Closing the Guantanamo Detention Center: Legal Issues

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Summary

Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which granted the President the authority "to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks" against the United States. Many persons subsequently captured during military operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station at Guantanamo Bay, Cuba, for detention and possible prosecution before military tribunals. Although nearly 800 persons have been transferred to Guantanamo since early 2002, the substantial majority of Guantanamo detainees have ultimately been transferred to another country for continued detention or release. The 192 detainees who remain fall into three categories: (1) persons placed in non-penal, preventive detention to stop them from rejoining hostilities; (2) persons who have faced or are expected to face criminal charges; and (3) persons who have been cleared for transfer or release, whom the United States continues to detain pending transfer. Although the Supreme Court ruled in *Boumediene v. Bush* that Guantanamo detainees may seek *habeas corpus* review of the legality of their detention, several legal issues remain unsettled, including the extent to which other constitutional provisions apply to noncitizens held at Guantanamo.

On January 22, 2009, President Obama issued an Executive Order requiring the closure of the Guantanamo detention facility no later than a year from the date of the Order. Although this deadline has not been met, the Administration has stated that it remains committed to closing the facility as expeditiously as possible. Numerous legislative proposals have been introduced in the 111th Congress concerning the potential closure of the Guantanamo facility. Congress has enacted several appropriations measures which contain provisions restricting funds from being used to transfer detainees into the United States for release or purposes other than prosecution. These measures also limit funds from being used to transfer detainees into the country for purposes of prosecution unless certain reporting requirements to Congress are first fulfilled. The National Defense Authorization Act for FY2010 (P.L. 111-84) also contains provisions modifying the rules for military commissions, which may have implications for Guantanamo detainees. For more information, see CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Anna C. Henning, and CRS Report R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, by Jennifer K. Elsea.

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 from the protections owed to persons held outside the United States. 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. This report provides an overview of major legal issues likely to arise as a result of executive and legislative action to close the Guantanamo detention facility. It discusses legal issues related to the transfer of Guantanamo detainees (either to a foreign country or into the United States), the continued detention of such persons in the United States, and the possible removal of persons brought into the country. It also discusses selected constitutional issues that may arise in the criminal prosecution of detainees, emphasizing the procedural and substantive protections that are utilized in different adjudicatory forums (i.e., federal civilian courts, court-martial proceedings, and military commissions).

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Introduction

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

Although nearly 800 persons have been transferred to Guantanamo since early 2002, the substantial majority of Guantanamo detainees have ultimately been transferred to a third country for continued detention or release.[2] The 192 detainees who remain fall into three categories:

- Persons who have been placed in preventive detention to stop them from returning to the battlefield (formerly labeled "enemy combatants" by the Bush Administration[3]). Preventive detention of captured belligerents is non-penal in nature, and must be ended upon the cessation of hostilities.
- Persons who, besides being subject to preventive detention, have been brought or are expected to be brought before a military or other tribunal to face criminal charges, including for alleged violations of the law of war. If convicted, such persons may be subject to criminal penalty, which in the case of the most severe offenses may include life imprisonment or death.

[1] P.L. 107-40.

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

[3] In March 2009, the Obama Administration announced a new definitional standard for the government's authority to detain terrorist suspects, which does not use the phrase "enemy combatant" to refer to persons who may be properly detained. The new standard is similar in scope to the "enemy combatant" standard used by the Bush Administration to detain terrorist suspects. Like the former standard, the new standard would permit the detention of members of the Taliban, Al Qaeda, and associated forces, along with persons who provide support to such groups, regardless of whether such persons were captured away from the battlefield in Afghanistan. However, in contrast to the former standard, the new definition specifies that persons may be detained on account of support provided to Al Qaeda, the Taliban, or associated forces only if such support is "substantial." Department of Justice, "Department of Justice Withdraws 'Enemy Combatant' Definition for Guantanamo Detainees," press release, March 13, 2009, http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html; In re Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held At Guantanamo Bay, No. 08-0442, filed March 13, 2009 (D.D.C.). In December 2009, a D.C. Circuit panel endorsed the somewhat broader definitional standard used by the Bush Administration to describe Executive authority to detain terrorist suspects, though this ruling has no effect upon the Obama Administration's decision to no longer refer to terrorist suspects as "enemy combatants." *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 10411 (D.C. Cir. Jan. 5, 2010). In October 2009, Congress modified rules for military commissions pursuant to the National Defense Authorization Act for Fiscal Year 2010, including by providing commissions with jurisdiction over alien "unprivileged enemy belligerents." P.L. 111-84, § 1802 (amending, *inter alia*, 10 U.S.C. §§ 948a-948b). Commissions previously could exercise jurisdiction over alien "unlawful enemy combatants." 10 U.S.C. § 948c (2008). Despite the difference in nomenclature, the two terms are used to refer to similar categories of persons.

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

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

The legal support for this policy was significantly eroded by a series of Supreme Court rulings permitting Guantanamo detainees to seek judicial review of the circumstances of their detention. Although Congress attempted to limit federal courts' jurisdiction over detainees through the enactment of the Detainee Treatment Act of 2005 (DTA, P.L. 109-148, Title X) and the Military Commissions Act of 2006 (MCA, P.L. 109-366), these efforts were subject to judicial challenge. In 2008, the Supreme Court ruled in *Boumediene v. Bush* that the constitutional writ of *habeas corpus* extends to noncitizens held at Guantanamo, and found that provisions of the DTA and MCA eliminating federal *habeas* jurisdiction over Guantanamo detainees acted as an unconstitutional suspension of the writ.[5] As a result, Guantanamo detainees may seek *habeas* review of the legality of their detention. Nonetheless, several legal issues remain unsettled, including the scope of *habeas* review available to Guantanamo detainees, the remedy available for those persons found to be unlawfully held by the United States, and the extent to which other constitutional provisions extend to noncitizens held at Guantanamo.[6] Some of these issues may be addressed by the Supreme Court in the case of *Kiyemba v. Obama*,[7] which is scheduled to be heard later this term.

On January 22, 2009, President Barack Obama issued an Executive Order requiring that the Guantanamo detention facility be closed as soon as practicable, and no later than a year from the date of the Order.[8] Any persons who continue to be held at Guantanamo at the time of closure are to be either transferred to a third country for continued detention or release, or transferred to another U.S. detention facility. The Order further requires specified officials to review all Guantanamo detentions to assess whether the detainee should continue to be held by the United States, transferred or released to a third country, or be prosecuted by the United States for

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

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

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

[7] *Kiyemba v. Obama*, 555 F.3d 1022, *cert. granted*, 130 S.Ct. 458 (Oct. 20, 2009).

