a foreign port within the meaning of Immigration Act of 1924 provision defining an “immigrant”); *In re Territo*, 156 F.2d 142, 145-146 (9th Cir. 1946) (“It is proper to note that petitioner was brought to this country under a war measure by orders of the military authorities as a prisoner of war and not in accord with nor under the immigration laws limiting and regulating entries of residents or nationals of another nation.”). Subsequent developments in immigration law, including with respect to alien eligibility for asylum and deferral of removal under CAT-implementing regulations, may nonetheless have implications for the transfer of alien detainees into the United States, particularly if they must be released from military custody. See *infra* at “Transfer of Detainees into the United States” and “Removal of Detainees from the United States.”

⁷⁰ As amended in 1996, the INA now provides that “An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and *including an alien who is brought to the United States after having been interdicted in international or United States waters*) shall be deemed for purposes of this Act an applicant for admission.” 8 U.S.C. § 1225(a)(1) (emphasis added). In an unpublished opinion, the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration laws, interpreted the 1996 amendment to the INA as overruling earlier circuit court jurisprudence (including WWII-era cases concerning the applicability of immigration laws to military detainees brought to the United States) to the extent that such jurisprudence recognized that any “alien who is involuntarily brought to the United States by agents of the United States is not considered to be an immigrant within the meaning of the immigration laws.” *In Re Alexander Navarro-Fierro*, 2004 WL 1167275 (BIA Jan. 16, 2004) (per curium) (ruling that an alien interdicted in international waters and brought to the United States to face criminal prosecution for drug smuggling was considered an applicant for admission under the INA).

⁷¹ In *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004), a majority of the Supreme Court found that Congress had authorized the (continued...)

Even assuming that the INA's restrictions on alien admissibility are applicable to military detainees, the executive branch could still effectuate their transfer into the United States pursuant to its "parole" authority. In the immigration context, parole is a discretionary authority that may be exercised on a case-by-case basis to permit inadmissible aliens to physically enter the United States, including when the alien's entry or stay serves a "significant public benefit."⁷² The entry of a paroled alien does not constitute admission into the United States for immigration purposes. Despite physical entry into the country, the alien is "still in theory of law at the boundary line and had gained no foothold in the United State[s]."⁷³ The executive branch may opt to use its parole authority with respect to transferred detainees in order to clarify their immigration status in case they are required to be released from U.S. custody.

As discussed later, an alien's physical presence in the United States, even in cases where the alien has been paroled into the country, may result in the alien becoming eligible for asylum or other forms of immigration-related relief from removal. In recent years, several legislative proposals have been introduced that address the application of federal immigration laws to the transfer of detainees into the United States and clarify the immigration status of detainees brought into the country.⁷⁴ Notably, the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), contains a provision barring any funds made available under the act from being

used to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba.⁷⁵

The Consolidated Appropriations Act, 2010 (P.L. 111-117) contains a similar restriction on using the funds it appropriates to provide a Guantanamo detainee with an immigration benefit.⁷⁶ The funding restrictions contained in both enactments applied to funds appropriated for the 2010 fiscal year. Congress did not enact any FY2011 regular appropriations acts before the 2010 fiscal year expired, but has instead passed a series of continuing resolutions that temporarily extend funding for federal agencies, subject to the terms and conditions of FY2010 appropriations

(...continued)

President, pursuant to the 2001 AUMF, to detain U.S. citizens properly designated as "enemy combatants" who were captured in the conflict in Afghanistan. *Id.* at 518 (O'Connor, J., plurality opinion), 588-589 (Thomas, J., dissenting). A plurality of the Court held that even assuming that the Non-Detention Act, 18 U.S.C. § 4001(a), which limits detention of U.S. citizens except pursuant to an act of Congress, was applicable to the detention of U.S. citizens held as enemy combatants, the AUMF satisfied the act's requirement that any detention of U.S. citizens be authorized by Congress. *Id.* at 517-518 (O'Connor, J., plurality opinion). It could be argued that the *Hamdi* plurality's reasoning supports the argument that the AUMF authorizes the President to transfer noncitizens into the United States for detention, even though the entry of such persons might otherwise be prohibited under the INA. On the other hand, it could be argued that the situation is not analogous to the facts at issue in *Hamdi*. Whereas the Non-Detention Act generally barred the detention of U.S. citizens "except pursuant to an act of Congress," similar language is not found in the INA with respect to alien inadmissibility.

⁷² 8 U.S.C. § 1182(d)(5)(A). For example, fugitives extradited to the United States whose U.S. citizenship cannot be confirmed are paroled into the United States by immigration authorities. 7 F.A.M. 1625.6.

⁷³ *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958).

⁷⁴ *See, e.g.*, S. 108, S. 147, H.R. 374, 111th Cong. (2009); S. 553, 112th Cong. (2011).

⁷⁵ P.L. 111-83, § 552(f).

⁷⁶ P.L. 111-117, § 532(f).

enactments.⁷⁷ Accordingly, restrictions on the use of appropriations to provide Guantanamo detainees with immigration benefits remain in effect for the duration of the period established under the continuing resolutions.

The FY2010 Department of Homeland Security Appropriations Act also amends Title 49 of the United States Code to require the placement of any person who has been detained at Guantanamo on the No Fly List, unless the President certifies to Congress that the detainee poses no threat to the United States, its citizens, or its allies.⁷⁸

Detention and Treatment of Persons Transferred to the United States

Many of the rules and standards governing the detention and treatment of persons at Guantanamo would remain applicable to detainees transferred into the United States. However, non-citizens held in the United States may be entitled to more protections under the Constitution than those detained abroad.

Authority to Detain Within the United States

Guantanamo detainees properly determined to be enemy belligerents may be held in preventive detention by military authorities even if transferred to the United States. In the 2004 case of *Hamdi v. Rumsfeld*, a majority of the Supreme Court recognized that, as a necessary incident to the 2001 AUMF, the President is authorized to detain persons captured while fighting U.S. forces in Afghanistan for the duration of the conflict.⁷⁹ A divided Supreme Court also declared that “a state of war is not a blank check for the president,” and ruled that persons who had been deemed “enemy combatants” by the Bush Administration had the right to challenge their detention before a judge or other “neutral decision-maker.”⁸⁰

While the preventive detention of enemy belligerents is constitutionally acceptable, the scope of persons potentially falling under this category remains uncertain. The *Hamdi* plurality was limited to an understanding that the phrase “enemy combatant” includes an “individual who ... was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”⁸¹ Left unresolved is the extent to which the 2001 AUMF permits the detention of persons captured away from the zone of

⁷⁷ Additional Continuing Appropriations Amendments, 2011, P.L. 112-6 (continuing funding through April 8, 2011). Congress had previously passed five continuing resolutions to temporarily fund federal agencies after the expiration to FY2010. P.L. 111-242 (extending funding for federal agencies at FY2010 levels through December 3, 2010); P.L. 111-290 (further extending funding through December 18, 2010); P.L. 111-317 (extending funding through December 21, 2010); P.L. 111-322 (continuing funding through March 4, 2011); P.L. 112-4 (providing funding through March 18, 2011).

⁷⁸ P.L. 111-83, § 553. Unlike other restrictions imposed by the act on detainee transfers and eligibility for immigration benefits, which apply only to the use of appropriated funds for the fiscal year, the amendment to Title 49 constitutes a permanent statutory change.

⁷⁹ *Hamdi*, 542 U. S. at 518 (O’Connor, J., plurality opinion), 588-589 (Thomas, J., dissenting).

⁸⁰ *Id.* at 536-537 (O’Connor, J., plurality opinion).

⁸¹ *Id.* at 526.

combat, or whether the President has the independent authority to detain such persons in the exercise of his Commander-in-Chief power. The Court also did not define what constitutes “support” for hostile forces necessary to acquire enemy belligerent status, or describe which activities constitute “engage[ment] in an armed conflict.”

In December 2008, the Supreme Court agreed to hear an appeal of an *en banc* ruling by the Fourth Circuit in the case of *al-Marri v. Pucciarelli*, in which a majority of the Court of Appeals found that the 2001 AUMF permits the detention as an “enemy combatant” of a resident alien alleged to have planned to engage in hostile activities within the United States on behalf of Al Qaeda, but who had not been part of the conflict in Afghanistan.⁸² However, prior to the Supreme Court considering the merits of the case, al-Marri was indicted by a federal grand jury for providing material support to Al Qaeda and conspiring with others to provide such support. The government immediately requested that the Supreme Court dismiss al-Marri’s pending case and authorize his transfer from military to civilian custody for criminal trial. In March 2009, the Supreme Court granted the government’s application concerning the transfer of al-Marri, vacated the Fourth Circuit’s judgment, and remanded the case back to the appellate court with instructions to dismiss the case as moot.⁸³

As a result, the scope of the executive’s authority to militarily detain persons captured away from the battlefield, including alleged members or associates of Al Qaeda or the Taliban who did not directly engage in hostilities against the United States or its coalition partners, will likely remain a matter of continuing dispute.

In January 2010, a three-judge panel of the D.C. Circuit Court of Appeals considered the scope of executive detention authority in the case of *Al-Bihani v. Obama*.⁸⁴ In an opinion supported in full by two members of the panel,⁸⁵ the appellate court recognized that, at a minimum, the President was authorized to detain persons who were subject to the jurisdiction of military commissions established pursuant to the Military Commissions Acts of 2006 and 2009; namely, any person who was “part of forces associated with Al Qaeda or the Taliban,” along with “those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.”⁸⁶ While the panel concluded that either purposeful and material support for or membership in an AUMF-targeted organization may be independently sufficient to justify detention,⁸⁷ it declined

⁸² *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), cert. granted by 129 S.Ct. 680 (2008), vacated and remanded by *Al-Marri v. Spagone*, 129 S.Ct. 1545 (2009). See also *Al-Marri v. Wright*, 487 F. 3d 160 (4th Cir. 2007).

⁸³ *Al-Marri v. Spagone*, 129 S.Ct. 1545 (2009).

⁸⁴ *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

⁸⁵ A third member of the panel issued a separate opinion concurring with the majority’s judgment. However, the opinion did not clearly endorse the majority’s view as to the scope of the executive’s detention authority. See *id.* at 883-885 (Williams, J., concurring) (arguing that petitioner was detainable on account of being “part of” an AUMF-targeted organization, but not deciding whether a person could be detained on account of “support” for a targeted organization that he was not also a “part of”).

⁸⁶ *Id.* at 872 (quoting 2006 MCA, P.L. 109-366, § 3, and 2009 MCA, P.L. 111-84, Div A, § 1802).

⁸⁷ While it has been recognized in subsequent circuit rulings that *Al-Bihani* establishes, at a minimum, that the executive may lawfully detain persons who are “part of” organizations targeted under the AUMF, there is arguably some ambiguity as to whether its conclusion that persons may also be lawfully detained on account of providing support to such entities is binding precedent or merely dicta. Compare, e.g., *Hatim v. Gates*, Civ. No. 10-5048, 2011 U.S. App. LEXIS 3171 (D.C. Cir., Feb. 15, 2011) (per curiam panel decision) (finding that district court ruling that military could only detain person who was “part of” Al Qaeda or the Taliban was “directly contrary to *Al-Bihani v. Obama*, which held that ‘those who purposefully and materially support’ al-Qaida or the Taliban could also be detained”); *Alsabri v. Obama*, Civ. No. 06-1767, 2011 U.S. Dist. LEXIS 17208 at *25 (D.D.C., Feb. 18, 2011) (continued...)

“to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard.”⁸⁸ It did, however, note that this standard would, permit the detention of a “civilian contractor” who “purposefully and materially supported” an AUMF-targeted organization through “traditional food operations essential to a fighting force and the carrying of arms.”⁸⁹ The D.C. Circuit Court of Appeals thereafter denied a petition for an *en banc* rehearing the *Al-Bihani* case.⁹⁰ Accordingly, the standard endorsed by the panel is controlling in the D.C. Circuit unless the decision is overturned by the Supreme Court.

The D.C. Circuit has also recognized that, when determining whether an individual was “part of” an AUMF-targeted organization, the government is not required to demonstrate that the person was part of the organization’s “command structure” in order to justify his detention.⁹¹ Instead, a determination as to whether an individual is “part of” al Qaeda or the Taliban “must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.”⁹²

In the absence of legal authority to militarily detain a terrorist suspect, U.S. military authorities must generally release the person from custody. However, there may be grounds for the person’s continued detention by U.S. law enforcement or immigration authorities. If a former detainee brought to the United States is charged with a federal crime, a judicial officer may order his pretrial detention following a hearing in which it is determined that no other conditions would reasonably assure the individual’s appearance for trial or the safety of the community or another individual.⁹³ A former detainee may also potentially be held in detention as a material witness to a criminal proceeding, including a grand jury proceeding, if a judicial officer orders his arrest and

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(Urbina, J.) (“This Circuit has stated that the AUMF authorizes the government to detain two categories of persons: (1) individuals ‘part of’ forces associated with al-Qaida or the Taliban and (2) individuals who purposefully and materially support such forces in hostilities against the United States.”); *Almerfedi v. Obama*, 725 F. Supp. 2d 18 (D.D.C., 2010) (Friedman, J.) (recognizing that *Al-Bihani* established that detention under the AUMF could be justified either on grounds that person was either a member of or provided substantial support to an AUMF-targeted organization); *with Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) (describing circuit jurisprudence in the aftermath of *Al-Bihani* as having “made clear...that the AUMF authorizes the Executive to detain, at the least, any individual who is functionally part of al Qaeda”).

⁸⁸ *Id.* at 873-874. The *Al-Bihani* panel recognized that the executive was authorized to detain, at a minimum, those persons who were triable by military commissions under either the 2006 or 2009 versions of the MCA; namely, “those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.” *Id.* at 872.

⁸⁹ *Id.* at 872-873. The panel found that even if petitioner was not a member of an AUMF-targeted organization, his service as a cook for a military brigade affiliated with Taliban and Al Qaeda forces, in addition to his accompaniment of the brigade during military operations, constituted sufficient grounds for his detention. *Id.*

⁹⁰ A concurring opinion joined by the majority of the active appellate court judges characterized certain aspects of the panel’s decision, concerning the application of international law of war principles in interpreting the AUMF, to be non-binding dicta. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring).

⁹¹ *See, e.g., Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010).

⁹² *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) *See also* *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010) (a person who “joined and was accepted by al-Qaida fighters who were engaged in hostilities against Afghan and allied forces ... could properly be considered ‘part of’ al-Qaida even if he never formally received or executed any orders”); *Awad*, 608 F.3d at 11.

⁹³ 18 U.S.C. § 3142. Subject to rebuttal by the person, it is presumed that a person shall be subject to pretrial detention if the judicial officer finds there is probable cause to believe he has committed a federal crime of terrorism for which a maximum sentence of 10 or more years’ imprisonment is prescribed. *Id.* at § 3142(e).

detention after determining that it may become impracticable to secure the presence of the person by subpoena.⁹⁴

If the military lacks authority to hold a detainee brought to the United States and is unable to effectuate his transfer to another country, the detainee might nonetheless be placed in immigration removal proceedings and continue being detained pending removal. Detention pending removal is generally required for aliens inadmissible on criminal or terrorism-related grounds.⁹⁵ Following a final order of removal,⁹⁶ an alien is typically required to be removed within 90 days. During this period, an alien is usually required to be detained, and in no circumstance may an alien inadmissible or deportable on any terrorism-related ground or most crime-related grounds be released from detention.⁹⁷ If the alien is unable to be removed during the 90-day period provided by statute, his continued detention for a period beyond six months may be statutorily and constitutionally prohibited.⁹⁸ However, those aliens who are specially dangerous to the community may be subject to continued detention, subject to periodic review. Immigration regulations permit the continued detention of certain categories of aliens due to special circumstances, including, *inter alia*, any alien who is detained on account of (1) serious adverse foreign policy consequences of release; (2) security or terrorism concerns; or (3) being considered specially dangerous due to having committed one or more crimes of violence and having a mental condition making it likely that the alien will commit acts of violence in the future.⁹⁹

Some legislative proposals have sought to clarify executive authority to detain certain wartime detainees.¹⁰⁰ Proposals have also been made to require any alien detainee released from military

⁹⁴ 18 U.S.C. § 3144.

⁹⁵ 8 U.S.C. § 1226. Immigration law also permits an alien to be detained for up to seven days prior to the initiation of removal proceedings or the charging of the alien with a criminal offense, if the Attorney General certifies that there are reasonable grounds to believe the alien is inadmissible or deportable on terrorism-related grounds or the alien is engaged in any other activity that endangers the national security of the United States. 8 U.S.C. § 1226a.

⁹⁶ The removal period begins on the latest of the following: (1) the date that the order of removal becomes administratively final; (2) if a reviewing court orders a stay of the removal of the alien, the date of the court's final order; or (3) if the alien is detained or confined for non-immigration purposes, the date of the alien's release. 8 U.S.C. § 1231(a)(1)(B).

⁹⁷ 8 U.S.C. § 1231(a)(2).

