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." 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. The roughly 250 detainees who remain fall into three categories: (1) persons placed in non-penal, preventative detention to stop them from rejoining hostilities; (2) persons who have been brought, or are expected to be brought, before a military tribunal to face criminal charges for alleged war crimes; and (3) persons who have been cleared for transfer or release to a third country, 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, 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.

The incoming Obama Administration has stated that the closure of the Guantanamo detention center will be a priority, and that it will work with Congress to craft legislation to effectuate the facility's closure and clarify the legal status of detainees transferred to the United States. The closure of the Guantanamo detention facility may raise 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 than the protections owed to persons held at Guantanamo or elsewhere. This may have implications for the continued detention or prosecution of persons who are transferred to the United States. The transfer of detainees to the United States may also have immigration consequences. Notably, some detainees might qualify for asylum or other protections under immigration law.

This report provides an overview of major legal issues likely to arise in the event of executive and/or 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. The report 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). 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.

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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] The roughly 250 detainees who remain fall into three categories:

- Persons designated as enemy combatants who have been placed in preventative detention to stop them from returning to the battlefield. Preventative detention of captured belligerents is non-penal in nature, and must be ended upon the cessation of hostilities.
- Persons designated as enemy combatants who, besides being subject to preventative detention, have been brought or are expected to be brought before a military tribunal to face criminal charges 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.
- Persons who have been cleared for transfer or release to a foreign country, either because (1) they are not believed to have been enemy combatants or (2) although they were designated as enemy combatants, 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.[3]

[1] P.L. 107-40.

[2] Department of Defense, "Detainee Transfer Announced," press release, December 16, 2008, available at http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=12394. For a detailed description of the Guantanamo detainee population, see Benjamin Wittes and Zaahira Wyne, *The Current Detainee Population of Guantánamo: An Empirical Study*, Brookings Institute, December 16, 2008 [hereinafter "Brookings Report"].

[3] 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*, December 28, 2001.

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 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.[4] 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.[5]

President-elect Barack Obama has stated his intent to close the Guantanamo detention facility.[6] Secretary of Defense Robert Gates has also described the closure of the Guantanamo detention facility as a "high priority" for the new administration, and has stated that the administration will work with Congress to craft legislation effectuating this goal and addressing some of the legal issues that would arise if detainees were transferred to the United States.[7] In December 2008, the Department of Defense (DoD) began formulating plans to close the Guantanamo detention facility in case the incoming Obama Administration opts to move quickly to shut down the facility.[8]

The closure of the Guantanamo detention facility raises a number of legal issues with respect to the individuals presently 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 than 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.

It is possible that legislative proposals may be introduced to effectuate or limit the transfer, detention, and/or prosecution of Guantanamo detainees. For example, proposals may be introduced to modify executive authority to detain certain persons in wartime. Proposals may also be made to clarify the immigration status of detainees transferred into the United States. Legislation may also be considered requiring criminal prosecutions of detainees to occur in a specified forum (i.e., in federal civilian court, in courts-martial proceedings, or before military commissions), or amending procedural rules governing the prosecution of detainees. Proposals

[4] *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

[5] For background, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea, Michael John Garcia, and Kenneth R. Thomas; and CRS Report RL34536, *Boumediene v. Bush: Guantanamo Detainees' Right to Habeas Corpus*, by Michael John Garcia.

[6] President-elect Barack Obama, "Transcript of Interview with '60 Minutes,'" CBS News, November 16, 2008 (stating that he "intend[s] to close Guantanamo, and...will follow through on that"), available at http://www.cbsnews.com/stories/2008/11/16/60minutes/main4607893_page3.shtml.

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

[8] Peter Finn, "Plans Being Drawn to Close the Guantanamo Prison," *Washington Post*, December 19, 2008, p. A03.

may also be considered to create an entirely new forum for the prosecution of detainees, such as a national security court. The scope and effect of such proposals may be shaped by constitutional constraints.

This report provides an overview of major legal issues that are likely to arise in the event of executive and/or 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 are utilized 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 and/or enemy combatants 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 third countries for continued detention or release, previous proposals to close the Guantanamo detention facility have contemplated transferring at least some detainees to the United States.[9]

Transfer/Release of Guantanamo Detainees to a Third Country

The vast majority of persons initially transferred to Guantanamo for preventative detention have been transferred to third countries, either for continued detention by the receiving country or for release.[10] Decisions to transfer a detainee to a third 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.[11] 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 U.S. 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.[12] The DoD also transfers enemy combatants to other countries for continued

[9] In the 110th Congress, a number of proposals were introduced to close the Guantanamo detention facility which contemplated the transfer of some detainees to the U.S. for trial or continued detention. *See* S. 1249, H.R. 2212, 110th Cong. (2008). Bills have also been introduced in the 111th Congress to close the facility. *See, e.g.*, S. 147, H.R. 374, 111th Cong. A few non-governmental organizations have also published reports containing proposals to close Guantanamo and transfer at least some detainees to the United States. *See* Human Rights First, *How to Close Guantanamo: Blueprint for the Next Administration*, November 2008; Sarah E. Mendelson, *Closing Guantanamo: From Bumper Sticker to Blueprint*, Center for Strategic and International Studies, September 2008.