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

criminal offenses.[9] Reviewing authorities are required to identify and consider the legal, logistical, and security issues that would arise in the event that some detainees are transferred to the United States. The Order also requires reviewing authorities to assess the feasibility of prosecuting detainees in an Article III court. During this review period, the Secretary of Defense is required to take steps to ensure that all proceedings before military commissions and the United States Court of Military Commission Review are halted. On the same day that the Executive Order to close the Guantanamo detention facility was issued, President Obama issued two other Executive Orders which created separate task forces—the Special Task Force on Detainee Disposition and the Special Task Force on Interrogation and Transfer Policies—charged with reviewing aspects of U.S. detention policy, including the options available for the detention, trial, or transfer of wartime detainees, whether held at Guantanamo or elsewhere.[10] Although these task forces are distinct from the task force responsible for reviewing Guantanamo detentions, their work and recommendations may have implications on U.S. policy with respect to Guantanamo.

On November 13, 2009, the Departments of Justice and Defense made an announcement regarding the forums in which 10 Guantanamo detainees, who had previously been charged before military commissions, would be tried.[11] The Department of Justice intends to bring charges against five of these detainees in the U.S. District Court for the Southern District of New York for criminal offenses related to the 9/11 terrorist attacks.[12] Once charges against these detainees are brought in federal civilian court, the military commission charges pending against them shall be withdrawn. The detainees will be transferred to the United States for trial once all legal requirements are met, including the completion of a 45-day notice period following the submission of relevant reports to Congress, as well as consultation with state and local authorities.[13] The Attorney General and Secretary of Defense also determined that military commission proceedings against the five other Guantanamo detainees may be resumed.[14]

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

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

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

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

[13] DOJ Announcement, *supra* footnote 11. The requirements are imposed by provisions contained in the Supplemental Appropriations Act, 2009 (P.L. 111-32, § 14103), Department of Homeland Security Appropriations Act, 2010 (P.L. (continued...)

Although its deadline for the closure of the Guantanamo detention facility has not been met, the Administration has stated that it remains committed to closing the facility as expeditiously as possible. In December 2009, President Obama issued a memorandum directing the Attorney General and Secretary of Defense to take steps to acquire the Thomson Correctional Facility in Thomson, Illinois, so that at least some Guantanamo detainees may be relocated there for continued internment.[15]

On January 22, 2010, the *Washington Post* reported that the Guantanamo Task Force had completed review of detainees currently held at Guantanamo. The Task Force has reportedly decided that, of the detainees currently held, "about 35 … should be prosecuted in federal or military courts; at least 110 … can be released, either immediately or eventually; and … nearly 50 … must be detained without trial" in preventive detention.[16]

The *New York Times* has reported that Administration officials do not believe that the closure of the Guantanamo detention facility can be effectuated until 2011.[17] The delay in effectuating the closure of Guantanamo is at least partially based on current legislative bars on the use of funds to effectuate the transfer of detainees into the United States for reasons other than prosecution, as well as the need for additional appropriations to acquire and secure the Thomson facility in order to house relocated detainees.[18]

The possible 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 from those available to persons held at Guantanamo or elsewhere. This may have implications for the continued detention or prosecution of persons transferred to the United States. The transfer of detainees to the United States may have additional consequences, as some detainees might qualify for asylum or other protections under immigration law. The Executive Order issued by President Obama also contemplates that the Administration "work with Congress on any legislation that may be appropriate" relating to the transfer of detainees to the United States.[19]

(...continued)

111-83, § 552), National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84, § 1041), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88, § 428), the Consolidated Appropriations Act, 2010 (P.L. 111-117, Div. B, § 532), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118, § 9011).

[14] DOJ Announcement, *supra* footnote 11. In a legal brief filed with the D.C. Circuit in January 2010, the government noted that the Attorney General decided that the prosecution of an additional detainee should occur before a military commission, and the convening authority of military commissions must now decide whether to refer charges against the detainee to a military commission. A copy of this brief is available at http://a.abcnews.go.com/images/Politics/Final_Brief.pdf.

[15] Presidential Memorandum Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantanamo Bay Naval Base, 75 *Federal Register* 1015, December 15, 2009.

[16] Peter Finn, "Justice Task Force Recommends about 50 Detainees Be Held Indefinitely," *Washington Post*, January 22, 2009.

[17] Charlie Savage, "Plan to Move Guantánamo Detainees Faces New Delay," *New York Times*, December 22, 2009.

[18] *Id.*

[19] Executive Order, *supra* footnote 8, at § 4(c)(5).

Legislative proposals introduced during the 111th Congress offer dramatically different approaches to the transfer, detention, and prosecution of Guantanamo detainees. Whereas some bills effectuate goals articulated in Executive Orders or codify presidential policies into statute, others reverse or adjust the approach taken by the Executive. Various proposals provide options for disposition of detainees subsequent to closure of the detention facility, clarify the immigration status of detainees transferred into the United States, require criminal prosecutions of detainees to occur in a specified forum (i.e., in federal civilian court, in courts-martial proceedings, or before military commissions), amend procedural rules governing detainee prosecutions, limit the use of U.S. funds for transferring detainees, or pursue other measures. The Supplemental Appropriations Act, 2009 (P.L. 111-32), Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), the Consolidated Appropriations Act, 2010 (P.L. 111-117), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118), all contain provisions barring funds from being used to transfer Guantanamo detainees into the United States for release or purposes other than prosecution, and also restrict funds from being used to transfer detainees into the country for prosecution prior to the submission of certain reports to Congress. The National Defense Authorization Act also contains provisions modifying the rules for military commissions, which may have implications for Guantanamo detainees. The scope and effect of legislative proposals concerning Guantanamo detainees may be shaped by constitutional constraints. For further discussion of the legislation introduced in the 111th Congress concerning Guantanamo detainees and military commissions, see CRS Report R40754, *Guantanamo Detention Center: Legislative Activity in the 111th Congress*, by Anna C. Henning; and CRS Report R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, by Jennifer K. Elsea.

This report provides an overview of major legal issues that are likely to arise as a result of executive and legislative action to close the Guantanamo detention facility. It discusses legal issues related to the transfer or release of Guantanamo detainees (either to a foreign country or into the United States), the continued detention of such persons in the United States, and the possible removal of persons brought to the United States. It considers selected constitutional issues that may arise in the criminal prosecution of detainees, emphasizing the procedural and substantive protections that exist in different adjudicatory forums. Issues discussed include detainees' right to a speedy trial, the prohibition against prosecution under ex post facto laws, and limitations upon the admissibility of hearsay and secret evidence in criminal cases. These issues are likely to be relevant not only to the treatment of Guantanamo detainees, but also to other terrorist suspects 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 other countries for continued detention or release, some proposals to close the Guantanamo detention facility have contemplated transferring at least some detainees to the United States, either for continued detention or, in the case of some detainees who are not considered a threat to U.S. security, possible release.[20]

[20]Initially, the Obama Administration considered the possibility of releasing at least some Guantanamo detainees who are not considered a threat into the United States. *See* Director of National Intelligence Dennis Blair, "Media (continued...)