⁹⁸ In *Zadvydas v. Davis*, the Supreme Court concluded that the indefinite detention of deportable aliens (i.e., aliens admitted into the United States who were subsequently ordered removed) would raise significant due process concerns. The Court interpreted an applicable immigration statute governing the removal of deportable and inadmissible aliens as only permitting the detention of aliens following an order of removal for so long as is "reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The Court found that the presumptively reasonable limit for the post-removal-period detention is six months, but indicated that continued detention may be warranted when the policy is limited to specially dangerous individuals and strong procedural protections are in place. *Id.* at 690, 701. Subsequently, the Supreme Court ruled that aliens who have been paroled into the United States also could not be indefinitely detained, but the Court's holding was based on statutory construction of the applicable immigration law, and it did not consider whether such aliens were owed the same due process protections as aliens who had been legally admitted into the United States. *Clark v. Martinez*, 543 U.S. 371 (2005).

⁹⁹ 8 C.F.R. § 241.14.

¹⁰⁰ *See, e.g.*, Detainee Security Act of 2011, H.R. 968, 112th Cong. (2011) (authorizing the President to detain, until the termination of hostilities, persons who are "part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or cobelligerents; or [] have engaged in hostilities or have substantially supported hostilities against the United States or its cobelligerents on behalf of or in aid of al-Qaeda, the Taliban, or associated forces"); Military Detainee Procedures Improvement Act of 2011, S. 551, 112th Cong. (2011) (authorizing the President to detain "unprivileged enemy belligerents" in conflict with Al Qaeda, the Taliban, and associated forces, which is defined to include any person, other than a privileged belligerent, who "has engaged in (continued...)

custody into the United States to be taken into custody by immigration authorities pending removal. Although in prior conflicts the United States interned “enemy aliens” and U.S. citizens who did not participate in hostilities against the United States,¹⁰¹ the scope and effect of proposals requiring the detention of specified categories of persons other than enemy combatants may be subject to constitutional challenges.

Treatment of Detained Persons

The rules governing the treatment of Guantanamo detainees would largely remain unchanged if detainees were transferred to the United States. The DTA provides that no person in the custody or effective control of the DOD or detained in a DOD facility shall be subject to any interrogation treatment or technique that is not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation, unless the person is being held pursuant to U.S. criminal or immigration laws (in which case the detainee’s interrogation would be governed by applicable criminal or immigration law enforcement standards).¹⁰² The Field Manual requires all detainees to be treated in a manner consistent with the Geneva Conventions, and prohibits the use of torture or cruel, inhuman, and degrading treatment in any circumstance. In the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court found that, at a minimum, Common Article 3 of the Geneva Conventions applied to persons captured in the conflict with Al Qaeda.¹⁰³ Common Article 3 requires persons to be treated humanely and protected from “violence to life and person,” “cruel treatment and torture,” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.” All of these requirements would remain applicable to detainees transferred into the United States, at least so long as they remained in military custody.

Noncitizen detainees transferred to the United States may also receive greater constitutional protections than those detained outside the United States. “It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens

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hostilities against the United States or its coalition partners; [] has purposefully and materially supported hostilities against the United States or its coalition partners; or [] was a member of, part of, or operated in a clandestine, covert, or military capacity on behalf of al Qaeda, the Taliban, or an affiliated group against which the [AUMF] applies”); Detention of Unprivileged Enemy Belligerents Act, S. 553, 112th Cong. (2011) (authorizing detention of “unprivileged enemy belligerents,” and defining the term elsewhere in a manner similar to S. 551); Enemy Combatant Detention Review Act of 2009, H.R. 630, 111th Cong. (2009); Terrorist Detention Review Reform Act, S. 3707, 111th Cong. (2010).

¹⁰¹ The Alien Enemy Act, which was originally enacted in 1798 as part of the Alien and Sedition Act, grants the President broad authority, during a declared war or presidentially proclaimed “predatory invasion,” to institute restrictions affecting alien enemies, including possible detention and deportation. 50 U.S.C. §§ 21-24. In its current form, the act applies to aliens within the United States who are fourteen years or older, and who are “natives, citizens, denizens, or subjects of the hostile nation or government” at war with the United States. 50 U.S.C. § 21. This authority was used frequently during World War I and World War II, and reviewing courts viewed such measures as constitutionally permissible. See generally CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea. See also *Johnson v. Eisentrager*, 339 U.S. 763, 775(1950) (“The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a ‘declared war’ exists.”); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding President’s authority to detain and remove a German citizen pursuant to the Alien Enemy Act). Whether more recent legal developments concerning the due process protections owed to noncitizens have come to limit this authority remains to be seen.

¹⁰² P.L. 109-148, Title X, § 1002 (2005); P.L. 109-163, Title XIV, § 1402 (2006).

¹⁰³ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

outside of our geographic borders.”¹⁰⁴ Although the Supreme Court in *Boumediene* held that the constitutional writ of *habeas corpus* extends to Guantanamo, it did not elaborate as to the extent to which other constitutional provisions apply to noncitizens held at the detention facility.¹⁰⁵ In February 2009, a D.C. Circuit panel held in the case of *Kiyemba v. Obama* that the Constitution’s due process protections do not extend to Guantanamo detainees.¹⁰⁶ In October 2009, the Supreme Court granted certiorari to review the *Kiyemba* ruling, but in March 2010 it vacated the appellate court’s opinion and remanded the case in light of changed circumstances surrounding the *Kiyemba* petitioners.¹⁰⁷ The circuit court thereafter reinstated its earlier opinion.¹⁰⁸ A petition has been filed with the Supreme Court seeking review of the circuit decision, but the Court has yet to rule on whether to grant certiorari.

Regardless of the Constitution’s application to persons held at Guantanamo, the DTA and MCA prohibit any person in U.S. custody or control (including those located at Guantanamo or elsewhere outside U.S. territory) from being subjected to cruel, inhuman, or degrading treatment of the kind prohibited by the Fifth, Eighth, and Fourteenth Amendments.¹⁰⁹

Legal Challenges to Nature of Detention

If transferred to the United States, detainees may be able to seek judicial review over a broader range of actions taken against them. Besides eliminating detainees’ access to *habeas corpus* review, the DTA and MCA stripped federal courts of jurisdiction to hear most claims by noncitizen detainees. Specifically, federal courts are denied jurisdiction over

any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.¹¹⁰

Although the *Boumediene* Court held that the constitutional writ of *habeas* permitted Guantanamo detainees to challenge the legality of their detention, the Court declined to “discuss

¹⁰⁴ *Zadvydas*, 533 U.S. at 693.

¹⁰⁵ The application of constitutional provisions other than the Suspension Clause to noncitizens held at Guantanamo is the subject of ongoing litigation. See *Rasul v. Myers*, 129 S.Ct. 763 (2008) (vacating pre-*Boumediene* lower court judgment that aliens held at Guantanamo lacked constitutional rights under the Fifth and Eighth Amendments, and remanding the case for further consideration in light of *Boumediene* decision); *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C.Cir.2009) (“*Kiyemba I*”) (finding that detainees at Guantanamo lacked rights under the Due Process Clause), *cert. granted*, 130 S.Ct. 458 (Oct. 20, 2009), *vacated*, 130 S.Ct. 1235 (2010), *reinstated, as modified*, by 605 F.3d 1046 (D.C. Cir. 2010).

¹⁰⁶ *Kiyemba I*, 555 F.3d at 1026-1027 (citing Supreme Court and D.C. Circuit cases recognizing that “the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States”). In a separate opinion concurring with the judgment of the *Kiyemba* majority, Judge Judith Rogers disagreed with the majority’s interpretation of the territorial application of the Constitution’s Due Process Clause, claiming that it was inconsistent with the Supreme Court’s reasoning in *Boumediene*. *Id.* at 1038 (Rogers, J., concurring).

¹⁰⁷ *Kiyemba v. Obama*, 130 S.Ct. 1235 (Mar. 10, 2010). See also *supra* text accompanying footnote 8.

¹⁰⁸ 605 F.3d 1046 (D.C. 2010).

¹⁰⁹ P.L. 109-148, Title X, § 1003; P.L. 109-163, Title XIV, § 1402; P.L. 109-366, § 6(c).

¹¹⁰ P.L. 109-366, § 7(a). While the DTA initially stripped federal courts of jurisdiction only over claims raised by aliens held at Guantanamo, the MCA’s restriction upon federal court jurisdiction applies to claims by any alien in U.S. custody who is properly detained as an enemy combatant or awaiting such a determination, regardless of the alien’s location.

the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.”¹¹¹ Because the *Boumediene* Court left these questions unresolved, the viability of measures stripping courts of jurisdiction to hear claims regarding the conditions of detention may depend upon a reviewing court’s interpretation of the constitutional protections owed to detainees.¹¹² While measures that eliminate detainees’ ability to pursue statute- or treaty-based challenges to aspects of their detention may be deemed permissible by a reviewing court,¹¹³ measures that seek to eliminate (rather than merely circumscribe) detainees’ ability to bring constitutional challenges regarding the circumstances of their detention would likely be subject to serious legal challenge. Although the scope of constitutional protections owed to Guantanamo detainees remains a matter of legal dispute, it is clear that the procedural and substantive due process protections of the Constitution apply to all persons within the United States, regardless of their citizenship.¹¹⁴ Accordingly, detainees transferred to the United States might be able to more successfully pursue legal challenges against aspects of their detention in the United States that allegedly infringe upon constitutional protections owed to them.

Removal of Detainees from the United States

If there are no longer grounds to hold a detainee, the United States must terminate custody either through transfer or release. Persons held in the United States may have greater legal redress

¹¹¹ *Boumediene*, 128 S.Ct. at 2264.

¹¹² In April 2009, a D.C. Circuit panel interpreted this court-stripping provision’s use of the phrase “any other action” as referring to legal claims other than a petition for a writ of *habeas corpus*. *Kiyemba II*, 561 F.3d at 513. In that case, the panel found that *habeas* courts could consider not only Guantanamo detainees’ challenges to the legality of their detention, but also their proposed transfer to another country (though *habeas* review of such transfers may be quite limited). *Id.* at 513-514. Accordingly, whether Guantanamo detainees may challenge their conditions of confinement may depend on whether a reviewing court considers these conditions to be “a proper subject of ... *habeas* relief.” *Id.* at 513. *Habeas* courts have thus far rejected challenges by Guantanamo detainees relating to their conditions of detention. *See, e.g., Khadr v. Bush*, 587 F. Supp. 2d 225, 235 (D.D.C., 2008) (“the Supreme Court appears to have left ... [the MCA’s bar on judicial review of conditions of detention] undisturbed”); *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 312, 314 (D.D.C.2008) (Hogan, J.) (“Cognizant of the long-standing rule of severability, this Court, therefore, holds that MCA2006 MCA § 7(a)(2) remains valid and strips it of jurisdiction to hear a detainee’s claims that ‘relat[e] to any aspect of the detention, transfer, treatment, trial, or conditions of confinement ...’”). *See also In re Guantanamo Bay Detainee Litigation*, 570 F. Supp. 2d 13 (D.D.C.2008) (Urbina, J.) (holding that MCA § 7(a)(2) was not invalidated by *Boumediene*, but declining to decide whether the constitutional writ of *habeas* permits challenges to conditions of confinement). The rejection of challenges to conditions of confinement may be based, at least in part, upon the opinion that any such claim by Guantanamo detainees does not derive from a constitutional protection to which they are entitled. *See Kiyemba I*, 555 F.3d at 1026-27 (finding that detainees at Guantanamo lacked rights under the Due Process Clause), *cert. granted*, 130 S.Ct. 458 (Oct. 20, 2009), *vacated*, 130 S.Ct. 1235 (2010), *reinstated, as modified*, by 605 F.3d 1046 (D.C. Cir. 2010).

¹¹³ *See Al-Bihani*, 590 F.3d at 875 (D.C. Cir. 2010) (2006 MCA precluded petitioner from raising claim that government’s failure to accord him prisoner of war status violated Geneva Convention requirements). *Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009) (2006 MCA precluded petitioner, a designated prisoner of war under the Geneva Conventions, from invoking Conventions in challenge to his proposed extradition to France), *cert. denied*, 130 S. Ct. 1002 (2010).

¹¹⁴ *Zadvydas*, 533 U.S. at 693 (“the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and ... aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law”).

against their unwilling transfer to another country than those held abroad, and may potentially seek judicial review of transfer decisions through *habeas* proceedings.

CAT Article 3 and its implementing legislation prohibit the transfer of detainees from the United States to countries where they would more likely than not face torture. This prohibition is absolute and without regard to whether an individual has been involved in terrorist or criminal activity. While the Bush Administration took the position that CAT Article 3 and its implementing legislation do not govern the transfer of detainees held outside the United States, there appears to be little if any dispute regarding CAT's application to the transfer of persons from within the country.¹¹⁵

Detainees transferred to the United States who may no longer be held by military authorities might potentially seek relief from removal under U.S. immigration laws. An alien who is physically present or arrives in the United States, regardless of immigration status, may apply for asylum, a discretionary form of relief from removal available to aliens who have a well-founded fear of persecution if transferred to another country. Persons granted asylum may thereafter apply for adjustment of status to that of a legal permanent resident. Certain potentially over-lapping categories of aliens are disqualified from asylum eligibility, including those involved in terrorism-related activity (including members of the Taliban and Al Qaeda) and those who are reasonably believed to pose a danger to U.S. security.¹¹⁶ Nonetheless, it is possible that some detainees who have been found not to have fought on behalf of the Taliban or Al Qaeda may qualify for asylum or other forms of relief from removal if transferred to the United States. Further, if a detainee is declared ineligible for asylum or another form of relief from removal and is thereafter ordered removed by immigration officials, immigration authorities may be required to provide evidence forming the basis of this determination in the face of a legal challenge by the detainee.¹¹⁷ It is important to note that asylum only constitutes relief from removal under immigration laws. It would not bar the transfer of a detainee pursuant to some other legal authority (e.g., extradition).

¹¹⁵ U.S. law implementing CAT generally specifies that no judicial appeal or review is available for any action, decision or claim raised under CAT, except as part of a review of a final immigration removal order. FARRA, § 2242(d). The ability of a person to raise a CAT-based claim in non-removal proceedings (e.g., in the case of extradition or military transfers), is the subject of debate and conflicting jurisprudence. *Compare Kiyemba v. Obama*, 561 F.3d 509, 514-515 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 1880 (2010) (wartime detainees held at Guantanamo could not bring CAT- or FARRA-based challenges to their proposed military transfer to a foreign country, as Congress had precluded judicial review of such claims except as part of a final order of immigration removal); *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), *cert. dismissed*, 128 S.Ct. 976 (Jan. 9, 2008) (finding that CAT-implementing legislation precludes review of CAT-based habeas petition in extradition proceedings); *with Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) (finding that an individual subject to an extradition order may appeal under the Administrative Procedures Act (APA), when his surrender would be contrary to U.S. laws and regulations implementing CAT), disapproved in later appeal, 379 F.3d 1075 (9th Cir. 2004), opinion of later appeal vacated on rehearing by 389 F.3d 1307 (9th Cir. 2004). *See also Khouzam v. Muckasey*, 549 F.3d 235 (3rd Cir. 2008) (aliens who have shown a likelihood of facing torture have a right under the Due Process Clause of the Fifth Amendment to challenge the sufficiency of diplomatic assurances obtained by immigration authorities to effectuate their removal). It should also be noted that although U.S. legislation implementing CAT required all relevant agencies to adopt regulations implementing CAT Article 3 requirements, the DOD has yet to implement such measures. It could be argued that the DOD could not transfer a detainee from the United States to a third country until CAT-implementing regulations were promulgated. *See* Robert M. Chesney, "Leaving Guantánamo: The Law of International Detainee Transfers," 40 U. Rich. L. Rev. 657 (2006) (arguing that detainees may have a right to compel the DOD to promulgate CAT-implementing regulations).

¹¹⁶ 8 U.S.C. § 1158(b)(2). Members of terrorist organizations are inadmissible and ineligible for asylum. U.S. law specifies that the Taliban is a terrorist organization for INA purposes. P.L. 110-161, Div. J, § 691(d) (2007).

¹¹⁷ 8 U.S.C. § 1252.

As discussed, proposals may be considered that would clarify the application of immigration laws to Guantanamo detainees transferred to the United States. Secretary of Defense Gates has stated that the Obama Administration will seek legislation from Congress addressing detainees' immigration status, possibly including barring them from asylum eligibility.¹¹⁸ As previously mentioned, the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83) and the Consolidated Appropriations Act, 2010 (P.L. 111-117) contained provisions barring any funds they made available from being used to provide any immigration benefit to Guantanamo detainees brought to the United States, or to provide for a detainee's classification as a refugee or applicant for asylum.¹¹⁹ Although FY2010 has ended, Congress has effectively extended the restrictions imposed by FY2010 appropriation enactments through a series of continuing resolutions.¹²⁰

Detainees' Rights in a Criminal Prosecution

While many persons currently held at Guantanamo are only being detained as a preventive measure to stop them from returning to battle, the United States has brought or intends to pursue criminal charges against some detainees. Various constitutional provisions, most notably those arising from the Fifth and Sixth Amendments to the U.S. Constitution, apply to defendants throughout the process of criminal prosecutions. Prosecuting Guantanamo detainees inside the United States would raise at least two major legal questions. First, does a detainee's status as an enemy belligerent reduce the degree of constitutional protections to which he is entitled? Secondly, would the choice of judicial forum—that is, civilian court, military commission, or court-martial—affect interpretations of constitutional rights implicated in detainee prosecutions?