[10] *See* DoD Press Release, footnote 2.

[11] 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)

[12] *Id.*

detention, investigation, and/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.[13]

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.[14] 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."[15]

Nonetheless, the DoD has 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."[16] 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.[17] 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.

Roughly 60 of the approximately 250 persons held at Guantanamo have been cleared for transfer or release, but 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. A significant number of detainees could also potentially be transferred to other countries for continued detention if the United States was assured that the receiving country could manage the threat they pose.[18] Whether future diplomatic efforts will effectuate the transfer of some or all of these persons to third countries remains to be seen.

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[13] *Id.*

[14] 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.

[15] 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.

[16] Benkert Declaration, footnote 11, at para. 6.

[17] *Id.* at para. 7.

[18] For example, the United States has 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, footnote 2, at 22-23; Matt Apuzzo, "'No progress' on Mass Guantanamo Prisoner Transfer," *USA Today*, July 7, 2008.

In recent years, legislative proposals have been introduced that would impose more stringent requirements upon the transfer of military detainees to foreign countries, particularly when the transfer might raise human rights concerns. These proposals have generally sought to establish standards for the acceptance of diplomatic assurances by transfer authorities, and require subsequent monitoring of the treatment of a transferred detainee.[19] Similar proposals may be introduced in the 111th Congress. If enacted, such measures might impede the transfer of some Guantanamo detainees to third countries.

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 preventative detention or prosecution before a military or civilian court. Whether existing federal laws limit executive discretion to transfer captured noncitizens into the United States for continued detention arguably remains an open question. The Immigration and Nationality Act (INA) generally bars the entry of aliens involved in terrorism-related activity, as well as the admission of aliens whose entry would pose a threat to U.S. security or otherwise have serious adverse foreign policy consequences.[20] Under current law, it would appear that 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 on such grounds, he may still be inadmissible under other INA provisions.[21] However, it could be argued that the INA's restrictions upon the entry of certain categories of aliens are not intended to cover those persons transferred by the DoD into the United States for purposes of military detention. It also 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.[22] Legislation may be considered which addresses the application of federal immigration laws to the transfer of detainees to the United States, and clarifies the immigration status of detainees transferred into the country.[23]

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

[19] *See, e.g.*, H.R. 1352, 110th Cong. (2007).

[20] 8 U.S.C. §1182(a)(3). For background, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

[21] *See* 8 U.S.C. § 1182 (grounds for alien inadmissibility).

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

[23] *See, e.g.*, S. 108, S. 147, H.R. 374, 111th Cong (2009).

"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."[24] 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]."[25] Indeed, even if the INA does not make parole a legal requisite for the transfer of aliens into the United States, the executive branch may nonetheless 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, however, an alien's parole into the United States may result in the alien becoming eligible for asylum or other forms of immigration-related relief from removal.

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 combatants" may be held in preventative 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.[26] A divided Supreme Court also declared that "a state of war is not a blank check for the president," and ruled that persons deemed "enemy combatants" have the right to challenge their detention before a judge or other "neutral decision-maker."[27]

While the preventative detention of "enemy combatants" 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."[28] Left unresolved is the extent to which the 2001 AUMF permits the detention of persons captured away from the zone of 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

[24] 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.

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

[26] *Hamdi*, 542 U. S. at 518 (O'Connor, J., plurality opinion), 588-589 (Thomas, J., dissenting).

[27] *Id.* at 536-537 (O'Connor, J., plurality opinion).

[28] *Id.* at 526.

"support" for hostile forces necessary to acquire "enemy combatant" status or activities which 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.[29] The Supreme Court's decision may have implications for the continued detention of persons in U.S. military custody who were 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.

In the absence of legal authority to detain a person as an "enemy combatant," U.S. military authorities must generally release the person from its 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 U.S. 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.[30] 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 detention after determining that it may become impracticable to secure the presence of the person by subpoena.[31]

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.[32] Following a final order of removal,[33] 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.[34] 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.[35] However, those aliens who are specially dangerous to the

[29] *al-Marri v. Pucciarelli*,534 F.3d 213 (4th Cir. 2008), *cert. granted* by __ S.Ct.__, 2008 WL 4326485 (U.S. Dec. 5, 2008). *See also al-Marri v. Wright*, 487 F. 3d 160 (4th Circ. 2007).

[30] 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).

[31] 18 U.S.C. § 3144.

[32] 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.

[33] 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).

[34] 8 U.S.C. § 1231(a)(2).

[35] 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 (continued...)