Transfer/Release of Guantanamo Detainees to a Country other than the United States

The vast majority of persons initially transferred to Guantanamo for preventive detention have been transferred to other countries, either for continued detention by the receiving country or for release.[21] Decisions to transfer a detainee to another country have been based upon a determination by U.S. officials that (1) the detainee is not an enemy combatant or (2) while the detainee was properly designated as an enemy combatant, his continued detention by the United States is no longer warranted.[22] A decision by military authorities that the continued detention of an enemy combatant is no longer appropriate is based on a number of factors, including a determination that the detainee no longer poses a threat to the United States and its allies. Generally, if continued detention is no longer deemed necessary, the detainee is transferred to the control of another government for his release.[23] The DOD also transfers enemy belligerents to other countries for continued 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.[24]

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.[25] 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."[26]

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 ...

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Roundtable Discussion," March 26, 2009, available at http://www.dni.gov/interviews/20090326_interview.pdf. Congress subsequently enacted a series of appropriations and authorization measures that barred funds from being used to release Guantanamo detainees into the United States or specified U.S. territories. Supplemental Appropriations Act, 2009 (P.L. 111-32), Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), the Consolidated Appropriations Act, 2010 (P.L. 111-117), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118).

[21] *See* Guantanamo Docket, *supra* footnote 2.

[22] 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).

[23] *Id.*

[24] *Id.*

[25] 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.

[26] 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.

[Guantanamo detainees] to other countries where it believes it is more likely than not that they will be tortured."[27] 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.[28] The use of diplomatic assurances in Guantanamo transfer decisions is similar to the practice sometimes employed by U.S. authorities when determining whether the extradition of a person or the removal of an alien by immigration authorities would comply with CAT requirements. In April 2009, a D.C. Circuit panel held that a government determination that a detainee would not be tortured if transferred to a particular country is not subject to district court review in *habeas* proceedings challenging the proposed transfer.[29]

Of the persons held at Guantanamo who have been cleared for transfer or release, several dozen reportedly 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.[30] Whether future diplomatic efforts will effectuate the transfer of some or all of these persons to third countries remains to be seen.

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.[31] In January 2009, President Obama issued an Executive Order creating a special task force to review U.S. transfer policies to ensure compliance with applicable legal requirements.[32] In August, the task force issued recommendations to ensure that U.S. transfer practices comply with applicable standards and do not result in the transfer of persons to face torture.[33] These recommendations include strengthening procedures used to obtain assurances from a country that a person will not face torture if transferred there, including through the establishment of mechanisms to monitor the

[27] Benkert Declaration, *supra* footnote 22, at para. 6.

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

[29] *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) ("*Kiyemba II*"), rehearing *en banc* denied (July 27, 2009).

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

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

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

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

treatment of transferred persons. If implemented, such measures might impede the transfer of some Guantanamo detainees to third countries.

The Supplemental Appropriations Act, 2009 (P.L. 111-32), Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (P.L. 111-88), the Consolidated Appropriations Act, 2010 (P.L. 111-117), and the Department of Defense Appropriations Act, 2010 (P.L. 111-118) all contain provisions barring funds from being used to effectuate the transfer of a Guantanamo detainee to a foreign State unless, 15 days prior to such transfer, the President submits a classified report to Congress concerning the identity of the detainee, the risk the transfer poses to U.S. security, and the terms of any agreement with the receiving country concerning the acceptance of the individual, including any financial assistance related to the agreement.

Transfer of Detainees into the United States

Most proposals to end the detention of foreign belligerents at Guantanamo contemplate the transfer of at least some detainees into the United States, either for continued preventive detention, prosecution before a military or civilian court, or in the case of detainees who are not deemed a threat to U.S. security, possible release. As mentioned earlier, several appropriations and authorization measures enacted by Congress have barred funds from being used to effectuate the release of Guantanamo detainees into the United States. They also bar the use of appropriated funds to transfer detainees into the United States (and specified territories), but provide an exception for the transfer of detainees for prosecution or continued detention during legal proceedings[34] when the President fulfills specified reporting requirements.

The transfer of detainees into the United States may have implications under immigration law. The Immigration and Nationality Act (INA) establishes rules and requirements for the entry and presence of aliens in the United States, and provides grounds for the exclusion or removal of aliens on account of certain activities. The INA generally bars the entry into the United States or continued presence of aliens involved in terrorism-related activity.[35] Under current law, most persons currently detained at Guantanamo would generally be barred from admission into the United States on terrorism- and other security-related grounds under normal circumstances. Even if a detainee is not inadmissible or removable ("deportable") on such grounds, he may still be inadmissible or removable under other INA provisions.[36] Accordingly, even in the absence of recent legislative enactments barring the use of funds to release Guantanamo detainees into the United States, the INA would generally preclude most detainees from being released into the country, as such aliens would be subject to removal under immigration law.

[34] P.L. 111-32, § 14103(c); P.L. 111-83, § 552(c); P.L. 111-88, § 428(c); P.L. 111-117, § 532(c); P.L. 111-118, §9011(c). Because the phrase "legal proceedings" is not defined in any of the acts or discussed in any detail in their legislative history, it is unclear what it encompasses. P.L. 111-32 was the first measure in which the phrase "for the purposes of prosecuting such individual, or detaining such individual during legal proceedings" appears. The conference report for that act states that the agreed-upon language "prohibits current detainees from being transferred to the U.S., except to be prosecuted," H.Rept. 111-151 at 141, which suggests a narrow meaning of the phrase. An alternative argument might be that the phrase "legal proceedings" arguably extends to non-prosecution proceedings such as resolution of petitions for habeas corpus relief.

[35] 8 U.S.C. § 1182(a)(3); 8 U.S.C. § 1227(a)(4). For background, see CRS Report RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, by Michael John Garcia and Ruth Ellen Wasem.

[36] *See* 8 U.S.C. § 1182 (grounds for alien inadmissibility); 8 U.S.C. § 1227 (grounds for deportation).

The INA's restrictions upon the entry of certain categories of aliens do not appear to necessarily bar executive authorities from transferring wartime detainees into the United States for continued detention or prosecution. During World War II, reviewing courts did not consider an alien prisoner of war's involuntary transfer to the United States for purposes of military detention to constitute an "entry" under immigration laws.[37] Although immigration laws have been amended since that time to expressly apply to certain categories of aliens involuntarily brought to the United States (e.g., those individuals apprehended in U.S. or international waters),[38] these modifications do not directly address the ability of the United States to intern alien enemy belligerents in the United States. Additionally, it could be argued that the 2001 AUMF, which grants the President authority to use all "necessary and appropriate force" against those responsible for the 9/11 attacks, impliedly authorizes the President to detain captured belligerents in the United States, even though such persons would generally be barred from entry under the INA.[39]

Even assuming that the INA's restrictions on alien admissibility are applicable to military detainees, the executive branch could still effectuate their transfer into the United States pursuant to its "parole" authority. In the immigration context, parole is a discretionary authority that may be exercised on a case-by-case basis to permit inadmissible aliens to physically enter the United States, including when the alien's entry or stay serves a "significant public benefit."[40] The entry

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

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

[39] 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.