As previously discussed, the nature and extent to which the Constitution applies to noncitizens detained at Guantanamo is a matter of continuing legal dispute. Although the Supreme Court held in *Boumediene* that the constitutional writ of *habeas* extends to detainees held at Guantanamo, it left open the nature and degree to which other constitutional protections, including those relating to substantive and procedural due process, may also apply. The *Boumediene* Court noted that the Constitution's application to noncitizens in places like Guantanamo that are located outside the United States turns on "objective factors and practical concerns."¹²¹ The Court has also repeatedly recognized that at least some constitutional protections are "unavailable to aliens outside our geographic borders."¹²² The application of constitutional principles to the prosecution of aliens located at Guantanamo remains unsettled.

On the other hand, it is clear that if Guantanamo detainees are subject to criminal prosecution in United States, the constitutional provisions related to such proceedings would apply.¹²³ The

¹¹⁸ Yochi J. Dreazen, "Gates Seeks Congress's Help in Closing Guantanamo," *Wall Street Journal*, December 3, 2008.

¹¹⁹ P.L. 111-83, § 552(f); P.L. 111-117, § 532(f).

¹²⁰ See *supra* footnote 77 (listing continuing resolutions enacted by Congress to temporarily fund agencies following the end of 2010 fiscal year, and which generally authorized continued funding subject to the same terms and conditions established by FY2010 appropriations measures).

¹²¹ *Boumediene*, 128 S.Ct. at 2258.

¹²² *Zadvydas*, 533 U.S. at 693. See also *Verdugo-Urquidez v. United States*, 494 U.S. 259, 270-71 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country").

¹²³ See *Ex Parte Quirin*, 317 U.S. 1, 25 (1942) (denying motion for leave to file writ of *habeas corpus* by eight German (continued...))

application of these constitutional requirements might nevertheless differ depending upon the forum in which charges are brought. The Fifth Amendment's requirement that no person be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury, and the Sixth Amendment's requirements concerning trial by jury, have been found to be inapplicable to trials by military commissions or courts-martial.¹²⁴ The application of due process protections in military court proceedings may also differ from civilian court proceedings, in part because the Constitution "contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'"¹²⁵ In the past, courts have been more accepting of security measures taken against "enemy aliens" than U.S. citizens, particularly as they relate to authority to detain or restrict movement on grounds of wartime security.¹²⁶ It is possible that the rights owed to enemy belligerents in criminal prosecutions would be interpreted more narrowly by a reviewing court than those owed to defendants in other, more routine cases, particularly when the constitutional right at issue is subject to a balancing test.

There are several forums in which detainees could potentially be prosecuted for alleged criminal activity, including in federal civilian court, in general courts-martial proceedings, or before military commissions. The procedural protections afforded to the accused in each of these forums may differ, along with the types of offenses for which the accused may be prosecuted. The MCA authorized the establishment of military commissions with jurisdiction to try alien "unlawful enemy combatants" for offenses made punishable by the MCA or the law of war, and afforded the accused fewer procedural protections than would be available to defendants in military courts-martial or federal civilian court proceedings.¹²⁷ The statutory framework for military commissions was amended by the Military Commissions Act of 2009 (MCA 2009), enacted as part of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), so that the procedural protections afforded to the accused (now referred to as alien "unprivileged enemy belligerents"¹²⁸) more closely resemble those found in military courts-martial proceedings, though

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saboteurs tried by military commission in the United States, but noting that "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty").

¹²⁴ See, e.g., *Whelchel v. McDonald*, 340 U.S. 122 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions."); *Quirin*, 317 U.S. at 40 ("we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts"). See also U.S. CONST., amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, *except* in cases arising in the land or naval forces")(italics added).

¹²⁵ *Weiss v. United States*, 510 U.S. 163, 177 (1994) (upholding a narrowed interpretation of Fifth Amendment due process rights for the context of military courts)(quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)).

¹²⁶ See *supra* footnote 101 and accompanying citations.

¹²⁷ See generally CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea. The MCA defined "unlawful enemy combatant" as a person who: (1) "has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant," or (2) "has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal" by a certain date. 10 U.S.C. § 948a(1) (2008).

¹²⁸ The term "unprivileged enemy belligerent" is defined to include an individual (other than a "privileged belligerent" belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War) who "(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of (continued...)

differences between the two forums remain.¹²⁹ The modifications made by the MCA 2009 are discussed in detail in CRS Report R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, by Jennifer K. Elsea. Critics raised questions regarding the constitutionality of the military commission system initially established by the original MCA,¹³⁰ and some of these arguments may also be raised even following the amendments made by the MCA 2009. Courts have yet to rule on the constitutional legitimacy of many procedures used by military commissions. Military commissions are not statutorily restricted from exercising jurisdiction within the United States, and the Supreme Court has previously upheld the use of commissions against enemy belligerents tried in the country.¹³¹

In November 2009, the Department of Justice and Department of Defense announced that military commission prosecutions against five Guantanamo detainees, which had been halted following President Obama's January 2009 Executive Order, may be resumed.¹³² It appears likely that several other detainees will be tried before military commissions as well.¹³³

Detainees could also potentially be prosecuted in federal civilian court for offenses under federal criminal statutes. Provisions in the U.S. Criminal Code relating to war crimes and terrorist activity apply extraterritorially and may be applicable to some detainees, though ex post facto and statute of limitation concerns may limit their application to certain offenses.¹³⁴ In June 2009, one detainee was transferred from Guantanamo to the United States for trial in federal court for his alleged role in the 1998 bombings of the U.S. embassies in Tanzania and Kenya.¹³⁵ In November 2009, the DOJ and DOD announced plans to bring charges in federal court against five detainees for their alleged role in the 9/11 terrorist attacks,¹³⁶ but opposition to the plan caused the Attorney General to place it on indefinite hold.¹³⁷

Although they have yet to be used for this purpose, military courts-martial could also be employed to try detainees by exercising jurisdiction under the Uniform Code of Military Justice

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al Qaeda at the time of the alleged offense under this chapter." P.L. 111-84, § 1802 (amending, *inter alia*, 10 U.S.C. § 948a).

¹²⁹ Prior to the enactment of the MCA 2009, the DOD announced certain modifications to commission procedures which, in some cases, would have made them more similar to the procedures employed in courts-martial. A copy of a DOD memo describing these changes can be viewed at <http://www.nimj.org/documents/2009%20DoD%20MMC%20Changes.pdf>.

¹³⁰ See Brookings Report, *supra* footnote 2, at p. 8. Information regarding ongoing and completed cases can be viewed at <http://www.defenselink.mil/news/commissions.html>.

¹³¹ See *Quirin*, 317 U.S. at 31 (upholding military commissions used to try eight German saboteurs in the United States).

¹³² DOJ Announcement, *supra* footnote 14.

¹³³ Peter Finn, "Justice Task Force Recommends about 50 Detainees Be Held Indefinitely," *Washington Post*, January 22, 2009. See also *Obaydullah v. Obama*, No. 09-5328, Brief for Respondent Department of Justice, at 8 Jan. 2010 (D.C. Cir.) (noting that "the Attorney General has determined that petitioner's case is appropriate for prosecution and that a military commission is the appropriate venue for such a prosecution").

¹³⁴ See 18 U.S.C. chapter 113B (terrorism-related offenses); 18 U.S.C. § 2441.

¹³⁵ Department of Justice, "Ahmed Ghailani Transferred from Guantanamo Bay to New York for Prosecution on Terror Charges," press release, June 9, 2009, <http://www.justice.gov/opa/pr/2009/June/09-ag-563.html>.

¹³⁶ DOJ Announcement, *supra* footnote 14.

¹³⁷ See Kornblut and Finn, *supra* footnote 18.

(UCMJ) over persons subject to military tribunals under the law of war.¹³⁸ Detainees brought before military courts-martial could be charged with offenses under the UCMJ and the law of war, though courts-martial rules concerning the accused's right to a speedy trial, as well as statute of limitations issues, may pose an obstacle to prosecution.¹³⁹

The executive currently retains at least technical discretion to determine the appropriate forum in which to prosecute detainees (though the 2011 NDAA has effectively precluded Guantanamo detainees from being tried in civilian court through the 2011 fiscal year, through its provision barring the transfer of detainees into the United States for any purpose). The Administration has repeatedly expressed its desire to prosecute some Guantanamo detainees in Article III courts and others before military commissions. Legislative proposals have been introduced that would require prosecutions to occur in a particular forum or modify the procedural rules applicable to the prosecution of detainees.¹⁴⁰ Pursuant to existing statutory authorization, the executive could also potentially modify military commission procedural rules to some degree, including by amending existing procedures so that they more closely resemble those employed by courts-martial.¹⁴¹ Some commentators have proposed the creation of an entirely new forum for the prosecution of detainees, such as a national security court.¹⁴² The scope and effect of such proposals may be shaped by constitutional constraints, including with respect to the rights owed to the accused in criminal proceedings.

The following sections discuss selected constitutional issues that may arise in the criminal prosecution of detainees, emphasizing the procedural and substantive protections that apply in different adjudicatory forums.

Right to Assistance of Counsel

Detainees brought to the United States would have a constitutional right to assistance of counsel in any criminal prosecution. The procedural rules for federal civilian courts, courts-martial, and military commissions all provide a defendant with the right to assistance of counsel, but the exercise of this right may differ according to the forum.

The Sixth Amendment guarantees a criminal defendant the right "to have the Assistance of Counsel for his defence." This constitutional protection attaches at the time of indictment and affords a defendant the right to retain counsel of his or her choosing as well as an opportunity to consult with that counsel.¹⁴³ Where a criminal defendant cannot afford to retain a lawyer, counsel

¹³⁸ 10 U.S.C. § 818 ("General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.")

¹³⁹ *Id.*

¹⁴⁰ *See, e.g.*, Detainee Trials at Gitmo Act, H.R. 388, 112th Cong. (2011).

¹⁴¹ The original MCA provided that the Secretary of Defense may prescribe rules of evidence and procedure for military commissions not inconsistent with the MCA. Rules applicable to courts-martial under the UCMJ were to apply except as otherwise specified. 10 U.S.C. § 949a(a). Pursuant to this authority, the Secretary of Defense published the Manual for Military Commissions, including the Rules for Military Commissions and the Military Commission Rules of Evidence. Under the amendments made by the MCA 2009, the Secretary of Defense retains authority to prescribe rules for military commissions that are not inconsistent with the act's requirements.

¹⁴² *See, e.g.*, Jack L. Goldsmith and Neal Katyal, op-ed, "The Terrorists' Court," *New York Times*, July 11, 2007; Stuart Taylor, Jr., "The Case for a National Security Court," *The Atlantic*, February 27, 2008.

¹⁴³ *Chandler v. Freytag*, 348 U.S. 3, 10 (1954).

will be appointed by the court to serve at public expense,¹⁴⁴ in which case the defendant's choice of counsel need not be heeded.¹⁴⁵ The court must advise a criminal defendant of his or her right to counsel and must ask the defendant whether he or she wishes to waive that right.¹⁴⁶ A defendant's waiver is valid only if it is knowing, voluntary, and intelligent.¹⁴⁷ This standard does not require that the defendant fully and completely comprehend all of the consequences of that waiver.¹⁴⁸ The right to counsel also encompasses the right of a defendant to represent himself or herself, if the defendant intelligently and knowingly chooses to do so.¹⁴⁹ It appears that there is no constitutional right to continuity of appointed counsel,¹⁵⁰ although federal law requires that substitution of counsel serve "the interest of justice,"¹⁵¹ and the military justice system authorizes substitution of detailed military counsel only for good cause.¹⁵²

The Sixth Amendment right to counsel is the right to the effective assistance of counsel.¹⁵³ The standard for determining whether a defendant has received ineffective assistance of counsel is two-fold. The attorney's performance must have been deficient, and the prejudice to the defense resulting from the attorney's deficient performance must be so serious as to bring into question the outcome of the proceeding.¹⁵⁴ If there is an actual breakdown in the adversarial process, such as a case involving "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," the Sixth Amendment is violated.¹⁵⁵

In the federal civilian courts, the right to counsel is implemented under Rule 44 of the Federal Rules of Criminal Procedure. In part, this rule affords a criminal defendant who is unable to obtain counsel the right to have counsel appointed to represent him at every stage of the proceedings from initial appearance through appeal, unless the defendant waives this right.¹⁵⁶ In courts-martial, the right to counsel is implemented under Rule 506 of the Rules for Courts-

¹⁴⁴ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462, 463 (1938).

¹⁴⁵ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006).

¹⁴⁶ *Walker v. Johnston*, 312 U.S. 275 (1941).

¹⁴⁷ *Iowa v. Tovar*, 541 U.S. 77 (2004).

¹⁴⁸ *Id.*

¹⁴⁹ *Faretta v. California*, 422 U.S. 806 (1975). However, "under some circumstances the trial judge may deny the authority to exercise it, as when the defendant simply lacks the competence to make a knowing or intelligent waiver of counsel or when his self-representation is so disruptive of orderly procedures that the judge may curtail it." UNITED STATES CONSTITUTION: ANALYSIS AND INTERPRETATION (Constitution Annotated), http://crs.gov/products/conan/Amendment06/topic_8_1_7.html. See *Indiana v. Edwards*, 128 S. Ct. 2379 (2008). The right to self-representation applies only in preparation for trial and at trial. The Constitution does not guarantee a right to self-representation on direct appeal from a criminal conviction. *Martinez v. Court of App. of Cal., Fourth App. Dist.*, 528 U.S. 152, 160 (2000); cf., *Abney v. United States*, 431 U.S. 651, 656 (1977) (finding that the right to appeal, as we now know it, in criminal cases arises from statutory rather than constitutional authority). The *Martinez* Court found that it necessarily followed from this that the Sixth Amendment did not provide a basis for self-representation on appeal. 528 U.S. at 160.

¹⁵⁰ *United States v. Ghailani*, 686 F. Supp. 2d 279, 299 (S.D.N.Y. 2009)(citing *United States v. Parker*, 469 F.3d 57, 61 (2d Cir.2006).

¹⁵¹ 18 U.S.C. § 3006A(c).

¹⁵² Both the Manual for Courts-Martial and the Manual for Military Commissions require a showing of good cause for the substitution of detailed military counsel once an attorney-client relationship has been formed. R.C.M. 505(d) (2008); R.M.C. 505(d) (2010).

¹⁵³ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Glasser v. United States*, 315 U.S. 60, 70 (1942).

¹⁵⁴ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁵⁵ *United States v. Cronin*, 466 U.S. 648, 658 (1984).

¹⁵⁶ FED. R. CRIM. P. 44(a).

Martial (R.C.M.). Rule 506 provides that a defendant has the right to be represented at a general or special court-martial by civilian counsel, if provided at no expense to the Government, and either by military counsel detailed under Article 27 of the UCMJ¹⁵⁷ or military counsel of the defendant's own selection. As in a civilian court, the defendant may also waive the right to be represented by counsel and may conduct the defense personally.¹⁵⁸

A detainee subject to a military commission has the right to be represented by counsel.¹⁵⁹ The right is implemented by Rule 506 of the Rules for Military Commissions (R.M.C.), which provides an accused detainee with a detailed military defense counsel once charged with an offense. The detainee also has the right to be represented by civilian counsel, if retained at no cost to the Government. Civilian counsel must fulfill certain qualifications, including being a U.S. citizen and having security clearance of Secret or higher.¹⁶⁰ As under the Rules for Courts-Martial, a defendant in a military commission proceeding may waive his right to counsel and may conduct the defense personally.¹⁶¹ However, in a departure from the rules governing courts-martial, under the earlier rules, the detainee did not have the right to be granted specific individual military counsel upon request. Pursuant to modifications to military commission procedures made by the MCA 2009, the accused is now able to request a military defense counsel of his choosing from the pool of qualified military attorneys, if that counsel is reasonably available.¹⁶²

Right Against Use of Coerced Confessions

One issue that could arise in the prosecution of certain detainees involves the admissibility of statements obtained during interrogation by U.S. or foreign military and intelligence agencies. Some detainees currently held at Guantanamo were subjected to interrogation techniques that, if performed in the United States, would almost certainly be deemed unconstitutionally harsh.¹⁶³ The use of any such evidence, or evidence derived from it, in the criminal trial of a detainee would likely be subject to legal challenge under the Fifth Amendment on the ground that the statement was gained through undue coercion. As a general rule, statements made in response to coercive interrogation methods are inadmissible in U.S. courts. Fifth Amendment protections concerning the right against self-incrimination and due process serve as dual bases for exclusion of such evidence.¹⁶⁴

¹⁵⁷ 10 U.S.C. § 827.

¹⁵⁸ R.C.M. 506(d).