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.[36]

Proposals have been made to clarify executive authority to detain certain wartime detainees. These include proposals to provide express statutory authority for the Executive to detain persons who have engaged in hostilities or purposefully supported Al Qaeda, the Taliban, or associated organizations.[37] Proposals have also been made to require any alien detainee released from military custody into the United States to be taken into custody by immigration authorities pending removal. While the United States has interned "enemy aliens" who had not participated in hostilities against the United States in prior conflicts,[38] the scope and effect of proposals requiring the detention of specified categories of persons other than enemy combatants may potentially 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).[39] The Field Manual requires all detainees to

(...continued)

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." *Zadyvydas 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).

[36] 8 C.F.R. § 241.14.

[37] H.R. 6705/S. 3401, 110th Cong.

[38] 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 German citizen pursuant to 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.

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

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.[40] 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 outside of our geographic borders."[41] 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 Guantanamo.[42] However, 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.[43]

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.[44]

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 the reach of the writ with respect to claims of unlawful conditions of treatment or confinement."[45] 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. While

[40] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[41] *Zadvydas*, 533 U.S. at 693.

[42] 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*, – S.Ct. – , 2008 WL 3910997 (U.S. Dec. 15, 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).

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

[44] 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.

[45] *Boumediene*, 128 S.Ct. at 2264.

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, 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.[46] Accordingly, detainees transferred to the United States might be able to more successfully pursue legal challenges against aspects of their detention 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 against their unwilling transfer to a third 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 transfers from the United States. [47]

Detainees transferred to the United States might 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 a third 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

[46] *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").

[47] 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 Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), *cert. dismissed*, 128 S.Ct. 976 (U.S. Jan. 9, 2008) (finding that CAT-implementing legislation precludes review of CAT-based habeas petition in extradition proceedings); O.K. v. Bush 377 F.Supp.2d 102, n. 17 (D.D.C. 2005) (finding that CAT-based claims were not cognizable in Guantanamo transfer decisions); *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). 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).

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.[48] 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 release 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.[49]

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.[50]

Detainees' Rights in a Criminal Prosecution

While many persons currently held at Guantanamo are only being detained as a preventative 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 the Guantanamo detainees inside the United States would raise at least two major legal questions. First, does a detainee's status as an "enemy combatant" reduce the degree of constitutional protections to which he is entitled? Secondly, would the choice of judicial forum – i.e., civilian court, military commission, or courts-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 located outside the United States turns on "objective factors and practical concerns."[51] The Court has also repeatedly recognized that at least some constitutional protections are "unavailable to aliens outside our geographic borders."[52] The application of constitutional principles to the prosecution of aliens located at Guantanamo remains unsettled.

[48] 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).

[49] 8 U.S.C. § 1252.

[50] Dreazen, footnote 7.

[51] *Boumediene*, 128 S.Ct. at 2258.

[52] *Zadyvdas*, 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").

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.[53] However, the application of these constitutional requirements might 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.[54] 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.'"[55] 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.[56] It is possible that the rights owed to enemy combatants 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 affords the accused fewer procedural protections than would be available to defendants in military courts-martial or federal civilian court proceedings.[57] Approximately 20 detainees at Guantanamo are currently facing charges before such commissions, though critics have raised questions regarding the constitutionality of the system established by the MCA.[58] The MCA does not restrict military commissions from exercising jurisdiction within the United States, and the Supreme Court has

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

[54] *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).

[55] *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).

[56] *See* footnote 38 and accompanying citations.

[57] 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 defines "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). Courts have yet to rule on the constitutional legitimacy of many procedures used by military commissions.

[58] See Brookings Report, footnote 2, at p. 8. Information regarding ongoing and completed cases can be viewed at http://www.defenselink.mil/news/commissions.html.

previously upheld the use of military commissions against enemy belligerents tried in the United States.[59] Although they have yet to be used for this purpose, detainees could also be brought before military courts-martial, which have jurisdiction over persons subject to military tribunal jurisdiction under the law of war via the Uniform Code of Military Justice (UCMJ).[60] 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 may pose an obstacle to prosecution absent modification.[61] 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.[62]

Presently, the Executive has discretion in deciding the appropriate forum in which to prosecute detainees. It is possible that legislative proposals may be introduced which require that prosecution occur in a particular forum or modify the procedural rules applicable to the prosecution of detainees. Proposals may also be considered to create an entirely new forum for the prosecution of detainees, such as a national security court. [63] 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 are utilized 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 under the MCA all provide a defendant with the right to assistance of counsel. Depending upon the forum in which the detainee is tried, the particular procedural rules concerning a defendant's exercise of this right may differ.

The Sixth Amendment guarantees a criminal defendant the right "to have the Assistance of Counsel for his defence." This constitutional protection affords a defendant the right to retain counsel of his or her choosing and an opportunity to consult with that counsel.[64] Where a criminal defendant cannot afford to retain a lawyer to assist in his or her defense, such counsel will be appointed by the court.[65] 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.[66] A defendant can waive

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

[60] 10 U.S.C. § 818.

[61] *Id.*

[62] *See* 18 U.S.C. chapter 113B (terrorism-related offenses); 18 U.S.C. § 2441.

[63] *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.

[64] *Chandler v. Freytag*, 348 U.S. 3, 10 (1954).