[40] 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.

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]."[41] The executive branch may opt to use its parole authority with respect to transferred detainees in order to clarify their immigration status in case they are required to be released from U.S. custody.

As discussed later, an alien's physical presence in the United States, even in cases where the alien has been paroled into the country, may result in the alien becoming eligible for asylum or other forms of immigration-related relief from removal. Several bills introduced during the 111th Congress address the application of federal immigration laws to the transfer of detainees to the United States and clarify the immigration status of detainees transferred into the country.[42] Notably, the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), contains a provision barring any funds made available under the act from being

> used to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantanamo Bay, Cuba.[43]

The Department of Homeland Security Appropriations Act also amends Title 49 of the United States Code to require the placement of any person who has been detained at Guantanamo on the No Fly List, unless the President certifies to Congress that the detainee poses no threat to the United States, its citizens, or its allies.[44]

Detention and Treatment of Persons Transferred to the United States

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

Authority to Detain within the United States

Guantanamo detainees properly determined to be enemy belligerents may be held in preventive detention by military authorities even if transferred to the United States. In the 2004 case of *Hamdi v. Rumsfeld*, a majority of the Supreme Court recognized that, as a necessary incident to the 2001 AUMF, the President is authorized to detain persons captured while fighting U.S. forces in Afghanistan for the duration of the conflict.[45] A divided Supreme Court also declared that "a

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

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

[43] P.L. 111-83, § 552(f) (2009).

[44] *Id.* at § 553.

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

state of war is not a blank check for the president," and ruled that persons who had been deemed "enemy combatants" by the Bush Administration had the right to challenge their detention before a judge or other "neutral decision-maker."[46]

While the preventive detention of enemy belligerents is constitutionally acceptable, the scope of persons potentially falling under this category remains uncertain. The *Hamdi* plurality was limited to an understanding that the phrase "enemy combatant" includes an "individual who ... was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there."[47] 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 "support" for hostile forces necessary to acquire enemy belligerent status, or describe the 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.[48] However, prior to the Supreme Court considering the merits of the case, al-Marri was indicted by a federal grand jury for providing material support to Al Qaeda and conspiring with others to provide such support. The government immediately requested that the Supreme Court dismiss al-Marri's pending case and authorize his transfer from military to civilian custody for criminal trial. On March 6, 2009, the Supreme Court granted the government's application concerning the transfer of al-Marri, vacated the Fourth Circuit's judgment, and remanded the case back to the appellate court with instructions to dismiss the case as moot.[49]

As a result, the scope of the Executive's authority to militarily detain persons captured away from the battlefield, including alleged members or associates of Al Qaeda or the Taliban who did not directly engage in hostilities against the United States or its coalition partners, will likely remain a matter of continuing dispute. Federal district court judges who have considered *habeas* claims by Guantanamo detainees have differed in their assessment of the scope of the President's authority to detain persons under the AUMF.[50]

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

[47] *Id.* at 526.

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

[49] *Al-Marri v. Spagone*, 129 S.Ct. 1545 (2009).

[50] *See, e.g.*, *Mattan v. Obama*, 618 F.Supp.2d 24 (D.D.C., May 21, 2009) (Lamberth, C.J.).(while AUMF and laws of war granted the Executive the authority to detain persons who were "part of" the Taliban , Al Qaeda, or associated forces, this authority did not extend to non-members who provided "support" to such forces, though support for such groups would be considered when determining whether a detainee was "part of" them); *Hamlily v. Obama*, 616 F.Supp.2d 63 (D.D.C. 2009) (Bates, J.) (same); *Gherebi v. Obama*, 609 F.Supp.2d 43 (D.D.C.,2009) (Walton, J.) (President has authority to detain persons who were "part of" or "substantially supported" Al Qaeda or the Taliban, so long as those terms are understood to include only those persons who were members of the enemy forces' armed forces at the time of capture); *Al-Adahi v. Obama*, 2009 WL 2584685 (D.D.C., August 21, 2009) (Kessler, J.) (same);.*Boumediene v. Bush*, 583 F.Supp.2d 133 (D.D.C.,2008) (applying "enemy combatant" definition employed by DOD in 2004 for use in Combatant Status Review Tribunal proceedings, which covered persons who were "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its (continued...)

In January 2010, a three-judge panel of the D.C. Circuit Court of Appeals considered the scope of executive detention authority in the case of *Al-Bihani v. Obama*.[51] In an opinion supported in full by two members of the panel,[52] the appellate court endorsed the definitional standard for the Executive's detention authority that had initially been asserted by the Bush Administration (and which was somewhat circumscribed by the Obama Administration[53]); namely, that the President may detain those persons who were "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[54] While the panel concluded that either support for or membership in an AUMF-targeted organization may be independently sufficient to justify detention, it declined "to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard."[55] It did, however, note that this standard would, for example, permit the detention of a "civilian contractor" who "purposefully and materially supported" an AUMF-targeted organization through "traditional food operations essential to a fighting force and the carrying of arms."[56] The standard endorsed by the panel will be controlling for the D.C. Circuit unless the decision is overturned either by the Circuit Court of Appeals sitting *en banc* or the Supreme Court.

In the absence of legal authority to militarily detain a terrorist suspect, U.S. military authorities must generally release the person from custody. However, there may be grounds for the person's continued detention by U.S. law enforcement or immigration authorities. If a former detainee brought to the United States is charged with a federal crime, a judicial officer may order his pretrial detention following a hearing in which it is determined that no other conditions would reasonably assure the individual's appearance for trial or the safety of the community or another individual.[57] 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.[58]

(...continued)

coalition partners … [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces").

[51] *Al-Bihani v. Obama*, No. 09-5051, 2010 WL 10411 (D.C. Cir. Jan. 5, 2010).

[52] A third member of the panel issued a separate opinion concurring with the majority's judgment. However, the opinion did not clearly endorse the majority's view as to the scope of the Executive's detention authority. *See* id., 2010 WL 10411 at *14-15 (Williams, J., concurring) (arguing that petitioner was detainable on account of being "part of" an AUMF-targeted organization, but not deciding whether a person could be detained on account of "support" for a targeted organization that he was not also a "part of").

[53] *See supra* footnote 3. In contrast, the Obama Administration espoused a standard which specified that such support must be "substantial."

[54] *Al-Bihani*, No. 09-5051, 2010 WL 10411 at *2.

[55] *Id.* at *4.

[56] *Id.* at *4-5. The panel found that even if petitioner was not a member of an AUMF-targeted organization, his service as a cook for a military brigade affiliated with Taliban and Al Qaeda forces, in addition to his accompaniment of the brigade during military operations, constituted sufficient grounds for his detention. *Id.*

[57] 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).