¹⁵⁹ 10 U.S.C. §§ 949a, 949c (as amended by P.L. 111-84, § 1802 (2009)).

¹⁶⁰ R.M.C. 502(d).

¹⁶¹ R.M.C. 506(c).

¹⁶² 10 U.S.C. § 949c (as amended by P.L. 111-84, § 1802 (2009)).

¹⁶³ See, e.g., U.S. Congress, Senate Select Committee on Intelligence, *Current and Projected National Security Threats*, (testimony by CIA Director Michael Hayden, discussing the use of waterboarding upon three detainees currently held at Guantanamo), 110th Cong., February 5, 2008; Bob Woodward, "Detainee Tortured, Says U.S. Official," *Washington Post*, January 14, 2009, at p. A1 (quoting Susan J. Crawford, convening authority of military commissions, as stating that case of a Guantanamo detainee was not referred for prosecution because "[h]is treatment met the legal definition of torture").

¹⁶⁴ U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"); U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). See also *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (incorporating the Fifth Amendment self-incrimination clause to the states). Throughout the nineteenth century, (continued...)

Under the leading Supreme Court case, *Miranda v. Arizona*, courts will not admit defendants' statements at trial unless law enforcement officers issued the well-known *Miranda* warnings, which typically begin with "You have the right to remain silent," before the statements were made.¹⁶⁵ As a general rule, *Miranda* applies any time police question a defendant who is in "custody," broadly defined.¹⁶⁶ In the context of terrorist suspects' statements, at least one court has held that *Miranda* applies in Article III courts even if the questioning took place outside of the United States.¹⁶⁷

However, the Court's recent jurisprudence has weakened *Miranda*'s effect by making clear that despite the holding's constitutional status,¹⁶⁸ there are cases in which it is appropriate to depart from strict adherence to *Miranda* warnings.¹⁶⁹ The *Miranda* exception possibly relevant to the Guantanamo detainees is the "public safety" exception, which the Court introduced in *New York v. Quarles*.¹⁷⁰ In *Quarles*, police officers apprehended a rape suspect in a supermarket and, on discovering his empty holster, inquired, "where's the gun?"¹⁷¹ The Court held that the suspect's incriminating response, "The gun is over there," was admissible in court, despite the lack of a *Miranda* warning, because the question had been necessary to secure the public's safety in that moment.¹⁷² Despite the Court's emphasis in *Quarles* on the time-sensitive nature of the safety risk in that case,¹⁷³ some commentators have argued that the *Quarles* "public safety" exception should

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courts excluded coerced statements under a common-law rule, which arose from a judicial concern that such statements were unreliable evidence. In *Bram v. United States*, the Supreme Court first introduced the self-incrimination clause rationale for excluding such statements. 168 U.S. 532, 542 (1887). Other twentieth century cases articulated a due-process rationale to exclude coerced statements. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1936) (holding that statements obtained by torturing an accused must be excluded under the Fourteenth Amendment due process clause, which forbids states to offend "fundamental principles of liberty and justice"). In *Miranda v. Arizona*, the Court affirmed the prominence of the *Baum* self-incrimination rationale for excluding coerced statements. 384 U.S. 436, 444-45 (1966). The Court has reiterated the due-process rationale in more recent cases. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 434 (2000) ("We have never abandoned [the] due process jurisprudence"). For information on more cases interpreting the Fifth Amendment right against self incrimination, see CRS Report R41252, *Terrorism, Miranda, and Related Matters*, by Charles Doyle.

¹⁶⁵ 384 U.S. 436, 479 (1966).

¹⁶⁶ *Id.* at 444. (defining questioning during "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

¹⁶⁷ *United States v. Bin Laden*, 132 F. Supp. 2d 168, 173-79 (S.D.N.Y. 2001) (in a case involving a non-citizen defendant who had been detained and interrogated in Kenya, holding that as a general rule, *Miranda* applies when U.S. law enforcement officials questioned the defendant outside of the United States). This outcome seems to comport with the self-incrimination clause rationale, espoused by the *Miranda* court, for excluding coerced statements; if the concern is compelled incrimination in a current legal proceeding, the location of the interrogation seems to be irrelevant under the constitutional standard.

¹⁶⁸ In *Dickerson v. United States*, the Supreme Court held that the *Miranda* warnings have the status of constitutional interpretation; thus, Congress cannot eliminate the *Miranda* warnings requirement by statute. 530 U.S. 428, 434-435 (2000).

¹⁶⁹ See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (declining to strictly enforce the *Miranda* warnings where police conduct "did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*").

¹⁷⁰ 467 U.S. 649 (1984).

¹⁷¹ *Id.* at 655.

¹⁷² *Id.*

¹⁷³ *Id.* at 657-58 (reasoning that requiring police to determine whether to take the time to give *Miranda* warnings "in a matter of seconds" was impracticable under the circumstances).

be extended to reach interrogations of all captured terrorist suspects.¹⁷⁴ Attorney General Holder has stated that the “public safety” exception was used to question suspected Times Square bomber Faisal Shahzad and suspected Detroit airline bomber Umar Farouk Abdulmutallab prior to the reading of their *Miranda* rights.¹⁷⁵ An FBI memorandum from October 2010 advises agents that the circumstances surrounding the arrest of a terrorist operative or leader may warrant significantly more extensive “public safety questioning” than an ordinary arrest, and could include questions about “possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might pose an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks.”¹⁷⁶ The memorandum further notes that in exceptional cases, an unwarned intelligence interrogation may be necessary to collect information related to less immediate threats, where the need to collect the information outweighs the government’s need to use such statements in court.

A second *Miranda* exception possibly applicable to some detainees is an exception for statements made in response to questioning by foreign officials. In *United States v. Yosef*, the U.S. Court of Appeals for the Second Circuit held that “statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary.”¹⁷⁷ The *Yosef* court identified two situations in which this exception does not apply: (1) situations where U.S. interrogators are working with foreign interrogators as part of a “joint venture”; and (2) situations that “shock the judicial conscience.”¹⁷⁸

If the *Quarles* public safety exception, the foreign-interrogator exception, or another *Miranda* exception applied to statements made during questioning of a Guantanamo detainee, prosecutors would need to show only that the detainees’ statements were made “voluntarily” before a court would admit them at trial.¹⁷⁹ For example, in *United States v. Abu Ali*, a case involving a defendant who had been arrested and questioned by the Saudi government for allegedly assisting terrorists in an attack, the U.S. Court of Appeals for the Fourth Circuit upheld statements made to the Saudi interrogators, despite a lack of *Miranda* warnings, because the court found that the statements were voluntary.¹⁸⁰

¹⁷⁴ See, e.g., Jeffrey S. Becker, “Legal War on Terrorism: Extending *New York v. Quarles* and the Departure from Enemy Combatant Designations,” 53 DePaul L. Rev. 831, 869 (2003-2004).

¹⁷⁵ Justice Department Budget, Hearing before the Senate Comm. on Appropriations, Subcomm. on Commerce, Justice, Science, And Related Agencies, May 6, 2010 (statement of Eric Holder).

¹⁷⁶ See Memorandum, U.S. Department of Justice Federal Bureau of Investigation, “Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States,” October 21, 2010, <http://www.nytimes.com/2011/03/25/us/25miranda-text.html>.

¹⁷⁷ 327 F.3d 56, 145 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003).

¹⁷⁸ *Id.* at 145-46. The Fourth Circuit articulated slightly different exceptions to this general rule in *Abu Ali*, holding that *Miranda* will apply to interrogations by foreign governments when the foreign interrogators are: “(1) engaged in a joint venture with, or (2) acting as agents of, United States law enforcement officers.” *United States v. Abu Ali*, 528 F.3d 210, 227-28 (4th Cir. 2008).

¹⁷⁹ See *Abu Ali*, 528 F.3d at 232 (“When *Miranda* warnings are unnecessary, as in the case of an interrogation by foreign officials, we assess the voluntariness of a defendant’s statements by asking whether the confession is ‘the product of an essentially free and unconstrained choice by its maker.’”) (citing *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

¹⁸⁰ *Id.* at 234 (“[W]e conclude that *Abu Ali*’s statements were voluntary. *Abu Ali* was intelligent, articulate, and comfortable with the language and culture of the country in which he was detained and questioned. The district court found, based upon copious record evidence, that he was not tortured, abused, threatened, held in cruel conditions, or subjected to coercive interrogations. On the basis of the totality of these circumstances, we conclude that *Abu Ali*’s statements were ‘the product of an essentially free and unconstrained choice.’”) (citing *Culombe*, 367 U.S. at 602)).

The constitutional standard of “voluntariness” is recognized as “the ultimate safeguard against coerced confessions.”¹⁸¹ The definition for “voluntary” in this context matches the definition employed in other due-process cases; specifically, the test for voluntariness is “whether the confession was ‘extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.’”¹⁸² The voluntariness test is a totality-of-the-circumstances inquiry, in which courts examine factors such as “the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.”¹⁸³ The failure to provide *Miranda* warnings can serve as one factor in the totality-of-circumstances evaluation.¹⁸⁴

Absent an exception, the failure to administer a *Miranda* warning to a suspect in custody results in the exclusion of any unwarned statements at trial as part of the prosecution’s case in chief. Evidence *derived* from an unwarned statement need not be excluded at trial under the “fruit of the poisonous tree” doctrine¹⁸⁵ unless, some courts have ruled, the evidence was uncovered (or witness identified) as a result of a coerced statement and the government cannot show that its subsequent discovery of the derivative evidence is so remote from the illegal action that the taint is removed. In the trial of Ahmed Ghailani for conspiracy in relation to the 1998 embassy bombings, the defendant’s allegedly abusive interrogation in CIA custody abroad did not persuade the judge to dismiss charges, but it did result in the exclusion of a government witness whose identity was uncovered during Ghailani’s interrogation and whose cooperation with prosecutors was less than willing.¹⁸⁶

Congress appears to have taken the position that *Miranda* warnings are not constitutionally required to be given to enemy belligerents captured and detained outside the United States. Pursuant to the National Defense Authorization Act for FY2010 (P.L. 111-84), Congress has generally barred enemy belligerents in military custody outside the United States from being read *Miranda* warnings, absent a court order. Specifically, it provides that:

Absent a court order requiring the reading of such statements, no member of the Armed Forces and no official or employee of the Department of Defense or a component of the intelligence community (other than the Department of Justice) may read to a foreign national who is captured or detained outside the United States as an enemy belligerent and is in the custody or under the effective control of the Department of Defense or otherwise under detention in a Department of Defense facility the statement required by *Miranda v. Arizona* ... or otherwise inform such an individual of any rights that the individual may or may not have to counsel or to remain silent consistent with *Miranda v. Arizona*.¹⁸⁷

¹⁸¹ See *Dickerson*, 530 U.S. at 434 (noting that although *Miranda* and its progeny “changed the focus” of the inquiry regarding coerced statements, the Court “continue[s] to exclude confessions that were obtained involuntarily” in cases in which *Miranda* does not apply).

¹⁸² *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (citing *Bram*, 168 U.S. at 542-543).

¹⁸³ *Abu Ali*, 528 F.3d at 232.

¹⁸⁴ *Id.* at 233.

¹⁸⁵ *United States v. Patane*, 542 U.S. 630, 631-33 (2004).

¹⁸⁶ *United States v. Ghailani*, 743 F.Supp.2d 261 (S.D.N.Y. 2010).

¹⁸⁷ P.L. 111-84, § 1040 (2009).

This provision is expressly made inapplicable to the Department of Justice,¹⁸⁸ meaning that agents of the DOJ could potentially read *Miranda* warnings to persons in military custody. One instance where the DOJ might opt to read *Miranda* warnings to an enemy belligerent in military custody would be when it intends to bring criminal charges against a detainee in federal civilian court.

Under Article 31 of the UCMJ, individuals “subject to the code” who are brought before a court-martial are protected from the use of statements obtained through the use of coercion, unlawful influence, or unlawful inducement.¹⁸⁹ Additionally, an individual may not be forced to incriminate himself or to answer a question before any military tribunal that is not material to the issue and may tend to degrade him.¹⁹⁰ A suspect is also generally entitled to *Miranda* type warnings, commonly referred to as *31 bravo* rights, which require that a suspect be informed of the nature of the accusation against him; be advised that he does not have to make a statement regarding the offense; and be informed that any statement may be used as evidence in a trial by court-martial. The protections of Article 31 are broader than *Miranda* warnings in that a suspect must receive the warnings even if he is not in custody.¹⁹¹ While a strict reading of the UCMJ might support the proposition that a captured insurgent suspected of engaging in unlawful hostilities could not be questioned by military personnel about such activities without first receiving a warning and possibly the opportunity to consult an attorney, developments in military case law cast that conclusion in doubt.¹⁹² A review of Army regulations pertaining to the treatment of war-time captives suggests that military authorities do not regard Article 31 as applicable to captured belligerents suspected of violating the law of war, regardless of their prisoner-of-war status.¹⁹³ Military courts have also recognized a “public safety” exception to *Miranda* requirements similar to the rule applied in federal courts.¹⁹⁴ The relationship between UCMJ Article 31 and the provision of the 2010 National Defense Authorization Act limiting the reading of *Miranda* rights is not immediately clear. A narrow reading of act’s limitation on *Miranda* warnings might not encompass Article 31 warnings because they technically differ from the warnings required by *Miranda*.

Persons subject to a military commission also have a statutory privilege against self-incrimination, though this standard is less robust than that applicable in courts-martial proceedings.¹⁹⁵ Statements obtained by the use of torture are statutorily prohibited.¹⁹⁶ Under the

¹⁸⁸ *Id.*

¹⁸⁹ 10 U.S.C. § 831(d). *See also* MIL. R. EVID. 305.

¹⁹⁰ 10 U.S.C. § 831(a),(c).

¹⁹¹ *United States v. Baird*, 271 U.S. App. D.C. 121 (D.C. Cir. 1988).

¹⁹² Not long after the passage of the UCMJ, the Court of Military Appeals (CMA) began to interpret Article 31(b) in light of congressional intent, wherein it discerned the aim on Congress’s part to counteract the presumptively coercive effect created whenever a service member is questioned by a superior. *United States v. Franklin*, 8 C.M.R. 513 (C.M.A. 1952). Subsequently, the CMA determined that “person subject to the code” was not meant to be read as broadly in Article 31 as that phrase is used elsewhere in the UCMJ. *See United States v. Gibson*, 14 C.M.R. 164, 170 (C.M.A. 1954) (questioning of prisoner by fellow inmate who was cooperating with investigators did not require art. 31 warning). It has also been held that interrogation for counter-espionage purposes conducted by civilian agents of the U.S. Navy did not require an Article 31 rights warning, in a case where the suspect was found not to be in military custody at the time of the questioning. *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992).

¹⁹³ *See* Department of the Army, AR 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (1997), at para. 2-1(d). (permitting interrogation of detainees in combat zones and barring use of torture or other coercion against them, but not requiring such persons to be informed of rights under Article 31).

¹⁹⁴ *See* David A. Schleuter, *Military Criminal Justice* § 5-4(B) (5th ed. 1999).

¹⁹⁵ 10 U.S.C. § 948r(a) (2008).

original MCA, military commissions were permitted to admit statements obtained in the course of harsh interrogation not rising to the level of torture, if certain criteria were met. Statements made on or after December 30, 2005, would not be admitted if the interrogation methods used to obtain them amounted to “cruel, inhuman, or degrading treatment” prohibited by the DTA.¹⁹⁷ The DTA’s prohibition applies to statements obtained through methods that, if they had occurred within the United States, would be considered unconstitutionally harsh.¹⁹⁸ The MCA’s requirement did not apply with respect to the admission of statements made prior to December 30, 2005,¹⁹⁹ meaning that statements elicited via “cruel, inhuman, or degrading treatment” could potentially have been introduced into evidence in military commission proceedings.

Pursuant to amendments made by the MCA 2009, all statements obtained via torture or “cruel, inhuman, or degrading treatment” are now inadmissible in military commission proceedings, regardless of when such statements were made, except when presented “against a person accused of torture or [cruel, inhuman, or degrading treatment] as evidence that the statement was made.”²⁰⁰ A detainee cannot be required to testify against himself.²⁰¹ However, self-incriminating statements made by the accused may be introduced into evidence during military commission proceedings when specific criteria are met. Specifically, the MCA 2009 provides that in order for a statement made by the accused to be admissible, the military commission judge must find that:

- (1) ... the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
- (2) ... (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given.²⁰²

The standards for admission of evidence in military commissions may be subject to legal challenge, particularly by those defendants who seek to bar the admission of statements as involuntary. Issues may also arise regarding the admissibility of any incriminating statements made *after* a detainee has been subjected to harsh interrogation. In November 2008, a military commission judge ruled that statements made by a detainee to U.S. authorities were tainted by his earlier confession to Afghan police hours before, which had purportedly been made under threat

(...continued)

¹⁹⁶ 10 U.S.C. § 948r(b) (2008).

¹⁹⁷ 10 U.S.C. § 948r(d) (2008).

¹⁹⁸ For further discussion, see CRS Report RL33655, *Interrogation of Detainees: Requirements of the Detainee Treatment Act*, by Michael John Garcia.