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

[66] *Walker v. Johnston*, 312 U.S. 275 (1941).

a right to assistance of counsel only if that waiver is knowing, voluntary, and intelligent.[67] However, the defendant need not fully and completely comprehend all of the consequences of that waiver.[68] This right also encompasses the right of a defendant to represent himself or herself, if the defendant intelligently and knowingly chooses to do so.[69] The Sixth Amendment right to counsel is the right to the effective assistance of counsel.[70] 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.[71] 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.[72]

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.[73] In courts-martial, the right to counsel is implemented under Rule 506 of the Rules for Courts-Martial (R.C.M.). Rule 506 provides that a defendant has the right to be represented at a general or special courts-martial by civilian counsel, if provided at no expense to the Government, and either by military counsel detailed under Article 27 of the UCMJ[74] 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.[75]

A detainee subject to a military commission has the right to represented by counsel. The right is implemented by Rule 506 of the Rules for Military Commissions (R.M.C.). Rule 506 provides a detainee with a detailed defense counsel. 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.[76]

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[67] *Iowa v. Tov*ar, 541 U.S. 77 (2004).

[68] *Id.*

[69] *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), found at 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.).

[70] *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).

[71] *Strickland v. Washington*, 466 U.S. 668 (1984).

[72] *United States v. Cronic*, 466 U.S. 648, 658 (1984). *See also, id.* at 657-659.

[73] FED. R. CRIM. P. 44(a).

[74] 10 U.S.C. § 827.

[75] R.C.M. 506(d).

[76] R.M.C. 502(d).

Much like 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.[77] However, in a departure from the rules governing courts-martial, the detainee does not have the right to be granted specific individual military counsel upon request.

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.[78] The use of any such evidence 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.[79]

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.[80] As a general rule, *Miranda* applies any time police question a defendant who is in "custody," broadly defined.[81] 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.[82]

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[77] R.M.C. 506(c).

[78] *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").

[79] 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, 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 97-645, *Repealing Miranda?: Background of the Controversy over Pretrial Interrogation and Self-Incrimination*, by Paul Starett Wallace Jr.

[80] 384 U.S. 436, 479 (1966).

[81] *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").

[82] *United States v. Bin Laden*, 132 F.Supp.2d 168, 173-79 (S.D.N.Y. 2001) (in a case involving a defendant who had (continued...)

However, the Court's recent jurisprudence has weakened *Miranda*'s effect by making clear that despite the holding's constitutional status,[83] there are cases in which it is appropriate to depart from strict adherence to *Miranda* warnings.[84] The *Miranda* exception possibly relevant to the Guantanamo detainees is the "public safety" exception, which the Court introduced in *New York v. Quarles*.[85] In *Quarles*, police officers inquired "Where is the gun?" to a suspect who had fled into a supermarket after a shooting.[86] The Court held that the suspect's incriminating response, "The gun is over there," was admissible in court, despite a lack of *Miranda* warnings, because the question had been necessary to secure the public's safety in that moment.[87] Despite the Court's emphasis in *Quarles* on the time-sensitive nature of the safety risk in that case,[88] some commentators have argued that the *Quarles* "public safety" exception should be extended to reach interrogations of captured terrorist suspects.[89]

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."[90] 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."[91]

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.[92] For example, in *United States v. Abu Ali*, a case involving a defendant

(...continued)

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.

[83] 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).

[84] *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*).

[85] 467 U.S. 649 (1984).

[86] *Id.* at 655.

[87] *Id.*

[88] *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).

[89] *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).

[90] 327 F.3d 56, 145 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003).

[91] *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." *Abu Ali*, 528 F.3d at 227-28.

[92] *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*, 367 U.S. at 602).

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.[93]

The constitutional standard of "voluntariness" is recognized as "the ultimate safeguard against coerced confessions."[94] 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.'"[95] 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."[96] The failure to provide *Miranda* warnings can serve as one factor in the totality-of-circumstances evaluation.[97]

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.[98] 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.[99] 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.[100] 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.[101] A review of Army regulations pertaining to the treatment of war-time

[93] 528 F.3d 210, 234 (4th Cir. 2008) ("[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 v. Connecticut*, 367 U.S. 568, 602 (1961))).

[94] *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).

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

[96] *Abu Ali*, 528 F.3d at 232.

[97] *Id.* at 233.

[98] 10 U.S.C. § 831(d). *See also* MIL. R. EVID. 305.

[99] 10 U.S.C. § 831(a),(c).

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

[101] 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. (continued...)