[58] 18 U.S.C. § 3144.

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.[59] Following a final order of removal,[60] 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.[61] 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.[62] However, those aliens who are specially dangerous to the community may be subject to continued detention, subject to periodic review. Immigration regulations permit the continued detention of certain categories of aliens due to special circumstances, including, *inter alia*, any alien who is detained on account of (1) serious adverse foreign policy consequences of release; (2) security or terrorism concerns; or (3) being considered specially dangerous due to having committed one or more crimes of violence and having a mental condition making it likely that the alien will commit acts of violence in the future.[63]

Some proposals in the 111th Congress would clarify executive authority to detain certain wartime detainees.[64] 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. Although in prior conflicts the United States interned "enemy aliens" and U.S. citizens who did not participate in hostilities against the United States,[65] the scope and effect of proposals

[59] 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.

[60] 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).

[61] 8 U.S.C. § 1231(a)(2).

[62] In *Zadvydas v. Davis*, the Supreme Court concluded that the indefinite detention of deportable aliens (i.e., aliens admitted into the United States who were subsequently ordered removed) would raise significant due process concerns. The Court interpreted an applicable immigration statute governing the removal of deportable and inadmissible aliens as only permitting the detention of aliens following an order of removal for so long as is "reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *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).

[63] 8 C.F.R. § 241.14.

[64] *See, e.g.*, Enemy Combatant Detention Review Act of 2009, H.R. 630, 111th Cong. (2009) (authorizing detention of persons who have engaged in hostilities or purposefully supported Al Qaeda, the Taliban, or associated organizations).

[65] 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 (continued...)

requiring the detention of specified categories of persons other than enemy combatants may be subject to constitutional challenges.

Treatment of Detained Persons

The rules governing the treatment of Guantanamo detainees would largely remain unchanged if detainees were transferred to the United States. The DTA provides that no person in the custody or effective control of the DOD or detained in a DOD facility shall be subject to any interrogation treatment or technique that is not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation, unless the person is being held pursuant to U.S. criminal or immigration laws (in which case the detainee's interrogation would be governed by applicable criminal or immigration law enforcement standards).[66] The Field Manual requires all detainees to be treated in a manner consistent with the Geneva Conventions, and prohibits the use of torture or cruel, inhuman, and degrading treatment in any circumstance. In the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court found that, at a minimum, Common Article 3 of the Geneva Conventions applied to persons captured in the conflict with Al Qaeda.[67] 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."[68] 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.[69] In February 2009, a D.C. Circuit panel held in the case of *Kiyemba v. Obama* that the Constitution's due process protections do not extend to Guantanamo detainees.[70] On October 20, 2009, the Supreme

(...continued)

constitutionally permissible. *See generally* CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea. *See also Johnson v. Eisentrager*, 339 U.S. 763, 775(1950) ("The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists."); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding President's authority to detain and remove a German citizen pursuant to the Alien Enemy Act). Whether more recent legal developments concerning the due process protections owed to noncitizens have come to limit this authority remains to be seen.

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

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

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

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

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

Court agreed to hear an appeal of the appellate court's ruling, and arguments will likely be heard later this year.[71] Regardless of the Constitution's application to persons held at Guantanamo, the DTA and MCA prohibit any person in U.S. custody or control (including those located at Guantanamo or elsewhere outside U.S. territory) from being subjected to cruel, inhuman, or degrading treatment of the kind prohibited by the Fifth, Eighth, and Fourteenth Amendments.[72]

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.[73]

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."[74] 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.[75] While measures that eliminate detainees' ability to pursue statute- or treaty-based challenges to aspects

[71] *Kiyemba v. Obama*, 130 S.Ct. 458 (October 20, 2009).

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

[73] 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.

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

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

of their detention may be deemed permissible by a reviewing court,[76] 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.[77] 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 another country than those held abroad, and may potentially seek judicial review of transfer decisions through *habeas* proceedings.

CAT Article 3 and its implementing legislation prohibit the transfer of detainees from the United States to countries where they would more likely than not face torture. This prohibition is absolute and without regard to whether an individual has been involved in terrorist or criminal activity. While the Bush Administration took the position that CAT Article 3 and its implementing legislation do not govern the transfer of detainees held outside the United States, there appears to be little if any dispute regarding CAT's application to transfers from the United States. [78]

[76] *See* Al-Bihani v. Obama, No. 09-5051, 2010 WL 10411, at *6 (D.C. Cir. Jan. 5, 2010) (2006 MCA precluded petitioner from raising claim that government's failure to accord him prisoner of war status violated Geneva Convention requirements). *Noriega v. Pastrana*, 564 F.3d 1290 (11th Cir. 2009) (MCA precluded petitioner, a designated prisoner of war under the Geneva Conventions, from invoking Conventions in challenge to his proposed extradition to France).

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

[78] 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. Bus*h, 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).

Detainees transferred to the United States who may no longer be held by military authorities might potentially seek relief from removal under U.S. immigration laws. An alien who is physically present or arrives in the United States, regardless of immigration status, may apply for asylum, a discretionary form of relief from removal available to aliens who have a well-founded fear of persecution if transferred to another country. Persons granted asylum may thereafter apply for adjustment of status to that of a legal permanent resident. Certain potentially over-lapping categories of aliens are disqualified from asylum eligibility, including those involved in terrorism-related activity (including members of the Taliban and Al Qaeda) and those who are reasonably believed to pose a danger to U.S. security.[79] Nonetheless, it is possible that some detainees who have been found not to have fought on behalf of the Taliban or Al Qaeda may qualify for asylum or other forms of relief from removal if transferred to the United States. Further, if a detainee is declared ineligible for asylum or another form of relief from removal and is thereafter ordered removed by immigration officials, immigration authorities may be required to provide evidence forming the basis of this determination in the face of a legal challenge by the detainee.[80] It is important to note that asylum only constitutes relief from removal under immigration laws. It would not bar the transfer of a detainee pursuant to some other legal authority (e.g., extradition).

As discussed, proposals may be considered that would clarify the application of immigration laws to Guantanamo detainees transferred to the United States. Secretary of Defense Gates has stated that the Obama Administration will seek legislation from Congress addressing detainees' immigration status, possibly including barring them from asylum eligibility.[81] As previously mentioned, the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), contains a provision barring any funds made available under the act from being used to provide any immigration benefit to Guantanamo detainees brought to the United States, or to provide for a detainee's classification as a refugee or applicant for asylum.[82]

Detainees' Rights in a Criminal Prosecution

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

As previously discussed, the nature and extent to which the Constitution applies to noncitizens detained at Guantanamo is a matter of continuing legal dispute. Although the Supreme Court held in *Boumediene* that the constitutional writ of *habeas* extends to detainees held at Guantanamo, it left open the nature and degree to which other constitutional protections, including those relating

[79] 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).