¹⁹⁹ 10 U.S.C. § 948r(c) (2008). In either case, however, when the degree of coercion used to obtain the statement was disputed, the military judge could only permit its admission if the totality of circumstances rendered that statement reliable and the interests of justice were served by its admission. 10 U.S.C. § 948r(c)-(d) (2008).

²⁰⁰ 10 U.S.C. § 948r(a)(as amended by P.L. 111-84, § 1802 (2009)).

²⁰¹ 10 U.S.C. § 948r(b)(as amended by P.L. 111-84, § 1802 (2009)).

²⁰² 10 U.S.C. § 948r(c)(as amended by P.L. 111-84, § 1802 (2009)). In determining the voluntariness of a statement, the presiding judge must consider the totality of the circumstances, including, as appropriate, “(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities[;] (2) The characteristics of the accused, such as military training, age, and education level[; and] (3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.” 10 U.S.C. § 948r(d)(as amended by P.L. 111-84, § 1802 (2009)).

of death.²⁰³ The judge concluded that the coercive effects of the death threats producing the detainee's first confession had not dissipated by the time of the second. Subsequently, a federal *habeas* court ruled that "every statement made by the detainee since his arrest [was] a product of torture," and could not be used by the government to support his detention.²⁰⁴ The detainee was thereafter ordered released by the *habeas* court²⁰⁵ and subsequently transferred to Afghanistan. In a separate case, however, a military judge permitted the use of a detainee's statements despite allegations that interrogators had threatened the youth by recounting stories of the prison rape of a fictitious Afghan youth.²⁰⁶ The military commission in that case was not persuaded that any of the statements the government sought to introduce at trial had been elicited through such tactics.

The MCA does not explicitly address evidence derived from statements elicited through torture or coercion. However, Rule 304 of the Military Commission Rules of Evidence states in paragraph 5(A):

Evidence Derived from Statements Obtained by Torture or Cruel, Inhuman, or Degrading Treatment. Evidence derived from a statement that would be excluded under section (a)(1) of [rule 304] may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection, unless the military judge determines by a preponderance of the evidence that—

- (i) the evidence would have been obtained even if the statement had not been made; or
- (ii) use of such evidence would otherwise be consistent with the interests of justice.

Right Against Prosecution under *Ex Post Facto* Laws

The ability to seek penal sanction against some detainees may be limited by ex post facto rules. Art. I, § 9, cl. 3, of the U.S. Constitution provides, "No Bill of Attainder or ex post facto Law shall be passed." The Ex Post Facto Clause²⁰⁷ "protects liberty by preventing the government from enacting statutes with 'manifestly unjust and oppressive' retroactive effects."²⁰⁸ This limitation may impede the ability of U.S. authorities to pursue criminal charges against some detainees, or alternatively inform decisions as to whether to pursue criminal charges in a military

²⁰³ *United States v. Jawad*, D-021 (November 19, 2008). The government appealed the commission's ruling to the Court of Military Commission Review, but the case was rendered moot when the accused was found to be unlawfully held by a reviewing habeas court and thereafter transferred by U.S. military authorities to Afghanistan for release.

²⁰⁴ *Bacha v. Obama*, 2009 WL 2149949 (D.D.C., July 17, 2009) (Huvelle, J.).

²⁰⁵ *Bacha v. Obama*, 2009 WL 2365846 (D.D.C., July 30, 2009) (Huvelle, J.).

²⁰⁶ *United States v. Khadr*, Ruling on Motions to Suppress D-94 and D-111 (Aug. 17, 2010), available at <http://www.defense.gov/news/D94-D111.pdf>.

²⁰⁷ U.S. Const., Art. I, § 10, cl. 1, prohibits the states from enacting ex post facto laws.

²⁰⁸ *Stogner v. California*, 539 U.S. 607, 612 (2003) (citing *Calder v. Bull*, 3 U.S. 386, 390-91 (1798)). In *Calder*, Justice Chase described the Ex Post Facto Clause as covering four categories of laws:

[1.] Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action ... [2.] Every law that aggravates a crime, or makes it greater than it was, when committed ... [3.] Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed ... [and 4.] Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. at 390-391.

or civilian court, as offenses punishable under the jurisdiction of one forum may not be cognizable under the laws of another. While laws having retroactive effect may also invite due process challenges,²⁰⁹ the Ex Post Facto Clause acts as an independent limitation on congressional power, going “to the very root of Congress’s ability to act at all, irrespective of time or place.”²¹⁰ Accordingly, the Ex Post Facto Clause may be pertinent to the prosecution of detainees regardless of whether they are brought to the United States or held for trial at Guantanamo.

It appears that some detainees could be prosecuted for activities in federal civilian court without running afoul of the Ex Post Facto Clause, including for offenses related to or preceding the 9/11 terrorist attacks. While the number of laws criminalizing terrorism-related activity expanded in the aftermath of the 9/11 terrorist attacks, some criminal statutes concerning terrorist activity and having extraterritorial application were in effect in the years preceding, including laws relating to acts of terrorism within the United States that transcend national boundaries; killing or causing serious bodily injury to an American overseas for terrorist purposes; and money laundering in support of certain terrorism-related activity.²¹¹ However, it may be more difficult to prosecute some detainees on account of other types of terrorist activity or material support that occurred abroad. In the early days of the conflict with the Taliban and Al Qaeda, many terrorism-related statutes did not apply to wholly extraterritorial acts committed by foreign nationals that did not injure U.S. persons. For instance, prior to 2004, federal criminal law generally did not extend to non-citizens with no ties to the United States who provided material support to a terrorist organization.²¹²

Some persons could also be charged with offenses under the War Crimes Act, which imposes criminal penalties for specified offenses under the law of war, including “grave breaches” of the Geneva Conventions.²¹³ For some alleged offenses, in particular those that occurred prior to September 11, 2001, it may be difficult to establish that they were committed in the context of an armed conflict.

Statute of limitations concerns may affect the ability of U.S. authorities to prosecute persons for some of the offenses noted above. While the statute of limitations for most non-capital federal offenses is five years,²¹⁴ the period for terrorism-related offenses is typically eight years unless the offense raises a foreseeable risk of death or serious bodily injury. If such a risk is foreseeable,

²⁰⁹ See *Weaver v. Graham*, 450 U.S. 24, 28 n. 10 (1981) (noting that in addition to giving protection to individuals, the Ex Post Facto Clause “upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law”).

²¹⁰ *Downes v. Bidwell*, 182 U.S. 244, 277 (1901). See also *United States v. Hamdan*, D012 and D050, slip op. at 2 (June 14, 2008) [hereinafter “*Hamdan* Military Commission Ruling”] (ruling by military commission citing *Downes* and finding that the Ex Post Facto Clause applies to congressional actions directed at aliens at Guantanamo).

²¹¹ 18 U.S.C. § 2332b (acts of terrorism within the United States that transcend national boundaries), § 2332 (killing or severely injuring a U.S. national overseas), § 1956 (criminalizing money laundering activities by a foreign person when a transaction at least partially occurs within the United States) (2000). For further discussion on the use of terrorism statutes in criminal prosecutions, including with respect to activities taking place outside the United States, see Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Courts*, Human Rights First, May 2008.

²¹² See 18 U.S.C. § 2339B (amended in 2004 to cover extraterritorial acts of material support by persons with no ties to the United States who were thereafter brought to the United States).

²¹³ 18 U.S.C. § 2441.

²¹⁴ 18 U.S.C. § 3282.

then, like capital offenses,²¹⁵ there is no limitation to the time within which an indictment may be found.²¹⁶

The constitutional prohibition against ex post facto laws may also have implications in courts-martial or military commission proceedings, limiting the offenses with which detainees may be charged.²¹⁷ The UCMJ provides that general courts-martial have jurisdiction to “try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”²¹⁸ The UCMJ does not enumerate the offenses punishable under the law of war, instead relying on the common law of war to define the subject-matter jurisdiction in general courts-martial. In *Hamdan v. Rumsfeld*, a plurality of the Supreme Court recognized that, for an act to be triable under the common law of war, there must be “plain and unambiguous” precedent for treating it as such.²¹⁹ After examining the history of military commission practice in the United States and internationally, the plurality further concluded that conspiracy to violate the law of war was not in itself a crime under the common law of war or the UCMJ.²²⁰

Congress’s post-*Hamdan* enactment of the original MCA exempted military commissions from many UCMJ requirements applicable to courts-martial proceedings. Although military commissions may exercise personal jurisdiction over a more limited category of belligerents than courts-martial,²²¹ the two forums share subject-matter jurisdiction over violations of the law of war. However, the systems differ in that Congress defined specific offenses punishable by military commissions, including, *inter alia*, murder of protected persons; murder in violation of the law of war; attacking civilians, civilian objects, or protected property; denying quarter; terrorism; providing material support for terrorism; and conspiracy to commit an offense punishable by military commission.²²² By statute, Congress has provided that such acts by an unprivileged enemy belligerent are punishable by military commissions regardless of whether they were “committed ... before, on, or after September 11, 2001.”²²³ In enacting the original MCA, Congress asserted that it did “not establish new crimes that did not exist before its enactment,” but rather codified “offenses that have traditionally been triable by military

²¹⁵ 18 U.S.C. § 3281. For background, see CRS Report RL31253, *Statutes of Limitation in Federal Criminal Cases: An Overview*, by Charles Doyle.

²¹⁶ 18 U.S.C. § 3286(b).

²¹⁷ See *United States v. Gorski*, 47 M.J. 370 (1997) (ruling that the Ex Post Facto Clause applies to courts-martial proceedings); *Hamdan* Military Commission Ruling, *supra* footnote 210 (finding that Ex Post Facto Clause applies to military commission proceedings at Guantanamo).

²¹⁸ 10 U.S.C. § 818.

²¹⁹ *Hamdan*, 548 U.S. at 602 (Stevens, J., plurality opinion).

²²⁰ *Id.* at 601-612 (Stevens, J., plurality opinion). Although the petitioner in *Hamdan* had been brought before a military tribunal established by a 2001 presidential order rather than a court-martial, the Court held that UCMJ procedural requirements were generally applicable to these tribunals. While a majority of the Court found that the military commissions established by the President did not comply with these requirements, Justice Kennedy declined to join the part of the opinion considering whether conspiracy was a cognizable offense under the law of war, finding the discussion unnecessary in light of the Court’s determination that the military commissions did not conform to the UCMJ.

²²¹ Whereas military commissions may exercise personal jurisdiction over “unprivileged enemy belligerents,” general courts-martial may potentially exercise jurisdiction over both privileged and unprivileged belligerents. See 10 U.S.C. § 818 (providing courts-martial jurisdiction over “any person who by the law of war is subject to trial by a military tribunal”).

²²² 10 U.S.C. § 950t (as amended by P.L. 111-84, § 1802 (2009)).

²²³ 10 U.S.C. § 948d.

commissions.”²²⁴ Congress retained this language when it amended the statutory guidelines for military commissions pursuant to the MCA 2009.

While many of the offenses listed in the original MCA and the MCA 2009 can be considered well-established offenses against the law of war, a court might conclude that some of the listed crimes are new, and that a detainee could not be prosecuted for such an offense on account of prior conduct. As previously mentioned, a plurality of the *Hamdan* Court found that conspiracy to commit a violation of the law of war is not itself a war crime.²²⁵ The crime of “murder in violation of the law of war,” which punishes persons who, as unprivileged belligerents, commit hostile acts that result in the death of any persons, including lawful combatants, in the context of an armed conflict, may also be new.²²⁶ Similarly, there appears to be no precedent for defining “material support for terrorism” as a war crime, though such conduct arguably could be analogized to other types of conduct that have been punishable by military commissions in the past.²²⁷

Whether a reviewing court would deem some of the punishable offenses listed by the MCA as constitutionally impermissible, at least when applied to activities occurring prior to the MCA’s enactment, may turn on the degree of deference given to Congress in defining violations of the law of war. The Constitution expressly grants Congress the power to “define and punish Offences ... against the Law of Nations.”²²⁸ While the Supreme Court has applied stringent criteria when determining whether an act is punishable under the law of war in the absence of a congressional

²²⁴ 10 U.S.C. § 950p.

²²⁵ *Hamdan*, 548 U.S. at 612 (Stevens, J., plurality opinion).

²²⁶ Civilians (sometimes characterized as “unprivileged belligerents” or “unlawful combatants”) have been tried by military tribunals for killing combatants in past wars, but the offense has been characterized as ordinary murder for which combatant immunity is unavailable as a defense rather than a violation of the law of war. The International Criminal Tribunal for the former Yugoslavia (ICTY) has found that war crimes in the context of non-international armed conflict include murder of civilians, but have implied that the killing of a combatant is not a war crime. *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 124: (“An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons ‘taking no active part in the hostilities.’”); *Prosecutor v. Jelusic*, Case No. IT-95-10 (Trial Chamber), December 14, 1999, para. 34 (“Common Article 3 protects ‘[p]ersons taking no active part in the hostilities’ including persons ‘placed hors de combat by sickness, wounds, detention, or any other cause.’”); *Prosecutor v. Blaskic*, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 180 (“Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective.”). For further discussion, see CRS Report RL33688, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

²²⁷ Compare *Hamdan* Military Commission Ruling, *supra* footnote 210 (analogizing “material support for terrorism” to guerilla activities subject to trial by military commission in the U.S. Civil War); with *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (citizen of Indiana accused of conspiring to commit hostile acts against the Union during Civil War, including conspiring to seize munitions stored in Union armory and liberating prisoners of war, was nevertheless a civilian who was not amenable to military jurisdiction in area where civil courts were open). Many military commissions that operated during the Civil War did not exercise jurisdiction solely over war crimes. Commissions were also used to try persons for other criminal offenses in occupied territory or in locations under conditions of martial law. The Obama Administration has expressed serious concern as to whether “material support for terrorism” has traditionally been recognized as a war crime, and has recommended that any legislation modifying military commissions not include “material support for terrorism” as an enumerated offense over which commissions have subject-matter jurisdiction. U.S. Congress, Hearing before the Senate Committee on Armed Services, *Military Commissions*, 111th Cong., 1st sess., July 7, 2009 (Submitted statement of David Kris, Assistant Attorney General) (stating that the Obama Administration believes that “there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense”).

²²⁸ U.S. Const., Art. I, § 10, cl. 8.

declaration,²²⁹ the standard may be more lenient when Congress acts pursuant to its constitutional authority to define war crime offenses.²³⁰ Accordingly, it is possible that a reviewing court may defer to Congress's finding the specified offenses under the MCA are not new offenses, and find that prosecution of those offenses under military commissions (or possibly under the general courts-martial system, if the court relies on the MCA to inform its judgment of activities punishable under the common law of war) does not run afoul of the Ex Post Facto Clause. On the other hand, a reviewing court might find that any deference owed to congressional determinations is insufficient to permit the prosecution of some offenses to go forward.

Although federal courts have not yet had the opportunity to rule on ex post facto claims concerning military commissions, the issue has arisen at the commission level. During military commission proceedings in the case of *United States v. Hamdan*, the commission considered a defense motion to dismiss charges of conspiracy and providing material support for terrorism on the grounds that they violated the prohibition against ex post facto laws in the U.S. Constitution, Common Article 3 of the Geneva Conventions, and the law of nations. The Government opposed the motion on the grounds that the Constitution did not protect aliens held outside the United States, and that, even if the Constitution did apply, there was precedent for trial of these offenses by military commissions as violations of the Law of Armed Conflict.²³¹

After determining that the Ex Post Facto Clause extends to congressional statutes applicable to Guantanamo, the commission turned to an examination of whether the MCA's prohibitions against conspiracy and material support for terrorism were ex post facto laws. The commission examined countervailing arguments as to whether these two offenses were violations of the law of war before enactment of the MCA and whether similar offenses had been tried by military commission in the past. After exploring conflicting evidence with respect to each of these crimes,²³² the commission deferred to the Congress's determination that these were not new offenses, finding that there was "adequate historical basis for this determination."²³³ In so doing, the commission distinguished instances where the Congress has been silent from those where Congress has enacted legislation, stating:

Absent Congressional action under the define and punish clause to identify offenses as violations of the Law of War, the Supreme Court has looked for "clear and unequivocal" evidence that an offense violates the common law of war ... or that there is "universal agreement and practice" for the proposition. But where Congress has acted under its Constitutional authority to define and punish offenses against the law of nations, a greater level of deference to that determination is appropriate.²³⁴

²²⁹ *Hamdan*, 548 U.S. at 602 (Stevens, J., plurality opinion). See *Quirin*, 317 U.S. at 30 ("universal agreement and practice" recognized offense as violation of the law of war).

²³⁰ See *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) ("provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to define offenses against the law of nations"); *Hamdan Military Commission Ruling*, *supra* footnote 210.

²³¹ *Hamdan Military Commission Ruling*, *supra* footnote 210, slip. op. at 1.

²³² *Id.*, slip op at 2-3 (conspiracy) and 3-5 (material support for terrorism).

²³³ *Id.*, slip op. at 6 (quoting MCA language stating that it did "not establish new crimes ... [but was] declarative of existing law").