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.[102] Military courts have also recognized a "public safety" exception to *Miranda* requirements similar to the rule applied in federal courts.[103]

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.[104] Statements obtained by the use of torture are also statutorily prohibited.[105] However, the MCA authorized military commissions to permit the admission of statements obtained in the course of harsh interrogation not rising to the level of torture, if certain criteria are met. Statements made obtained on or after December 30, 2005 may not be admitted if the interrogation methods used to obtain them amounted to "cruel, inhuman, or degrading treatment" prohibited by the DTA.[106] This prohibition applies to statements obtained through methods that, if they had occurred within the United States, would be considered unconstitutionally harsh.[107] This requirement does not apply with respect to the admission of statements made prior to December 30, 2005.[108] In either case, if the degree of coercion used to obtain the statement is disputed, the military judge may only permit its admission if the totality of circumstances renders that statement reliable and the interests of justice are served by its admission.[109]

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, when the incriminating statements were made prior to the enactment of the DTA and were purportedly obtained through cruel, inhuman, or degrading treatment. 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 of death.[110] 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.

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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).

[102] *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).

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

[104] 10 U.S.C. § 948r(a).

[105] 10 U.S.C. § 948r(b).

[106] 10 U.S.C. § 948r(d).

[107] For further discussion, see CRS Report RL33655, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia.

[108] 10 U.S.C. § 948r(c).

[109] 10 U.S.C. § 948r(c)-(d).

[110] *United States v. Jawad*, D-021 (November 19, 2008). The government has appealed the commission's ruling to the Court of Military Commission Review.

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 Clause[111] "protects liberty by preventing the government from enacting statutes with 'manifestly unjust and oppressive' retroactive effects."[112] 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 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 potentially be challenged on due process grounds,[113] 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."[114] 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.[115] 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.[116] It should be noted, however, that statute of limitations concerns may affect the ability of U.S. authorities to prosecute persons for some of these offenses. The statute of limitations for most federal offenses is five years,

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

[112] *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 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.

[113] *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").

[114] *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).

[115] 18 U.S.C. § 2332b (acts of terrorism within the U.S. that transcend national boundaries), § 2332 (killing or severely injuring a U.S. national overseas), § 1956 (money laundering). 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.

[116] 18 U.S.C. § 2441.

though the period for terrorism-related offenses is typically eight years, and there is no statute of limitations for capital offenses.[117]

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.[118] 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."[119] 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 the precedent for it being treated as an offense must be "plain and unambiguous."[120] 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.[121]

Following the *Hamdan* ruling, Congress enacted the MCA, which authorized the establishment of military commissions to try certain detainees and exempted the commissions from many UCMJ requirements applicable to courts-martial proceedings. While military commissions differ from the general courts-martial system in that their personal jurisdiction is limited to "unlawful enemy combatants" (in contrast to the jurisdiction of general courts-martial, which may extend to "lawful" and "unlawful" combatants[122]), military commissions share subject-matter jurisdiction with the general courts-martial system over violations of the law of war. However, the systems differ in that Congress also lists several 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.[123] The MCA provides that such acts are punishable by military commissions regardless of whether they were "committed by an alien unlawful enemy combatant before, on, or after September 11,

[117] For background, see CRS Report RL31253, *Statutes of Limitation in Federal Criminal Cases: An Overview*, by Charles Doyle.

[118] *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, footnote 114 (finding that Ex Post Facto Clause applies to military commission proceedings at Guantanamo).

[119] 10 U.S.C. § 818.

[120] *Hamdan*, 548 U.S. at 602 (Stevens, J., plurality opinion).

[121] *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. Although 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.

[122] 10 U.S.C. § 948d(b). The military commissions established by the MCA do not have jurisdiction over "lawful enemy combatants." A "lawful enemy combatant" is defined to refer to (1) a member of the regular forces of a State party engaged in hostilities against the United States; (2) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (3) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States. 10 U.S.C. § 948a.

[123] 10 U.S.C. § 950v.

2001."[124] In enacting the 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 commissions."[125]

While many of the offenses listed in the MCA 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.[126] 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.[127] 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.[128]

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."[129] 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 declaration,[130] the standard may be more lenient when Congress acts pursuant to its constitutional authority to define war crime offenses.[131] Accordingly, it is possible that a reviewing court may

[124] 10 U.S.C. § 948d(a).

[125] 10 U.S.C. § 950p.

[126] *Hamdan*, 548 U.S. at 612 (Stevens, J., plurality opinion).

[127] 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. 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. Kvocka 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. Jelisic, 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.").

[128] *Compare Hamdan* Military Commission Ruling, footnote 114 (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.

[129] U.S. Const., Art. I, § 10, cl. 8.

[130] *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).

[131] *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 (continued...)

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.[132]

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,[133] the commission deferred to the Congress' determination that these were not new offenses, finding that there was "adequate historical basis for this determination."[134] 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. . . .[135]

The commission's ruling in *Hamdan* was not appealed to the federal courts, and therefore it is unclear whether a reviewing court would reach a similar conclusion regarding whether certain offenses under the MCA raised ex post facto concerns.

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nations"); *Hamdan* Military Commission Ruling, footnote 114.

[132] *Hamdan* Military Commission Ruling, footnote 114, slip. op. at 1.

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

[134] *Id.*, slip op. at 6 (quoting MCA language states that it did "not establish new crimes...[but] are declarative of existing law," 10 U.S.C. § 950p).