[80] 8 U.S.C. § 1252.

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

[82] P.L. 111-83, § 552(f) (2009).

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."[83] The Court has also repeatedly recognized that at least some constitutional protections are "unavailable to aliens outside our geographic borders."[84] The application of constitutional principles to the prosecution of aliens located at Guantanamo remains unsettled.

On the other hand, it is clear that if Guantanamo detainees are subject to criminal prosecution in United States, the constitutional provisions related to such proceedings would apply.[85] 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.[86] 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.'"[87] 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.[88] It is possible that the rights owed to enemy belligerents in criminal prosecutions would be interpreted more narrowly by a reviewing court than those owed to defendants in other, more routine cases, particularly when the constitutional right at issue is subject to a balancing test.

There are several forums in which detainees could potentially be prosecuted for alleged criminal activity, including in federal civilian court, in general courts-martial proceedings, or before military commissions. The procedural protections afforded to the accused in each of these forums may differ, along with the types of offenses for which the accused may be prosecuted. The MCA authorized the establishment of military commissions with jurisdiction to try alien "unlawful enemy combatants" for offenses made punishable by the MCA or the law of war, and afforded the accused fewer procedural protections than would be available to defendants in military courts-

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

[84] *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").

[85] *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").

[86] *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).

[87] *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).

[88] *See supra* footnote 65 and accompanying citations.

martial or federal civilian court proceedings.[89] The statutory framework for military commissions was amended in October 2009 by the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), so that the procedural protections afforded to the accused (now referred to as alien "unprivileged enemy belligerents"[90]) more closely resemble those found in military courts-martial proceedings, though differences between the two forums remain.[91] The modifications made by the National Defense Authorization Act are discussed in detail in CRS Report R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, by Jennifer K. Elsea. Critics raised questions regarding the constitutionality of the military commission system initially established by the MCA,[92] and some of these arguments may also be raised even following the amendments made by the National Defense Authorization Act. Courts have yet to rule on the constitutional legitimacy of many procedures used by military commissions. Military commissions are not statutorily restricted from exercising jurisdiction within the United States, and the Supreme Court has previously upheld the use of commissions against enemy belligerents tried in the United States.[93]

Presently, 10 Guantanamo detainees have charges referred for trial by military commission,[94] though ongoing proceedings in these cases were effectively halted following President Obama's Executive Order. The DOJ and DOD announced in November 2009 that prosecutions against five of these detainees may be resumed in that forum.[95]

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.[96] In June 2009, a Guantanamo detainee was transferred to the United States for prosecution in federal civilian court for his alleged role in the 1998 bombings of the U.S. embassies in Tanzania and Kenya.[97] In

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

[90] The term "unprivileged enemy belligerent" is defined to include an individual (other than a "privileged belligerent" belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War) who "(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter." P.L. 111-84, § 1802 (amending, *inter alia*, 10 U.S.C. § 948a).

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

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

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

[94] *See* Brookings Report Update, *supra* footnote 2 (listing detainees who have had charges referred to trial before a military commission as of October 21, 2009).

[95] DOJ Announcement, *supra* footnote 11.

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

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

November 2009, the DOJ and DOD announced that five more detainees shall be transferred into the country for prosecution before a federal civilian court for their alleged role in the 9/11 terrorist attacks.[98]

Although they have yet to be used for this purpose, military courts-martial could also be employed to try detainees by exercising jurisdiction under the Uniform Code of Military Justice (UCMJ) over persons subject to military tribunals under the law of war.[99] Detainees brought before military-courts martial could be charged with offenses under the UCMJ and the law of war, though courts-martial rules concerning the accused's right to a speedy trial, as well as statute of limitations issues, may pose an obstacle to prosecution.[100]

Presently, the Executive has discretion in deciding the appropriate forum in which to prosecute detainees. As previously discussed, President Obama has issued an Executive Order that (at least temporarily) effectively halted military commission trials, and also required designated officials to assess the feasibility of prosecuting some detainees in federal civilian court. It is possible that legislative proposals may be introduced which require prosecutions to occur in a particular forum or modify the procedural rules applicable to the prosecution of detainees. Pursuant to existing statutory authorization, the Executive could also potentially modify military commission procedural rules to some degree, including by amending existing procedures so that they more closely resemble those employed by courts-martial.[101] Proposals may also be considered to create an entirely new forum for the prosecution of detainees, such as a national security court.[102] 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 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.

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[98] DOJ Announcement, *supra* footnote 11.

[99] 10 U.S.C. § 818 ("General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.").

[100] *Id.*

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

[102] *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.

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.[103] 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.[104] 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.[105] A defendant can waive a right to assistance of counsel only if that waiver is knowing, voluntary, and intelligent.[106] However, the defendant need not fully and completely comprehend all of the consequences of that waiver.[107] This right also encompasses the right of a defendant to represent himself or herself, if the defendant intelligently and knowingly chooses to do so.[108] The Sixth Amendment right to counsel is the right to the effective assistance of counsel.[109] 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.[110] 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.[111]

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.[112] 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 court-martial by civilian counsel, if provided at no expense to the Government, and either by military counsel detailed under Article 27 of the UCMJ[113] or military counsel of the

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

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

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

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

[107] *Id.*

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

[109] *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).

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

[111] *United States v. Cronic*, 466 U.S. 648, 658 (1984).

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

[113] 10 U.S.C. § 827.

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.[114]

A detainee subject to a military commission has the right to represented by counsel.[115] 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.[116] 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.[117] However, in a departure from the rules governing courts-martial, the detainee initially did not have the right to be granted specific individual military counsel upon request. Pursuant to modifications to military commission procedures made by the National Defense Authorization Act for FY2010, the accused would now be able to select a military defense counsel of his choosing, if counsel is reasonably available.[118]

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.[119] 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.[120]

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

[115] 10 U.S.C. §§ 949a, 949c (as amended by P.L. 111-84, § 1802 (2009)).

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

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

[118] 10 U.S.C. § 949c (as amended by P.L. 111-84, § 1802 (2009)).

[119] *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").

[120] 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*, (continued...)

Under the leading Supreme Court case, *Miranda v. Arizona*, courts will not admit defendants' statements at trial unless law enforcement officers issued the well-known *Miranda* warnings, which typically begin with "You have the right to remain silent," before the statements were made.[121] As a general rule, *Miranda* applies any time police question a defendant who is in "custody," broadly defined.[122] 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.[123]

However, the Court's recent jurisprudence has weakened *Miranda*'s effect by making clear that despite the holding's constitutional status,[124] there are cases in which it is appropriate to depart from strict adherence to *Miranda* warnings.[125] The *Miranda* exception possibly relevant to the Guantanamo detainees is the "public safety" exception, which the Court introduced in *New York v. Quarles*.[126] In *Quarles*, police officers inquired "Where is the gun?" to a suspect who had fled into a supermarket after a shooting.[127] 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.[128] Despite the Court's emphasis in *Quarles* on the time-sensitive nature of the safety risk in that case,[129] some commentators have argued that the *Quarles* "public safety" exception should be extended to reach interrogations of captured terrorist suspects.[130]

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

(...continued)

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.