²³⁴ *Id.*, slip. op. at 5. Hamdan was subsequently convicted by the commission on the material support charge and acquitted of the charge of conspiracy, and sentenced to 66 months with credit for serving all but five months. He was subsequently transferred to his native country of Yemen in November 2008 to serve out the remainder of his sentence, (continued...)

The commission's ruling in *Hamdan* having not undergone review by an Article III court,²³⁵ it remains unclear whether such a court would reach a similar conclusion regarding whether certain offenses under the MCA raised ex post facto concerns.

In addition to the constitutional question explored by the military commission in *Hamdan*, ex post facto concerns could potentially be raised in other situations. Statute of limitations concerns may also arise in war crimes prosecutions under the UCMJ,²³⁶ though these limitations would not apply with respect to prosecutions before military commissions. These considerations may inform decisions by U.S. authorities as to whether to pursue criminal charges against detainees in civilian court or another forum. They may also be relevant in the crafting of any new legislative proposals concerning the prosecution of detainees. If a statute increases the penalty for an existing crime and is given retroactive effect, ex post facto issues would arise. Likewise, the lengthening of a statute of limitations on a particular offense to prosecute someone for whom the statute has already run would raise ex post facto concerns.²³⁷ A further ex post facto issue could arise if the

(...continued)

and his conviction was not reviewed by a federal court. See Department of Defense, "Detainee Treatment Announced," press release, November 25, 2008, available at <http://www.defenselink.mil/releases/release.aspx?releaseid=12372>.

²³⁵ The commission's ruling has been appealed to the Court of Military Commission Review, but a final ruling has not been made. See Docket for Salim Ahmed Hamdan, CMCR Case No. 09-002, available at <http://www.defense.gov/news/CMCRHamdan.html>. The CMCR recently heard oral arguments on two questions in the *Hamdan* and *Al Bahlul* cases: whether "joint criminal enterprise" theory informs the ex post facto nature of any conviction for conspiracy, and whether the charge of aiding the enemy is limited to "those who have betrayed an allegiance or duty to a sovereign nation." (The government argues that the charge of "material support of terrorism" is essentially the same as the more familiar law of war offense "aiding the enemy"). The government brief in the *Al Bahlul* case is available online at http://media.miamiherald.com/smedia/2011/03/22/11/Bahlul_Brief_IRT_Specified_Issues__11_Mar_2011__docx.source.prod_affiliate.56.pdf.

²³⁶ Article 43 of the UCMJ provides that the statute of limitations for most non-capital offenses that may be tried by court-martial is five years. The extent to which this Article might preclude prosecution of war crimes by a general courts-martial may be an issue in assessing the appropriate forum for the prosecution of detainees, as there does not appear to be a case which squarely addresses the Article's application to war crimes prosecutions. Assuming that Article 43 is applicable, the statute of limitations could potentially be suspended during "time of war" if the President certifies that the limitation would be detrimental to the war effort or harmful to national security. Specifically, Article 43(e) provides that:

For an offense the trial of which in time of war is certified to the President by the Secretary [of Defense] concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

10 U.S.C. § 843(e). Military courts have previously interpreted the phrase "in time of war," as used in Article 43 and applied to U.S. servicemen, to be applicable to both declared wars and other military conflicts. See, e.g., *United States v. Castillo*, 34 M.J. 1160 (1992) (Persian Gulf conflict was a "time of war" for purposes of UCMJ); *United States v. Anderson*, 38 C.M.R. 389 (1968) (unauthorized absence during Vietnam conflict was "in time of war" for purposes of Article 43 provision allowing suspension of statute of limitations); *United States v. Taylor*, 15 C.M.R. 232 (1954) (Korean conflict was "in time of war" within meaning of UCMJ Article 43). In *United States v. Averette*, 41 C.M.R. 363 (1970), a UCMJ provision giving military courts jurisdiction over civilians accompanying armed forces "in time of war" was interpreted as applying only to declared wars, so as to avoid constitutional issues that might be implicated by the military trial of civilians. This provision was subsequently amended to give courts-martial jurisdiction over civilians accompanying the military in "contingency operations" as well. Presuming that the UCMJ's statute of limitations is applicable to war crimes, it could be argued that the conflict with Al Qaeda and the Taliban, authorized by Congress pursuant to the AUMF, is "a time of war," and that the statute of limitations for the prosecution of war crimes committed by enemy belligerents may be suspended under Article 43(e).

²³⁷ *Stogner*, 539 U.S. at 613-17.

rules of evidence applicable at the time of prosecution for an offense set a lower evidentiary bar for conviction than those applicable at the time of the commission of the offense.²³⁸

Rules Against Hearsay Evidence

Hearsay is a prior out-of-court statement of a person, offered at trial either orally by another person or in written form, in order to prove the truth of the matter asserted. In a trial before either a civilian or military court, the admissibility of hearsay may raise both procedural and constitutional issues. Civilian and military courts each have procedural rules limiting the admission of hearsay evidence. Further, the Sixth Amendment's Confrontation Clause states that the accused in any criminal prosecution retains the right to be "confronted with the witnesses against him."

As a practical matter, hearsay issues may arise in any prosecution of persons captured in the "war on terror" for reasons peculiar to that context. For example, witnesses detained by foreign governments may be unavailable to come to the United States to testify in a federal court,²³⁹ or the government may be unwilling to make military and intelligence assets and personnel available for testimony.²⁴⁰ Procedural rules and constitutional requirements may limit the use of hearsay evidence in the prosecution of some detainees, though exceptions may permit the introduction of certain types of hearsay evidence.

Evidentiary Issues

Federal civilian courts, courts-martial, and military commissions all possess procedural rules governing the admission of hearsay evidence. Procedural rules applicable to federal courts under

²³⁸ *Carmell v. Texas*, 529 U.S. 513, 530-31, 552; 120 S. Ct. 1620; 146 L. Ed. 2d 577 (2000); *cf.*, *Stogner*, 539 U.S. at 615-16 (dicta). In *Carmell*, the Supreme Court considered an amendment to a statute concerning certain sexual offenses which authorized conviction for such offenses based on a victim's testimony alone, in contrast to the earlier version of the statute which required the victim's testimony plus other corroborating evidence to permit conviction. The Court held that application of the amendment to conduct that occurred before the amendment's effective date violated the constitutional prohibition against ex post facto laws. In *Stogner*, the Court found that the statute at issue was an ex post facto law, because it inflicted punishment where the defendant, by law, was not liable to any punishment. However, the Court noted in dicta, that:

a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. See *United States v. Marion*, 404 U.S. 307, 322, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971). And that judgment typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. ... Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient. And, in that sense, the new law would "violate" previous evidence-related legal rules by authorizing the courts to "'receiv[e] evidence ... which the courts of justice would not [previously have] admit[ted]'" as sufficient proof of a crime ... Nonetheless, given Justice Chase's description of the second category, we need not explore the fourth category, or other categories, further.

Id. at 615-16.

²³⁹ *E.g.*, *Abu Ali*, 528 F.3d at 239-240.

²⁴⁰ *E.g.*, *United States v. Moussaoui*, 382 F.3d 453, 459 (4th Cir. 2004) (noting that the government informed the court that it would not comply with the court's deposition order in case involving person accused of involvement in terrorist attacks of September 11, 2001).

the Federal Rules of Evidence and courts-martial proceedings under the Military Rules of Evidence impose largely similar restrictions on the usage of hearsay evidence. Under both the federal and the military rules of evidence, hearsay is generally inadmissible unless it qualifies under an exception to the hearsay rule.²⁴¹ For the most part, these exceptions require the hearsay evidence to be of a particular nature or context that gives them a greater degree of reliability than other out-of-court statements. Examples of exceptions to the hearsay rule include “excited utterances” made under the stress of excitement caused by a startling event; records of regularly-conducted activity; and statements of a self-incriminating nature.²⁴² Both sets of evidentiary rules recognize a residual exception for statements that have “equivalent circumstantial guarantees of trustworthiness.”²⁴³ Examples of statements that have been held to qualify under the residual exception include interviews of child abuse victims by specially trained FBI agents²⁴⁴ and statements contained within the files of a foreign intelligence agency.²⁴⁵

One important aspect of the definition of hearsay is that statements made by co-conspirators in furtherance of a conspiracy are not considered hearsay.²⁴⁶ For example, in prosecutions alleging material support to terrorist organizations, evidence of statements by co-conspirators may be introduced against a defendant at trial even if those statements would not have qualified under a hearsay exception. Before these statements may be admitted, it is necessary to establish that the conspiracy exists. The co-conspirators’ statements being offered may be considered when making this initial determination, but are not sufficient standing alone to establish the existence of a conspiracy.²⁴⁷

In comparison with the Federal Rules of Evidence and the Military Rules of Evidence, the procedural rules for military commissions under the Military Commission Rules of Evidence are much more permissive regarding the admissibility of hearsay evidence. Initially, hearsay evidence could be admitted in commission proceedings if either (1) it would be admitted under rules of evidence applicable in trial by general courts-martial; or (2) more broadly, if the proponent of the evidence makes known to the adverse party the intention to offer such evidence, and as well as the particulars of the evidence.²⁴⁸ In the latter case, the accused would only have such evidence excluded if he could demonstrate by a preponderance of evidence that the hearsay evidence was unreliable under the totality of the circumstances.²⁴⁹

The rules for admissibility of hearsay evidence in military commission proceedings were modified by the MCA 2009. Under the new rule, hearsay evidence that would not be admissible in general courts-martial proceedings may be admitted in a trial by military commission if

²⁴¹ Federal Rules of Evidence (FED. R. EVID.) 802; Military Rules of Evidence (MIL. R. EVID.) 802.

²⁴² FED. R. EVID. 801(D), 803; MIL. R. EVID. 801(d), 803 -804. Certain hearsay exceptions also require that the declarant be unavailable to testify, for example, due to death or an asserted privilege.

²⁴³ FED. R. EVID. 807; MIL. R. EVID. 807.

²⁴⁴ *United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997).

²⁴⁵ *United States v. Dumeisi*, 424 F.3d 566 (7th Cir. 2005).

²⁴⁶ FED. R. EVID. 801(D)(2)(E); MIL. R. EVID. 801(d)(2)(E).

²⁴⁷ FED. R. EVID. 801(D)(2); MIL. R. EVID. 801(d)(2).

²⁴⁸ Military Commissions Rules of Evidence (MIL. COMM. R. EVID.) 802-803. The proponent of the evidence may satisfy the notification requirement by providing written notice of the statement and its circumstances 30 days in advance of trial or hearing and by providing the opposing party with any materials regarding the time, place, and conditions under which the statement was produced that are in its possession.

²⁴⁹ *Id.* at 803(c).

(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.²⁵⁰

Despite this modification, hearsay evidence that is inadmissible in federal civilian court or military courts-martial proceedings might be admissible in a trial before a military commission. As a result, prosecutors may have a broader range of inculpatory evidence at their disposal. On the other hand, military commission rules permit a broader scope of hearsay for both parties. In some cases, a defendant might be able to introduce more *exculpatory* evidence in a military commission proceeding than in a federal court or court martial. Because prosecutors generally choose the forum in which to prosecute a case, U.S. authorities may have the option of choosing among the different hearsay rules to their advantage, depending upon the particular facts of a case.

Constitutional Issues

The Constitution imposes its own limitations on the admission of hearsay evidence in criminal cases. The protections afforded under the Confrontation Clause apply to both civilian and military proceedings.²⁵¹ While courts have yet to rule as to whether the Confrontation Clause's protections against hearsay extend to noncitizens brought before military commissions held at Guantanamo,²⁵² it would certainly appear to restrict the use of hearsay evidence in cases brought against detainees transferred to the United States.

²⁵⁰ 10 U.S.C. § 949a(b)(3) (as amended by P.L. 111-84, § 1802 (2009)).

²⁵¹ See, e.g., *United States v. Coulter*, 62 M.J. 520 (2005) (applying Sixth Amendment hearsay restrictions to court-martial proceedings, including requirements of *Crawford v. Washington*, 541 U.S. 36 (2004)).

²⁵² In the case of *In re Yamashita*, 327 U.S. 1 (1946), the Supreme Court denied application of the writ of *habeas corpus* to a Japanese general who had been tried and convicted before a military commission in the Philippines. Having found that the Court lacked jurisdiction to review the proceedings, the Court declined to consider whether the procedures employed by the commission, which permitted significant use of hearsay evidence, violated constitutional requirements. While the Supreme Court has not definitively addressed the question of whether the Confrontation Clause applies to noncitizens at Guantanamo, the reliance on hearsay evidence in administrative determinations as to whether a detainee was an "enemy combatant" informed the Court's ruling in *Boumediene* that those proceedings were (continued...)

In *Crawford v. Washington*, the Supreme Court held that even where a hearsay exception may apply under applicable forum rules, the Confrontation Clause prohibits the admission of hearsay against a criminal defendant if the character of the statement is testimonial and the defendant has not had a prior opportunity for cross-examination.²⁵³ Although the definition of testimonial statements has not been thoroughly explicated, lower courts have interpreted the proper inquiry to be “whether a reasonable person in the declarant’s position would have expected his statements to be used at trial.”²⁵⁴ In the traditional law enforcement context, the Court has expressly held that statements taken by police officers in the course of either investigations of past criminal activity or formal interrogation would qualify as testimonial under any reasonable definition of the term.²⁵⁵ In contrast, the Supreme Court has held that statements made “to enable police assistance to meet an ongoing emergency”²⁵⁶ were not testimonial, because, objectively determined, the purpose of the statements was to request assistance and not to act “as a witness.”²⁵⁷

Many of the individuals detained at the naval base at Guantanamo Bay were apprehended on the battlefield in Afghanistan or other locations, as a consequence of their alleged actions there. Evidence against these potential defendants may include statements regarding their activities by persons also engaged in that conflict and subsequently captured. Sixth Amendment concerns may be raised if prosecutory authorities attempt to introduce statements made by other persons or detainees without presenting those declarants to personally testify in court. In these situations, the admissibility of the statements against the defendants would appear to turn on whether the character of the statements made is testimonial or not.²⁵⁸

In light of the Supreme Court’s rulings in the domestic law enforcement context, it seems reasonable to conclude that the statements of enemy combatant witnesses obtained during formal interrogation by law enforcement would be considered testimonial. Similarly, incriminating statements made to U.S. or foreign military personnel by enemy combatants on the battlefield might also be considered testimonial. Insofar as these statements are determined to be testimonial,

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an inadequate substitute for habeas corpus. 128 S.Ct. at 2268-2269. *See also Hamdan*, 548 U.S. at 638 n. 67 (Stevens, J., plurality opinion) (finding 2001 presidential order establishing military commissions violated statutory requirements concerning commission procedures, and stating that “the Government suggests no circumstances in which it would be ‘fair’ to convict the accused based on evidence he has not seen or heard.”) (citing *cf. Crawford*, 541 U.S. at 49).

²⁵³ *Crawford v. Washington*, 541 U.S. 36 (2004). This constitutional prohibition on certain types of hearsay only prohibits the admission of statements to be used *against* the defendant. For example, in the *Moussaoui* case, involving the prosecution of an individual for involvement in the 9/11 terrorist attacks, the Fourth Circuit applied *Crawford* and prohibited the government from using statements in the substitutions for testimony from certain witnesses to show the defendant’s guilt. *Moussaoui*, 382 F.3d at 481-482. Exculpatory statements in the deposition substitutions, which were clearly testimonial, would have been admissible.

²⁵⁴ *United States v. Udeozor*, 515 F.3d 260 (4th Cir. 2008) (citing decisions by the First, Second, Third, Fourth, Seventh, and Tenth Circuits).

²⁵⁵ *See Davis v. Washington*, 547 U.S. 813, 821, 830 (2006). The Supreme Court also recently held that affidavits from forensic analysts are also testimonial. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 557 U.S. ____ (2009) (prosecution cannot prove that substance was cocaine using *ex parte* out-of-court affidavits). While this case dealt solely with narcotics, the Confrontation Clause would likely impose a similar requirement upon affidavits describing other types of chemical analysis, such as the identification of materials used for bombs or other explosive devices.

²⁵⁶ *Id.* at 822.

²⁵⁷ *Id.* at 827-828. The statements in this case were made during a 911 call describing a contemporaneous physical assault.

²⁵⁸ The character of the questioning may be relevant but does not appear to be determinative. For example, open ended questioning may still give rise to testimonial statements that would require confrontation. *Davis*, 547 U.S. at n.1.

the Sixth Amendment would not appear to permit their use against a defendant without an opportunity for the defendant to cross-examine the declarant.

This constitutional requirement is not affected by less stringent rules regarding the admission, or even the definition, of hearsay that may be used in different forums. While the reach of the Confrontation Clause to noncitizens held at Guantanamo has not been definitively resolved, that clause would clearly apply to military commissions held within the United States. Therefore, although the evidentiary rules for federal civilian courts, general courts-martial, and military commissions may permit different amounts of hearsay initially, prosecutors in each forum would be subject to the requirements of the Confrontation Clause regarding testimonial hearsay against the defendant, at least with respect to proceedings occurring within the United States. Lastly, non-testimonial hearsay against the defendant, including statements which a reasonable person would not expect to be used at trial, are unaffected by the *Crawford* decision, and even testimonial hearsay may be admitted if the defense has had a prior opportunity to cross-examine the declarant.