[135] *Id.*, slip. op. at 5. Hamdan was subsequently convicted by the commission on the material support charge and acquited 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, 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.

In addition to the constitutional question explored by the military commission in *Hamdan*, ex post facto concerns could potentially be raised in other situations. These considerations may inform decisions by U.S. authorities as to whether to pursue criminal charges against detainees in civilian court, under the general courts-martial system, or via the military commissions established by the MCA. They may also be relevant in the crafting of any new legislative proposals concerning the prosecution of detainees. If a statute increasing the penalty for an existing crime were to be given retroactive effect, it would raise ex post facto concerns. Additionally, in the event that a statute of limitations on a particular offense expired, a detainee would no longer face the possibility of prosecution for that offense. If that statute of limitations were then extended and that extension given retroactive effect, this would also be deemed an ex post facto law.[136] A further ex post facto issue could arise if the 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.[137]

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 evidentiary 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

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[136] *Stogner*, 539 U.S. at 613-17.

[137] *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.

governments may be unavailable to come to the United States to testify in a federal court,[138] or the government may be unwilling to make military and intelligence assets and personnel available for testimony.[139] Procedural rules and constitutional requirements may limit the use of hearsay evidence in the prosecution of some detainees.

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 the Federal Rules of Evidence (FED. R. EVID.) and courts-martial proceedings under the Military Rules of Evidence (MIL. R. EVID.) impose largely similar restrictions on the usage of hearsay evidence. Under the FED. R. EVID. and the MIL. R. EVID., hearsay is generally inadmissible unless it qualifies under an exception to the hearsay rule.[140] 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 in relation to a startling event that made while the declarant was under the stress of excitement caused by the event; records of regularly-conducted activity; and statements of a self-incriminating nature. [141] The FED. R. EVID. and the MIL. R. EVID. also recognize a residual exception for statements which have "equivalent circumstantial guarantees of trustworthiness."[142] Examples of statements that have been held to qualify under the residual exception include interviews of child abuse victims by specially trained FBI agents[143] and statements contained within the files of a foreign intelligence agency.[144]

One important aspect of the definition of hearsay is that statements made by co-conspirators in furtherance of a conspiracy are not considered hearsay.[145] 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.[146]

In comparison with the FED. R. EVID. or the MIL. R. EVID., the procedural rules for military commissions under the Military Commission Rules of Evidence (MIL. COMM. R. EVID.) are much more permissive regarding the admissibility of hearsay evidence. Hearsay evidence may be admitted if either (1) it would be admitted under rules of evidence applicable in trial by general

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

[139] *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 on involvement in terrorist attacks of September 11, 2001).

[140] FED. R. EVID. 802; MIL. R. EVID. 802.

[141] 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.

[142] FED. R. EVID. 807; MIL. R. EVID. 807.

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

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

[145] FED. R. EVID. 801(D)(2)(E); MIL. R. EVID. 801(d)(2)(E).

[146] FED. R. EVID. 801(D)(2); MIL. R. EVID. 801(d)(2).

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.[147] In the latter case, the accused may only have such evidence excluded if he can demonstrate by a preponderance of evidence that the hearsay evidence is unreliable under the totality of the circumstances.[148]

As a result of the less stringent rules regarding the admissibility of hearsay in Military Commissions, prosecutors may have a broader range of inculpatory evidence at their disposal. Hearsay evidence that is inadmissible under the FED. R. EVID. or MIL. R. EVID. might be admitted under the MIL. R. EVID. because the defendant is unable to meet the burden of showing the statements are unreliable. In contrast, under the FED. R. EVID. or the MIL. R. EVID., it is the *proponent's* burden to show that a statement has sufficient indicia of reliability to qualify for the residual exception. On the other hand, the MIL. R. EVID. permits a broader scope of hearsay for both parties. In some cases, a defendant may be able to introduce more *exculpatory* evidence under the MIL. COMM. R. EVID. 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.[149] 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,[150] it would certainly appear to restrict the use of hearsay evidence in cases brought against detainees transferred to the United States.

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

[147] 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.

[148] *Id.* at 803(c).

[149] *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)).

[150] 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 detainees could seek *habeas* review of the legality of their detention. 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).

not had a prior opportunity for cross-examination.[151] 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."[152] 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.[153] In contrast, the Supreme Court has held that statements made "to enable police assistance to meet an ongoing emergency"[154] were not testimonial, because, objectively determined, the purpose of the statements was to request assistance and not to act "as a witness."[155]

Many of the individuals detained at the naval base at Guantanamo Bay were apprehended on battlefields 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.[156]

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, 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 FED. R. EVID., MIL. R. EVID., and MIL. COMM. R. EVID. 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

[151] *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.

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

[153] *See Davis v. Washington*, 547 U.S. 813, 821, 830 (2006).

[154] *Id.* at 822.