[121] 384 U.S. 436, 479 (1966).

[122] *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").

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

[124] 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).

[125] *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*").

[126] 467 U.S. 649 (1984).

[127] *Id.* at 655.

[128] *Id.*

[129] *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).

[130] *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).

Miranda warnings are admissible if voluntary."[131] 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."[132]

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.[133] For example, in *United States v. Abu Ali*, a case involving a defendant who had been arrested and questioned by the Saudi government for allegedly assisting terrorists in an attack, the U.S. Court of Appeals for the Fourth Circuit upheld statements made to the Saudi interrogators, despite a lack of *Miranda* warnings, because the court found that the statements were voluntary.[134]

The constitutional standard of "voluntariness" is recognized as "the ultimate safeguard against coerced confessions."[135] 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.'"[136] 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."[137] The failure to provide *Miranda* warnings can serve as one factor in the totality-of-circumstances evaluation.[138]

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

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[131] 327 F.3d 56, 145 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003).

[132] *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.

[133] *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).

[134] 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))).

[135] *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).

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

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

[138] *Id.* at 233.

> Absent a court order requiring the reading of such statements, no member of the Armed Forces and no official or employee of the Department of Defense or a component of the intelligence community (other than the Department of Justice) may read to a foreign national who is captured or detained outside the United States as an enemy belligerent and is in the custody or under the effective control of the Department of Defense or otherwise under detention in a Department of Defense facility the statement required by *Miranda v. Arizona* … or otherwise inform such an individual of any rights that the individual may or may not have to counsel or to remain silent consistent with *Miranda v. Arizona.*[139]

This provision is expressly made inapplicable to the Department of Justice,[140] meaning that agents of the DOJ could potentially read *Miranda* warnings to persons in military custody. One instance where the DOJ might opt to read *Miranda* warnings to an enemy belligerent in military custody would be when it intends to bring criminal charges against a detainee in federal civilian court.

Under Article 31 of the UCMJ, individuals "subject to the code" who are brought before a court-martial are protected from the use of statements obtained through the use of coercion, unlawful influence, or unlawful inducement.[141] 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.[142] 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.[143] 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.[144] A review of Army regulations pertaining to the treatment of war-time captives suggests that military authorities do not regard Article 31 as applicable to captured belligerents suspected of violating the law of war, regardless of their prisoner-of-war status.[145] Military courts have also recognized a "public safety" exception to *Miranda* requirements similar

[139] P.L. 111-84, § 1040 (2009).

[140] *Id.*

[141] 10 U.S.C. § 831(d). *See also* MIL. R. EVID. 305.

[142] 10 U.S.C. § 831(a),(c).

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

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

[145] *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).

to the rule applied in federal courts.[146] The relationship between UCMJ Article 31 and the provision of the National Defense Authorization Act for FY2010 limiting the reading of *Miranda* rights is not immediately clear. A narrow reading of act's limitation on *Miranda* warnings might not encompass Article 31 warnings because they technically differ from the warnings required by *Miranda*.

Persons subject to a military commission also have a statutory privilege against self-incrimination, though this standard is less robust than that applicable in courts-martial proceedings.[147] Statements obtained by the use of torture are statutorily prohibited.[148] Originally under the MCA, military commissions were permitted to admit statements obtained in the course of harsh interrogation not rising to the level of torture, if certain criteria were met. Statements made on or after December 30, 2005, would not be admitted if the interrogation methods used to obtain them amounted to "cruel, inhuman, or degrading treatment" prohibited by the DTA.[149] The DTA's prohibition applies to statements obtained through methods that, if they had occurred within the United States, would be considered unconstitutionally harsh.[150] The MCA's requirement did not apply with respect to the admission of statements made prior to December 30, 2005,[151] meaning that statements elicited via "cruel, inhuman, or degrading treatment" could potentially have been introduced into evidence in military commission proceedings.

Pursuant to amendments made by the National Defense Authorization Act, all statements obtained via torture or "cruel, inhuman, or degrading treatment" are now inadmissible in military commission proceedings, regardless of when such statements were made, except when presented "against a person accused of torture or [cruel, inhuman, or degrading treatment] as evidence that the statement was made."[152] A detainee cannot be required to testify against himself.[153] However, self-incriminating statements made by the accused may be introduced into evidence during military commission proceedings when specific criteria are met. In certain circumstances, statements that were not made voluntarily may be deemed admissible. Specifically, the National Defense Authorization Act provides that in order for a statement made by the accused to admissible, the military commission judge must find that

> (1) … the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
>
> (2) … (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of

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

[147] 10 U.S.C. § 948r(a) (2008).

[148] 10 U.S.C. § 948r(b) (2008).

[149] 10 U.S.C. § 948r(d) (2008).

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

[151] 10 U.S.C. § 948r(c) (2008). In either case, however, when the degree of coercion used to obtain the statement was disputed, the military judge could only permit its admission if the totality of circumstances rendered that statement reliable and the interests of justice were served by its admission. 10 U.S.C. § 948r(c)-(d) (2008).

[152] 10 U.S.C. § 948r(a)(as amended by P.L. 111-84, § 1802 (2009)).

[153] 10 U.S.C. § 948r(b)(as amended by P.L. 111-84, § 1802 (2009)).

> justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given.[154]

The standards for admission of evidence in military commissions may be subject to legal challenge, particularly by those defendants who seek to bar the admission of statements as involuntary. Issues may also arise regarding the admissibility of any incriminating statements made *after* a detainee has been subjected to harsh interrogation. In November 2008, a military commission judge ruled that statements made by a detainee to U.S. authorities were tainted by his earlier confession to Afghan police hours before, which had purportedly been made under threat of death.[155] The judge concluded that the coercive effects of the death threats producing the detainee's first confession had not dissipated by the time of the second. Subsequently, a federal *habeas* court ruled that "every statement made by the detainee since his arrest [was] a product of torture," and could not be used by the government to support his detention.[156] The detainee was thereafter ordered released by the *habeas* court[157] and subsequently transferred to Afghanistan.

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[158] "protects liberty by preventing the government from enacting statutes with 'manifestly unjust and oppressive' retroactive effects."[159] 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,[160] 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

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[154] 10 U.S.C. § 948r(c)(as amended by P.L. 111-84, § 1802 (2009)). In determining the voluntariness of a statement, the presiding judge must consider the totality of the circumstances, including, as appropriate, "(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities[;] (2) The characteristics of the accused, such as military training, age, and education level[; and] (3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused." 10 U.S.C. § 948r(d)(as amended by P.L. 111-84, § 1802 (2009)).