Right to a Speedy Trial

In early 2008, the DOD announced that approximately 80 detainees being held at Guantanamo were expected to face trial before military commissions.²⁵⁹ In January 2010, it was reported that the Obama Administration intends to bring charges against about 35 detainees in military or civilian court.²⁶⁰ The Sixth Amendment guarantees a right to a speedy trial for the accused in all criminal prosecutions.²⁶¹ The protection is triggered “when a criminal prosecution has begun.”²⁶² The invocation of the right may occur prior to indictment or formal charge, when “the actual restraints imposed by arrest and holding” are made.²⁶³ The right has been found to extend to civilian and military courts,²⁶⁴ though the nature of the right’s application to military courts may differ from its application in the civilian context.²⁶⁵ Statutory requirements and forum rules may

²⁵⁹ Department of Defense, “Charges Referred on Detainee al Bahlul,” press release, February 26, 2008, available at <http://www.defenselink.mil/releases/release.aspx?releaseid=11718>.

²⁶⁰ Finn, *supra* footnote 133.

²⁶¹ U.S. Const. amend. VI. The right applies to prosecutions in both federal and state courts, as the Supreme Court has found the right to be one of the “fundamental” constitutional rights that the Fourteenth Amendment incorporated to the states. *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). Justifications for the right to a speedy trial include not only a concern regarding lengthy incarceration but also societal interests in resolving crimes in a timely and effective manner. *See Barker v. Wingo, Warden* 407 U.S. 514, 519 (1972) (“there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the rights of the accused”).

²⁶² *United States v. Marion*, 404 U.S. 307, 313 (1971).

²⁶³ *Id.* at 320.

²⁶⁴ *See, e.g., United States v. Becker*, 53 M.J. 229 (2000).

²⁶⁵ In his concurring opinion in the case of *Reid v. Covert*, in which the Supreme Court held that court-martial jurisdiction could not be constitutionally applied to civilian dependents of members of the armed forces overseas during peacetime, Justice Frankfurter wrote that:

Trial by court-martial is constitutionally permissible only for persons who can, on a fair appraisal, be regarded as falling within the authority given to Congress under Article I to regulate the ‘land and naval Forces,’ and who therefore are not protected by specific provisions of Article III and the Fifth and Sixth Amendments. It is of course true that, at least regarding the right to a grand jury indictment, the Fifth Amendment is not unmindful of the demands of military discipline. Within the scope of appropriate construction, the phrase ‘except in cases arising in the land or naval Forces’ has been assumed also to modify the guaranties of speedy and public trial by jury.

354 U.S. 1, 42-43 (1957) (Frankfurter, J., concurring).

also impose speedy trial requirements on applicable proceedings. Detainees transferred to the United States may argue that they are constitutionally entitled to a speedy trial,²⁶⁶ and that denial of this right compels a reviewing court to dismiss the charges against them.²⁶⁷

A reviewing court's assessment of any speedy trial claim raised by a detainee is likely to balance any prejudice suffered by the accused with the public's interest in delaying prosecution. Courts have employed a multi-factor balancing test to assess whether a defendant's right to a speedy trial has been violated, taking into account the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant.²⁶⁸ Because the remedy for the government's violation of the speedy trial right—dismissal—is relatively severe, courts have often hesitated to find violations of the right. However, the Supreme Court has indicated that extremely long delays violate a person's Sixth Amendment right to a speedy trial even in the absence of "affirmative proof of particularized prejudice."²⁶⁹ It is possible that a court could find that some Guantanamo detainees have been prejudiced in any future prosecution by their long periods of detention, since "a defendant confined to jail prior to trial is obviously disadvantaged by delay."²⁷⁰ If so, a key question in cases involving Guantanamo detainees might be whether the prejudice suffered by detainees outweighs the public's interest in delaying prosecution. However, it is possible that a court would find that non-citizen detainees were not entitled to a speedy trial right prior to their transfer to the United States,²⁷¹ which may affect a reviewing court's consideration of any speedy trial claims.

Ahmed Ghailani, the sole Guantanamo detainee to have been transferred to the United States to face trial in civilian court, sought dismissal of his indictment based on his claim that the government violated his Sixth Amendment right to a speedy trial due to the five-year delay between the time he was brought into U.S. custody and his production before the court.²⁷² The court denied the motion, finding that the time Ghailani spent in CIA detention was justified by the need to interrogate him for intelligence purposes, a process that was incompatible with prosecution in federal court.²⁷³ The time between Ghailani's transfer to Guantanamo in 2006 and his transfer to New York in 2009 was held not to justify postponement of trial, because the need

²⁶⁶ The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." The constitutional right to a speedy trial has been interpreted as generally applying to courts-martial proceedings.

²⁶⁷ See *Strunk*, 412 U.S. at 438.

²⁶⁸ See *Barker*, 407 U.S. at 530. Courts have recognized at least three types of prejudice, including "'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." See *Doggett v. United States*, 505 U.S. 647, 654 (1992) (citing *Barker*, 407 U.S. at 532; *Smith v. Hoey*, 393 U.S. 374, 377-379 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

²⁶⁹ *Doggett v. United States*, 505 U.S. 647, 657 (1992) (holding that the government's "egregious persistence in failing to prosecute" the defendant for more than eight years after an initial indictment was "clearly sufficient" to constitute a violation of the defendant's speedy trial right, despite a lack of proof that the defendant was specifically harmed by the delay).

²⁷⁰ *Barker*, 407 U.S. at 527.

²⁷¹ See *Verdugo-Urquidez v. United States*, 494 U.S. 259, at 268, 270-71 (1990) (stating that "not every constitutional provision applies to governmental activity even where the United States has sovereign power" and that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country"), *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable to Puerto Rico, an unincorporated U.S. territory).

²⁷² See *United States v. Ghailani*, No. S10 98 Crim. 1023, 2010 WL 2756546 (S.D.N.Y. 2010)

²⁷³ *Id.* at *12.

to prevent the defendant from returning to hostilities was not incompatible with federal prosecution.²⁷⁴ The aborted military commission prosecution did not justify delay because the government had complete discretion as to where to prosecute the defendant.²⁷⁵ However, although the Guantanamo portion of the delay was attributable to the government, it was assessed as a “neutral factor” because there was no evidence that its purpose had to do with a “quest for tactical advantage.”²⁷⁶ Because Ghailani was detainable as an “enemy combatant” with or without prosecution, the need to avoid excessive incarceration was also not a relevant factor under *Barker* analysis. Because the court was not persuaded that Ghailani was prejudiced by the delay, it held there was no violation of his Sixth Amendment rights.

Statutory and Regulatory Requirements

In addition to these constitutional requirements, statutes and forum rules may impose speedy trial requirements of their own. The Federal Speedy Trial Act of 1974 delineates specific speedy trial rules in the context of federal courts.²⁷⁷ As a general rule, the Speedy Trial Act requires that the government bring an indictment against a person within 30 days of arrest, and that trial commences within 70 days of indictment.²⁷⁸ However, the act provides several specific exceptions, under which the determination regarding speed of prosecution becomes nearly as much a balancing act as under the Supreme Court’s interpretation of the constitutional right. Potentially relevant exceptions to the prosecution of detainees permit a trial judge to grant a so-called “ends of justice” continuance if he or she determines that the continuance serves “ends of justice” that outweigh the interests of the public and defendant in a speedy trial, and also permit the granting of a continuance when the facts at issue are “unusual or complex.”²⁷⁹ Presumably, many of the same factors that are important in considering constitutional issues relating to a right to a speedy trial are also relevant when interpreting the statutory requirements of the Speedy Trial Act.²⁸⁰

In *United States v. al-Arian*, the United States charged four men with having provided material support to terrorists, among other charges.²⁸¹ The primary evidence in the case included more than 250 taped telephone conversations, which the U.S. government had collected pursuant to the Foreign Intelligence Surveillance Act.²⁸² A federal district court granted co-defendants’ motion for

²⁷⁴ *Id.* at *13-14. The court pointed out that the defendant had been “no more able to engage in hostilities against the United States while in the custody of the Bureau of Prisons pending trial on this indictment than he was at Guantanamo in the custody of the DoD. He could have been brought to this Court in 2006 or any subsequent date to face this 1998 indictment and, at the same time, prevented from engaging in hostilities against this country.” *Id.* at 14.

²⁷⁵ *Id.* at *15. The judge contrasted this factor against situations where delay is justified by ongoing state investigations and prosecutions.

²⁷⁶ *Id.* at *17.

²⁷⁷ 18 U.S.C. § 3161. Congress passed the Speedy Trial Act shortly after the Supreme Court, in *Barker v. Wingo*, rejected a specific, judicially imposed time period. 407 U.S. at 523. The *Barker* court held that such a specific timeframe would invade the province of the legislature. *Id.* The Speedy Trial Act is just the primary statute implementing the constitutional right for defendants in federal courts. If detainees were located in another country’s jurisdiction, then the government would have to comply with both the Speedy Trial Act and the Interstate Agreement on Detainers. See 18 U.S.C. Appendix 2, § 2, Articles III-VI.

²⁷⁸ 18 U.S.C. § 3161(b),(c).

²⁷⁹ 18 U.S.C. § 3161(h)(8)(A).

²⁸⁰ 18 U.S.C. § 3161(h)(8)(B)(ii).

²⁸¹ 267 F. Supp.2d 1258, 1264 (M.D. Fla. 2003).

²⁸² *Id.* at 1260.

a continuance in the case over the objection of one defendant, al-Arian, who claimed that the continuance violated his constitutional right to a speedy trial.²⁸³ The court determined that the “ends of justice” would be served by granting the continuance because factors such as the complexity of the case, the “voluminous” discovery involved, and the “novel questions of fact and law” outweighed the defendant’s interest in a speedy trial.²⁸⁴ In addition, the *al-Arian* court found that the defendant had failed to prove that he would suffer any specific prejudice as a result of the continuance, because the period of the continuance would in any case be consumed with discovery proceedings.²⁸⁵

Speedy Trials under Military System

There are no statutory or procedural rule requirements governing military commissions concerning enemy combatant’s right to a speedy trial. While many UCMJ requirements apply to military commission proceedings, those relating to the right to a speedy trial do not.²⁸⁶ Whatever rights owed to the accused in this context are only those provided by the Sixth Amendment.

In contrast, statutory requirements and forum rules afford significant speedy trial rights to individuals subject to courts-martial. Article 10 of the UCMJ requires the government, when a person is placed in arrest or confinement prior to trial, to take immediate steps to inform of the accusations and to try the case or dismiss the charges and release.²⁸⁷ The R.C.M. implements this requirement in Rule 707(a) with a requirement that an individual be brought to trial within 120 days of the preferral of charges or the imposition of restraint, whichever date is earliest.²⁸⁸ Rule 707 provides for certain circumstances when time periods of delay are excluded from the 120 day requirement, as well as allows the military judge or the convening authority to exclude other periods of time.²⁸⁹

On their face, the statutory and procedural rules concerning speedy trial rights in courts-martial proceedings may pose a significant obstacle for their usage in prosecuting persons held at Guantanamo. While enemy combatants may be tried by a general court-martial for war crimes under the UCMJ,²⁹⁰ statutory and procedural rules governing a defendant’s right to a speedy trial may be implicated. Arguably, the speedy trial requirement may have started to run when the enemy combatants were placed in confinement by the United States military.²⁹¹ And while it is possible to exclude time from the speedy trial requirement for those periods when the accused

²⁸³ *Id.* at 1267.

²⁸⁴ *Id.* at 1264.

²⁸⁵ *Id.* at 1264 n.16.

²⁸⁶ 10 U.S.C. § 948b(d) (other provisions of the UCMJ specifically excluded include those related to compulsory self-incrimination and the requirement for pretrial investigation). The MCA 2009 retains this provision.

²⁸⁷ 10 U.S.C. § 810.

²⁸⁸ R.C.M. 707(a) (Preferral occurs when an individual, with personal knowledge of or has investigated the matters set forth in the charges and specifications, signs the charges and specifications under oath asserting that they are true in fact to the best of that person’s knowledge and belief. *See* R.C.M. 307).

²⁸⁹ R.C.M. 707(c) (allowing for the exclusion of time when appellate courts have issued stays in the proceedings, the accused is absent without authority, the accused is hospitalized due to incompetence, or is otherwise in custody of the Attorney General).

²⁹⁰ *Id.* at 201(f)(1)(B).

²⁹¹ 10 U.S.C. § 810.

was in the custody of civilian authorities or foreign countries,²⁹² it may be difficult to argue that the speedy trial period did not start when the U.S. military commenced detention of the person at Guantanamo. The government is not precluded from preferring charges to a general court-martial in this scenario, but the defense has the right to object to the trial on the basis of the speedy trial requirement.²⁹³ Prosecution of detainees before a general court-martial may require modification of applicable statutes and forum rules relating to a defendant's right to a speedy trial.

Finally, even if the government complied with time constraints imposed by applicable statutes and forum rules and did not violate detainees' constitutional rights to a speedy trial under the Sixth Amendment, it is possible that a court could hold that the government violated a defendant's constitutional right to a fair trial under the Fifth Amendment Due Process Clause by "caus[ing] substantial prejudice to [the detainee's] right to a fair trial," typically by intentionally stalling prosecution in a case.²⁹⁴

Right to Confront Secret Evidence

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."²⁹⁵ However, in the context of prosecuting persons seized in the "war on terror," a public trial could risk disclosure of classified information. In these cases, the government is arguably placed in a difficult position, forced to choose between waiving prosecution and potentially causing damage to national security or foreign relations. This dilemma was one factor leading to the enactment of the Classified Information Procedures Act (CIPA),²⁹⁶ which formalized the procedures to be used by federal courts when faced with the potential disclosure of classified information during criminal litigation. Courts-martial and military commissions also have procedures concerning a defendant's right to confront secret evidence.²⁹⁷ The rules governing the disclosure of classified information in military commissions were amended by the MCA 2009 to more closely resemble the practices employed in federal civilian court under CIPA and in general courts-martial.²⁹⁸

Prosecutions implicating classified information can be factually varied, but an important distinction that may be made among them is from whom information is being kept. In some situations, the defendant seeks to introduce classified information of which he is already aware

²⁹² See *United States v. Cummings*, 21 M.J. 987, 988 (N.M.C.M.R. 1986) (after being notified that the accused is available for the immediate pickup from civilian custody, the Government has a reasonable time to arrange for transportation of the accused before the speedy trial period begins to run), *United States v. Reed*, 2 M.J. 64, 67 (C.M.A. 1976) (holding "the military is not accountable for periods an accused is retained in civil confinement as a result of civil offenses irrespective of whether his initial confinement was by civil or military authority"), *United States v. Stubbs*, 3 M.J. 630, 636 (N.M.C.M.R. 1977) (confinement by the U.S. military pursuant to a Status of Forces Agreement, in order to ensure the presence of the accused at a judicial proceeding in a foreign jurisdiction, is not attributable to the Government).

²⁹³ R.C.M. 707(c)(2).

²⁹⁴ *Marion*, 404 U.S. at 324.

²⁹⁵ U.S. CONST. amend. VI.

²⁹⁶ P.L. 96-456, codified at 18 U.S.C. app. 3 § 1-16. For more information about CIPA, see CRS Report R40603, *The State Secrets Privilege and Other Limits on Litigation Involving Classified Information*, by Edward C. Liu

²⁹⁷ MIL. R. EVID. 505, MIL. COMM. R. EVID. 505. Following the enactment of the MCA 2009, the Military Commission Rules of Evidence will likely be modified to reflect the new statutory requirements for the usage of classified evidence in military commission proceedings.

²⁹⁸ 10 U.S.C. §§ 949p-1 – 949p-1 (as added by P.L. 111-84, § 1802 (2009)).

because he held a position of trust with the U.S. government. The interests of national security require sequestration of that information from the general public.²⁹⁹ In the case of ordinary terrorism prosecutions, the more typical situation is likely to be the introduction of classified information as part of the prosecution's case against the defendant. In these cases, preventing disclosure to the defendant, as well as to the public, may be required. Preventing the accused from having access to evidence to be used against him at trial raises concerns under the Confrontation Clause of the Constitution. Both CIPA and the Federal Rules of Criminal Procedure authorize federal courts to issue protective orders preventing disclosure of classified information to various parties, including the defendant, in cases where nondisclosure would not unduly prejudice the rights of the accused.³⁰⁰ The judge may permit the prosecution to provide an unclassified summary or substitute statement so long as this procedure provides the defendant with substantially the same ability to make his defense as disclosure of the classified information itself would provide. Such a substitute submission might redact, for example, sources and methods of intelligence gathering so long as enough information is made available to give the defendant a fair opportunity to rebut the evidence or cast doubt on its authenticity.