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

[156] 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 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.[157] The Sixth Amendment guarantees a right to a speedy trial for the accused in all criminal prosecutions.[158] The protection is triggered "when a criminal prosecution has begun."[159] The invocation of the right may occur prior to indictment or formal charge, when "the actual restraints imposed by arrest and holding" are made.[160] The right has been found to extend to civilian and military courts,[161] though the nature of the right's application to military courts may differ from its application in the civilian context.[162] Statutory requirements and forum rules may 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,[163] and that denial of this right compels a reviewing court to dismiss the charges against them.[164]

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

[157] 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. Eighteen persons are currently facing charges before a military commission, and seven other detainees had charges brought against them that were subsequently dropped on account of evidentiary or other difficulties. Brookings Report, footnote 2, at 8.

[158] 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").

[159] *United States v. Marion*, 404 U.S. 307, 313 (1971).

[160] *Id.* at 320.

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

[162] 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).

[163] 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.

[164] *See Strunk*, 412 U.S. at 438.

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.[165]

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."[166] 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."[167] 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,[168] which may affect a reviewing court's consideration of any speedy trial claims.

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.[169] 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.[170] 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."[171] Presumably, many of the same factors that are important in considering constitutional issues relating to a right

[165] *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. Hooey*, 393 U.S. 374, 377-379 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966).

[166] *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).

[167] *Barker*, 407 U.S. at 527.

[168] *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).

[169] 18 U.S.C. § 3161. Congress passed the Speedy Trial Act shortly after the Supreme Court, in *Baker v. Wingo*, rejected a specific, judicially imposed time period. 407 U.S. at 523. The *Baker* 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 Trials Act and the Interstate Agreement on Detainers. *See* 18 U.S.C. Appendix 2, § 2, Articles III-VI.

[170] 18 U.S.C. § 3161(b),(c).

[171] 18 U.S.C. § 3161(h)(8)(A).

to a speedy trial are also relevant when interpreting the statutory requirements of the Speedy Trial Act. [172]

In *United States v. al-Arian*, the United States charged four men with having provided material support to terrorists, among other charges.[173] 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.[174] A federal district court granted co-defendants' motion for 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.[175] 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.[176] 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.[177]

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. [178] 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.[179] 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.[180] 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.[181]

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

[172] 18 U.S.C. § 3161(h)(8)(B)(ii).

[173] 267 F. Supp.2d 1258, 1264 (M.D. Fla. 2003).

[174] *Id*. at 1260.

[175] *Id.* at 1267.

[176] *Id.* at 1264.

[177] *Id.* at 1264 n.16.

[178] 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).

[179] 10 U.S.C. § 810.

[180] 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).

[181] 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).

Guantanamo. While enemy combatants may be tried by a general court-martial for war crimes under the UCMJ,[182] 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.[183] And while it is possible to exclude time from the speedy trial requirement for those periods when the accused was in the custody of civilian authorities or foreign countries,[184] 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.[185] Prosecution of detainees before a general courts-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.[186]

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." [187] 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), which formalized the procedures to be used by federal courts when faced with the potential disclosure of classified information during criminal litigation.[188] Courts-martial and military commissions also have procedures concerning a defendant's right to confront secret evidence.[189]

[182] *Id.* at 201(f)(1)(B).

[183] 10 U.S.C. § 810.

[184] *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), U*nited 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).

[185] R.C.M. 707(c)(2).

[186] *Marion*, 404 U.S. at 324.

[187] U.S. CONST. amend. VI (emphasis added).

[188] P.L. 96-456, *codified at* 18 U.S.C. app. 3 § 1-16.

[189] MIL. R. EVID. 505, MIL. COMM. R. EVID. 505

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 he already has as part of his defense, and the interests of national security require sequestration of that information from the general public.[190] However, in the case of 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. To that end, both CIPA and the Federal Rules of Criminal Procedure (FED. R. CRIM. P.) 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.[191]

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 FED. R. CRIM. P. 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*,[192] refers to information in the prosecution's possession which is exculpatory, or 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,"[193] but, whether information held exclusively by elements of the intelligence community could fall within this category does not appear to have been addressed.[194]

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*,[195] the Court noted the high

[190] 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.

[191] 18 U.S.C. app. 3 § 3; FED. R. CRIM. P. 16(d)(1).

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

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

[194] *But, see United States v.Libby*, 429 F. Supp. 2d 1 (D.D.C. March 10, 2006) (holding that, on the facts of this case, the CIA was closely aligned with special prosecutor for purposes of *Brady*).

[195] *Jencks v. U.S.*, 353 U.S. 657 (1957) (holding that, in a criminal prosecution, the government may not withhold (continued...)

impeachment value a witness' prior statements can have, both to show inconsistency or incompleteness of the in court testimony. Subsequently, this requirement was codified by the Jencks Act.[196]

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.[197] 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.[198]

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.[199] Under the FED. R. CRIM. P., a defendant may request a deposition in order to preserve testimony at trial.[200] 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.[201] However, the government refused to produce the deponents citing national security concerns.[202]

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.[203] Instead, the appropriate standard was whether the substitutes put the defendant in substantially the same position he would have been absent the government's national security concerns.[204] Here, the Fourth Circuit

(...continued)

documents relied upon by government witnesses, even where disclosure of those documents might damage national security interests).