Legal issues related to withholding classified information from a defendant are likely to arise during two distinct phases of criminal litigation. First, issues may arise during the discovery phase when the defendant requests and is entitled to classified information in the possession of the prosecution. Secondly, issues may arise during the trial phase, when classified information is sought to be presented to the trier-of-fact as evidence of the defendant's guilt. The issues implicated during both of these phases are discussed below.

Withholding Classified Information During Discovery

The mechanics of discovery in federal criminal litigation are governed primarily by the Federal Rules of Criminal Procedure. These rules provide the means by which defendants may request information and evidence in the possession of the prosecution, in many cases prior to trial. There are two important classes of information that the prosecution must provide, if requested by the defendant: specifically *Brady* material and *Jencks* material.

Brady material, named after the seminal Supreme Court case *Brady v. Maryland*,³⁰¹ refers to information in the prosecution's possession which is exculpatory, that is, tends to prove the innocence of the defendant. For example, statements by witnesses that contradict or are inconsistent with the prosecution's theory of the case must be provided to the defense, even if the prosecution does not intend to call those witnesses. Prosecutors are considered to have possession of information that is in the control of agencies that are "closely aligned with the prosecution,"³⁰² but, whether information held exclusively by elements of the intelligence community could fall within this category does not appear to have been addressed.³⁰³

²⁹⁹ This situation has traditionally been called "graymail" to suggest that the defendant may be seeking to introduce classified information to force the prosecution to dismiss the charges. See S. REP. NO. 96-823 at 1-4.

³⁰⁰ 18 U.S.C. app. 3 § 3; FED. R. CRIM. P. 16(d)(1).

³⁰¹ *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process requires prosecution to turn over exculpatory evidence in its possession).

³⁰² *United States v. Brooks*, 966 F.2d 1500, 1503 (1992).

³⁰³ *But see United States v. Libby*, 429 F. Supp. 2d 1 (D.D.C., 2006) (holding that, on the facts of this case, the CIA was closely aligned with special prosecutor for purposes of *Brady*).

Jencks material refers to written statements made by a prosecution witness that has testified or may testify. For example, this would include a report made by a witness called against the defendant. In the Supreme Court's opinion in *Jencks v. United States*,³⁰⁴ the Court noted the high impeachment value a witness's prior statements can have, both to show inconsistency or incompleteness of the in court testimony. Subsequently, this requirement was codified by the Jencks Act.³⁰⁵

The operation of *Jencks* and *Brady* may differ significantly in the context of classified information. Under § 4 of CIPA, which deals with disclosure of discoverable classified information, the prosecution may request to submit either a redacted version or a substitute of the classified information in order to prevent harm to national security.³⁰⁶ While the court may reject the redacted version or substitute as an insufficient proxy for the original, this decision is made *ex parte* without defense counsels' input or knowledge. Classified information that is also *Jencks* or *Brady* material is still subject to CIPA.³⁰⁷

In some cases, the issue may not be the disclosure of a document or statement, but whether to grant the defendant pre-trial access to government witnesses. In *United States v. Moussaoui*, one issue was the ability of the defendant to depose "enemy combatant" witnesses that were, at the time the deposition was ordered, considered intelligence assets by the United States.³⁰⁸ Under the Federal Rules of Criminal Procedure, a defendant may request a deposition in order to preserve testimony at trial.³⁰⁹ In *Moussaoui*, the court had determined that a deposition of the witnesses by the defendant was warranted because the witnesses had information that could have been exculpatory or could have disqualified the defendant for the death penalty.³¹⁰ However, the government refused to produce the deponents, citing national security concerns.³¹¹

In light of this refusal, the Fourth Circuit, noting the conflict between the government's duty to comply with the court's discovery orders and the need to protect national security, considered whether the defendant could be provided with an adequate substitute for the depositions. The court also noted that substitutes would necessarily be different from depositions, and that these differences should not automatically render the substitutes inadequate.³¹² Instead, the appropriate

³⁰⁴ *Jencks v. United States*, 353 U.S. 657 (1957) (holding that, in a criminal prosecution, the government may not withhold documents relied upon by government witnesses, even where disclosure of those documents might damage national security interests).

³⁰⁵ Codified at 18 U.S.C. § 3500. The Jencks Act provides definitions for so-called "Jencks material" and requires disclosure of such material to the defense, but only after the witness has testified.

³⁰⁶ 18 U.S.C. app. 3, § 4.

³⁰⁷ See *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (holding that *in camera* examination and redaction of purported *Brady* material by trial court was proper).

³⁰⁸ *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). Moussaoui was prosecuted for his involvement in the conspiracy to commit the terrorist attacks of September 11, 2001. While the U.S. Court of Appeals for the Fourth Circuit held that CIPA did not apply to question of whether Moussaoui and his standby counsel would be allowed to depose to enemy combatant witnesses, *United States v. Moussaoui*, 333 F.3d 509, 514-15 (4th Cir. 2003), both the district court and the Fourth Circuit looked to CIPA for guidance when considering the question, see *Moussaoui, supra*, 382 F.3d at 471 n. 20 and accompanying text

³⁰⁹ FED. R. CRIM. P. 15(a). The court should permit the deposition if there are exceptional circumstances and it is in the interest of justice.

³¹⁰ *Moussaoui*, 382 F.3d at 458, 473-475.

³¹¹ *Id.* at 459.

³¹² *Id.* at 477.

standard was whether the substitutes put the defendant in substantially the same position he would have been absent the government's national security concerns.³¹³ Here, the Fourth Circuit seemed to indicate that government-produced summaries of the witnesses' statements, with some procedural modifications, could be adequate substitutes for depositions.³¹⁴

Within the courts-martial framework, the use of and potential disclosure of classified information is addressed in Rule 505 of the Military Rules of Evidence. Rule 505 applies at all stages of proceedings, including during discovery.³¹⁵ Under the Rule, the convening authority may (1) delete specified items of classified information from documents made available to the accused; (2) substitute a portion or summary of the information; (3) substitute a statement admitting relevant facts that the classified materials would tend to prove; (4) provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or (5) withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the national security.³¹⁶ Prior to arraignment, any party may move for a pretrial session to consider matters related to classified information that may arise in connection with the trial.³¹⁷ The military judge is required, upon request of either party or *sua sponte*, to hold a pretrial session in order to address issues related to classified information, as well as any other matters that may promote a fair and expeditious trial.³¹⁸

As amended by the MCA 2009, disclosure of classified information during a military commission is governed by 10 U.S.C. §§ 949p-1 – 949p-9. The act provides that “[t]he judicial construction of the Classified Information Procedures Act ... shall be authoritative” in interpreting the statutory requirements governing the use of classified information in military commission proceedings, “except to the extent that such construction is inconsistent with the specific requirements” of these statutory provisions.³¹⁹ Much like in courts-martial, any party may move for a pretrial session to consider matters related to classified information that may arise during the military commission proceeding.³²⁰ However, in a departure from the rules governing courts-martial, the convening authority is replaced by the military judge with respect to the modification or substitution of classified information. Pursuant to modifications made by the MCA 2009, the military judge shall, upon request by either party, “hold such conference *ex parte* to the extent necessary to protect classified information from disclosure, in accordance with the practice of the federal courts under the Classified Information Procedures Act.”³²¹ The military judge may not authorize discovery or access to the classified information unless the judge finds that the information “would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution’s case, or to sentencing, in accordance with standards generally applicable to discovery of or access to classified information in federal criminal cases.”³²² The military judge, upon motion of the government’s counsel, has the authority to modify and/or

³¹³ *Id.*

³¹⁴ *Id.* at 479-483. The precise form of the deposition substitutes is unclear as significant portions of the Fourth Circuit’s opinion dealing with the substitute were redacted.

³¹⁵ MIL. R. EVID. 505(d).

³¹⁶ *Id.*

³¹⁷ MIL. R. EVID. 505(e).

³¹⁸ *Id.*

³¹⁹ 10 U.S.C. § 949p-1(d) (as added by P.L. 111-84, § 1802 (2009)).

³²⁰ 10 U.S.C. § 949p-2 (as added by P.L. 111-84, § 1802 (2009)).

³²¹ *Id.*

³²² 10 U.S.C. § 949p-4 (as added by P.L. 111-84, § 1802 (2009)).

substitute classified evidence during discovery, and ultimately may dismiss the charges or specifications if he feels that the fairness of the proceeding will be compromised without disclosure of the classified evidence.³²³

The Use of Secret Evidence at Trial

The use of secret evidence at trial also implicates constitutional concerns. As described above, there may be instances where disclosure of classified information to the defendant would be damaging to the national security. In these instances, the prosecution may seek to present evidence at trial in a manner that does not result in full disclosure to the defendant. One proposed scenario (which is not authorized by the MCA) might be the physical exclusion of the defendant from those portions of the trial, while allowing the defendant's counsel to remain present.³²⁴ However, such proceedings could unconstitutionally infringe upon the defendant's Sixth Amendment right to confrontation.³²⁵

Historically, defendants have had the right to be present during the presentation of evidence against them, and to participate in their defense.³²⁶ But other courts have approved of procedures which do not go so far as to require the defendant's physical presence in the same room as witnesses to be confronted. For example, the government is in some cases permitted to use depositions in lieu of live witness testimony where the witness is beyond the subpoena power of federal courts, as is the case with foreign national witnesses overseas. In *United States v. Abu Ali*, the Fourth Circuit permitted video conferences to allow the defendant to observe, and be observed by, witnesses who were being deposed in Riyadh, Saudi Arabia.³²⁷ The Fourth Circuit stated that these procedures satisfied the Confrontation Clause if "the denial of 'face-to-face confrontation' [was] 'necessary to further an important public policy,'" and sufficient procedural protections were in place to assure the reliability of the testimony.³²⁸ Here, the Fourth Circuit cited the protection of national security as satisfying the "important public policy" requirement, where the government could not reasonably ensure that a defendant charged with serious terrorism offenses would remain in its custody if he were permitted to travel abroad. The cited procedural safeguards were the presence of mutual observation, the fact that testimony was given under oath in the Saudi criminal justice system, and the ability of defense counsel to cross examine the witnesses.³²⁹

³²³ 10 U.S.C. § 949p-6 (as added by P.L. 111-84, § 1802 (2009)).

³²⁴ See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 168 (D.D.C. 2004) (describing potential procedures under military commissions established by Presidential order).

³²⁵ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 634 (2006) (Stevens, J., plurality opinion) (stating that "an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him").

³²⁶ See, e.g., *id.*; *Crawford*, 541 U.S. at 49, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine") (internal citations omitted).

³²⁷ *United States v. Abu Ali*, 528 F.3d 210, 239-240 (4th Cir. 2008)(quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990)). In this case the defendant, while located in the federal courthouse in Alexandria, Va., was able to communicate with his counsel in Riyadh via telephone during breaks in the deposition or upon the request of defense counsel.

³²⁸ *Id.* at 241-242 (citing *Maryland v. Craig*, 497 U.S. 836 (1990), in which one-way video testimony procedures were used in a prosecution for alleged child abuse).

³²⁹ *Id.* See, also, *United States v. Bell*, 464 F.2d 667 (2nd Cir. 1972) (holding that exclusion of the public and the defendant from proceedings in which testimony regarding a "hijacker profile" was presented was consistent with the Confrontation Clause).

CIPA does not have any provisions which authorize the exclusion of defendants from any portion of trial, based upon national security considerations. But as noted earlier, CIPA § 3 authorizes the court to issue protective orders preventing disclosure of classified information to the defendant by defense counsel, for example, in order to protect intelligence sources and methods by which evidence to be presented at trial was obtained.

Under CIPA, the admissibility of classified information at trial is determined at a pretrial hearing. As with the case in discovery, the government may seek to replace classified information with redacted versions or substitutions. However, in this context, the adequacy of a substitute or redacted version is determined in an adversarial proceeding in which both prosecutors and defense counsel have full access to the substitute and may argue whether it provides the defendant with “substantially the same ability to make his defense” as the underlying classified information would provide.³³⁰

In the courts-martial context, Rule 505 of the Military Rules of Evidence governs the use of classified information during trial. When classified material is relevant and necessary to an element of the offense or a legally cognizable defense, the convening authority may obtain the information for use by the military judge in determining how to proceed with the trial, or may dismiss the charges against the accused rather than disclose the information in the interest of protecting the national security.³³¹ If the classified information is provided to the judge, an *in camera* proceeding may be ordered allowing for an adversarial proceeding on the admissibility of the potential evidence.³³² Additionally, the military judge has the authority to issue a protective order to prevent the disclosure of classified evidence that has been disclosed by the government to the accused.³³³ In a case where classified information has not been provided to the military judge, and proceeding with the case without the information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.³³⁴

In trials before military commissions, the military judge shall permit, upon motion of the government, the introduction of otherwise admissible evidence while protecting from disclosure the sources, methods, or activities by which the United States obtained the evidence.³³⁵ An *in camera* hearing may be held to determine how classified information is to be handled, from which the detainee may be excluded in order to maintain the classified nature of the material.³³⁶ In this scenario, the detainee will not have access to the information pertaining to the source of the evidence, but his defense counsel will be able to argue for the release of the information on behalf of the detainee.³³⁷ The detainee will have access to all evidence that will be viewed by the commission members.³³⁸

³³⁰ 18 U.S.C. app. 3 § 6(c)(1). For a discussion of the “substantially the same” standard, see *United States v. Collins*, 603 F. Supp. 301, 304 (S.D. Fla. 1985).

³³¹ MIL. R. EVID. 505(f).

³³² MIL. R. EVID. 505(i).

³³³ MIL. R. EVID. 505(g).

³³⁴ MIL. R. EVID. 505(f).

³³⁵ 10 U.S.C. § 949p-6(c) (as added by P.L. 111-84, § 1802 (2009)).

³³⁶ 10 U.S.C. § 949p-6(a)(3) (as added by P.L. 111-84, § 1802 (2009)).

³³⁷ *Id.*

³³⁸ 10 U.S.C. § 949p-1(b) (as added by P.L. 111-84, § 1802 (2009)).

If constitutional standards required by the Sixth Amendment are applicable to military commissions, commissions may be open to challenge for affording the accused an insufficient opportunity to contest evidence. An issue may arise as to whether, where the military judge is permitted to assess the reliability of evidence based on *ex parte* communication with the prosecution, adversarial testing of the reliability of evidence before the panel members meets constitutional requirements. If the military judge's determination as to the reliability of *ex parte* evidence is conclusive, precluding entirely the opportunity of the accused to contest its reliability, the use of such evidence may serve as grounds to challenge the verdict.³³⁹ On the other hand, if evidence resulting from classified intelligence sources and methods contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to [its] reliability," it may be admissible and survive challenge.³⁴⁰

Conclusion

Since its inception, the policy of detaining suspected belligerents at Guantanamo has been the subject of controversy. In particular, there has been significant international and domestic criticism of the treatment of detainees held there, as well as detainees' limited access to federal courts to challenge aspects of their detention. Defenders of the policy argue that Guantanamo offers a safe and secure location away from the battlefield where suspected belligerents can be detained, and prosecuted for war crimes when appropriate. They contend that enemy belligerents should not receive the same access to federal courts as civilians within the United States. To a degree, these conflicting viewpoints are reflected in the divergent actions taken by the executive and legislative branches. While the Obama Administration has made efforts to close the facility, and has stated its interest in bringing at least some persons held at Guantanamo into the United States for continued detention or prosecution, its efforts to close the facility have been impeded, in part, by congressional enactments that have effectively prevented the executive from transferring any Guantanamo detainee into the United States. It remains to be seen whether Congress and the Administration will reassess their respective positions in the foreseeable future.

In any event, the closure of the Guantanamo detention facility may raise complex legal issues, particularly if detainees are transferred to the United States. The nature and scope of constitutional protections owed to detainees within the United States may be different from the protections owed to those held elsewhere. The transfer of detainees into the country may also have immigration consequences.

Criminal charges could also be brought against detainees in one of several forums—that is, federal trial courts, the courts-martial system, or military commissions. The procedural protections afforded to the accused in each of these forums may differ, along with the types of offenses for which persons may be charged. This may affect the ability of U.S. authorities to pursue criminal charges against some detainees. Whether the military commissions established to

³³⁹ *Cf. Crane v. Kentucky*, 476 U.S. 683 (1986) (evidence concerning the manner in which a confession was obtained should have been admitted as relevant to its reliability and credibility, despite court's determination that the confession was voluntary and need not be suppressed).

³⁴⁰ *Cf. Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (admissibility of hearsay evidence), *but cf. Crawford v. Washington*, 541 U.S. 36 (2004) ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.... [The Confrontation Clause] commands ... that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

try detainees for war crimes fulfill constitutional requirements concerning a defendant's right to a fair trial is likely to become a matter of debate, if not litigation. There is considerable prosecutorial discretion within the executive branch regarding which forum to utilize, but legislative enactments may potentially limit the exercise of such discretion, including by requiring detainees to be charged in a particular forum.

The issues raised by the proposed closure of the Guantanamo detention facility have broad implications. Executive policies, legislative enactments, and judicial rulings concerning the rights and privileges owed to enemy belligerents may have long-term consequences for U.S. detention policy, both in the conflict with Al Qaeda and the Taliban and in future armed conflicts.

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