[196] *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.

[197] 18 U.S.C. app. 3, § 4.

[198] *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).

[199] *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

[200] 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.

[201] *Moussaoui*, 382 F.3d at 458, 473-475.

[202] *Id.* at 459.

[203] *Id.* at 477.

[204] *Id.*

seemed to indicate that government-produced summaries of the witnesses' statements, with some procedural modifications, could be adequate substitutes for depositions.[205]

Within the courts-martial framework, the use of and potential disclosure of classified information is addressed in MIL. R. EVID. 505. The Rule applies at all stages of proceedings, including during discovery.[206] 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.[207] 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.[208] 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.[209]

Disclosure of classified information during a military commission is governed by the MIL. COMM. R. EVID. 505, which implements restrictions on the release of information to protect the national security found in the MCA.[210] 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.[211] 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. The military judge, upon motion of the government, has the authority to modify and/or substitute classified evidence during discovery, and ultimately may dismiss the charges or specifications with or without prejudice if he feels that the fairness of the proceeding will be compromised.[212] Additionally, when classified information is provided to the defense, modified or not, the military judge may issue a protective order to guard against the compromise of the information.[213]

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 disclosure to the defendant. One proposed scenario might be the physical exclusion of the defendant from those portions of the trial, while

[205] *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.

[206] MIL. R. EVID. 505(d).

[207] *Id.*

[208] MIL. R. EVID. 505(e).

[209] *Id.*

[210] *See* 10 U.S.C. §§ 949d(f), 949j(c).

[211] MIL. COMM. R. EVID. 505(d).

[212] MIL. COMM. R. EVID. 505(e)(3), (4).

[213] MIL. COMM. R. EVID. 505(e)(1).

allowing the defendant's counsel to remain present.[214] However, such proceedings could be viewed as unconstitutionally infringing upon the defendant's Sixth Amendment right to confrontation.[215]

Historically, defendants have had the right to be present during the presentation of evidence against them, and to participate in their defense.[216] But other courts have approved of procedures which do not go so far as to require the defendant's physical presence. In *United States v. Abu Ali*, the Fourth Circuit permitted video conferences to allow the defendant to observe, and be observed by, witnesses that were being deposed in Riyadh, Saudi Arabia.[217] 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.[218] Here, the Fourth Circuit cited the protection of national security as satisfying the "important public policy" requirement. 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.[219]

Arguments alleging that protective orders violate the Confrontation Clause because they do not allow the participation of the defendant may also be undercut in the classified information context because, in some cases, the excluded defendant is not believed to have knowledge of the information being presented.[220] Therefore, his ability to provide his counsel with rebuttal information for cross examination purposes may be reduced. 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, § 3 of CIPA does authorize the court to issue protective orders preventing disclosure of classified information to the defendant by defense counsel.

Under CIPA, the admissibility of classified information at trial is determined at a pre-trial 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

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

[215] *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").

[216] *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).

[217] *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.

[218] *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).

[219] *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).

[220] Arguably, if the defendant is already aware of the information, the need to prevent disclosure to him is lessened.

redacted version is determined in an adversarial proceeding in which both prosecutors and defense counsel have full access to the underlying information.[221]

In the courts-martial context, MIL. R. EVID. 505 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.[222] 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.[223]Additionally, the military judge has the authority to order a protective order to prevent the disclosure of classified evidence that has been disclosed by the government to the accused.[224] 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.[225]

In another departure from the rules governing courts-martial, the military judge in a military commission 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.[226] An *in camera* presentation of classified information is also available as part of the military commission proceeding, however, the detainee may be excluded from the presentation in order to maintain the classified nature of the material and thereby protect the national security.[227] In this scenario, the detainee will not have access to the information, but his defense counsel will be able to argue the release of the information on behalf of the detainee.[228]

The MCA does not explicitly provide an opportunity for the accused to contest the admissibility of substitute evidence proffered under these procedures. It does not appear to permit the accused or his counsel to examine the evidence or a proffered substitute prior to its presentation to the military commission. If constitutional standards required by the Sixth Amendment are applicable to military commissions, the MCA 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.[229] On the other hand, if

[221] 18 U.S.C. app. 3 § 6.

[222] MIL. R. EVID. 505(f).

[223] MIL. R. EVID. 505(I).

[224] MIL. R. EVID. 505(G).

[225] MIL. R. EVID. 5050(F).

[226] MIL. COMM. R. EVID. 505(E)(6).

[227] MIL. COMM. R. EVID. 505(h)(3).

[228] *Id.*

[229] *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 (continued...)

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.[230]

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 by which 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.

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– i.e., federal civilian 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 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. Legislative proposals may be considered which address these issues, though the nature of such measures may be shaped by constitutional constraints.

The issues raised by the closure of the Guantanamo detention facility have broader 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 "war on terror" and in future armed conflicts.

(...continued)

was voluntary and need not be suppressed).

[230] *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.").

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