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

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

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

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

[159] *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.

[160] *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").

time or place."[161] 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.[162] However, it may be more difficult to prosecute some detainees on account of other types of terrorist activity or material support which occurred abroad. In the early days of the conflict with the Taliban and Al Qaeda, many terrorism-related statutes did not apply to wholly extraterritorial acts committed by foreign nationals which did not injure U.S. persons. For instance, prior to 2004, federal criminal law generally did not extend to non-citizens with no ties to the United States who provided material support to a terrorist organization.[163]

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.[164] 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. While the statute of limitations for most non-capital federal offenses is five years,[165] the period for terrorism-related offenses is typically eight years unless the offense raises a foreseeable risk of death or serious bodily injury. If such a risk is foreseeable, then, like capital offenses,[166] there is no limitation to the time within which an indictment may be found.[167]

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.[168] The UCMJ provides that general courts-martial have jurisdiction to "try any person

[161] *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).

[162] 18 U.S.C. § 2332b (acts of terrorism within the United States that transcend national boundaries), § 2332 (killing or severely injuring a U.S. national overseas), § 1956 (criminalizing money laundering activities by a foreign person when a transaction at least partially occurs within the United States) (2000). For further discussion on the use of terrorism statutes in criminal prosecutions, including with respect to activities taking place outside the United States, see Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Courts*, Human Rights First, May 2008.

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

[164] 18 U.S.C. § 2441.

[165] 18 U.S.C. § 3282.

[166]18 U.S.C. § 3281. For background, see CRS Report RL31253, *Statutes of Limitation in Federal Criminal Cases: An Overview*, by Charles Doyle.

[167] 18 U.S.C. § 3286(b).

[168] *See United States v. Gorski*, 47 M.J. 370 (1997) (ruling that the Ex Post Facto Clause applies to courts-martial proceedings); *Hamdan* Military Commission Ruling, *supra* footnote 161 (finding that Ex Post Facto Clause applies to military commission proceedings at Guantanamo).

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."[169] 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."[170] 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.[171]

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. Although military commissions may exercise personal jurisdiction over a more limited category of belligerents than courts-martial,[172] the two forums share subject-matter jurisdiction 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.[173] By statute, Congress has provided that such acts by an unprivileged enemy belligerent are punishable by military commissions regardless of whether they were "committed … before, on, or after September 11, 2001."[174] 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."[175] Congress retained this language when it amended the statutory guidelines for military commissions pursuant to the National Defense Authorization Act for FY2010.

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.[176] 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

[169] 10 U.S.C. § 818.

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

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

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

[173] 10 U.S.C. § 950t (as amended by P.L. 111-84, § 1802 (2009)).

[174] 10 U.S.C. § 948d.

[175] 10 U.S.C. § 950p.

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

death of any persons, including lawful combatants, in the context of an armed conflict, may also be new.[177] 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.[178]

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."[179] 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,[180] the standard may be more lenient when Congress acts pursuant to its constitutional authority to define war crime offenses.[181] Accordingly, it is possible that a reviewing court may defer to Congress's finding the specified offenses under the MCA are not new offenses, and find that prosecution of those offenses under military commissions (or possibly under the general courts-martial system, if the court relies on the MCA to inform its judgment of activities punishable under the common law of war) does not run afoul of the Ex Post Facto Clause. On the

[177] Civilians (sometimes characterized as "unprivileged belligerents" or "unlawful combatants") have been tried by military tribunals for killing combatants in past wars, but the offense has been characterized as ordinary murder for which combatant immunity is unavailable as a defense rather than a violation of the law of war. The International Criminal Tribunal for the former Yugoslavia (ICTY) has found that war crimes in the context of non-international armed conflict include murder of civilians, but have implied that the killing of a combatant is not a war crime. *Prosecutor v. 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."). 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.

[178] *Compare Hamdan* Military Commission Ruling, *supra* footnote 161 (analogizing "material support for terrorism" to guerilla activities subject to trial by military commission in the U.S. Civil War); *with Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (citizen of Indiana accused of conspiring to commit hostile acts against the Union during Civil War, including conspiring to seize munitions stored in Union armory and liberating prisoners of war, was nevertheless a civilian who was not amenable to military jurisdiction in area where civil courts were open). Many military commissions that operated during the Civil War did not exercise jurisdiction solely over war crimes. Commissions were also used to try persons for other criminal offenses in occupied territory or in locations under conditions of martial law. The Obama Administration has expressed serious concern as to whether "material support for terrorism" has traditionally been recognized as a war crime, and has recommended that any legislation modifying military commissions not include "material support for terrorism" as an enumerated offense over which commissions have subject-matter jurisdiction. U.S. Congress, Hearing before the Senate Committee on Armed Services, *Military Commissions*, 111th Cong., 1st sess., July 7, 2009 (Submitted statement of David Kris, Assistant Attorney General) (stating that the Obama Administration believes that "there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense").

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

[180] *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).

[181] *See United States v. Bin Laden*, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) ("provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to define offenses against the law of nations"); *Hamdan* Military Commission Ruling, *supra* footnote 161.

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.[182]

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,[183] the commission deferred to the Congress's determination that these were not new offenses, finding that there was "adequate historical basis for this determination."[184] 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.[185]

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.

In addition to the constitutional question explored by the military commission in *Hamdan*, ex post facto concerns could potentially be raised in other situations. Statute of limitations concerns may also arise in war crimes prosecutions under the UCMJ,[186] though these limitations would not

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[182] *Hamdan* Military Commission Ruling, *supra* footnote 161, slip. op. at 1.

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

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

[185] *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.

[186] Article 43 of the UCMJ provides that the statute of limitations for most non-capital offenses that may be tried by court-martial is five years. The extent to which this Article might preclude prosecution of war crimes by a general courts-martial may be an issue in assessing the appropriate forum for the prosecution of detainees, as there does not (continued...)

apply with respect to prosecutions before military commissions. These considerations may inform decisions by U.S. authorities as to whether to pursue criminal charges against detainees in civilian court, 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.[187] 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.[188]

(...continued)

appear to be a case which squarely addresses the Article's application to war crimes prosecutions. Assuming that Article 43 is applicable, the statute of limitations could potentially be suspended during "time of war" if the President certifies that the limitation would be detrimental to the war effort or harmful to national security. Specifically, Article 43(e) provides that:

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

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

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

[188] *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

(continued...)

Rules Against Hearsay Evidence

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

As a practical matter, hearsay issues may arise in any prosecution of persons captured in the "war on terror" for reasons peculiar to that context. For example, witnesses detained by foreign governments may be unavailable to come to the United States to testify in a federal court,[189] or the government may be unwilling to make military and intelligence assets and personnel available for testimony.[190] Procedural rules and constitutional requirements may limit the use of hearsay evidence in the prosecution of some detainees, though exceptions may permit the introduction of certain types of hearsay evidence.

Evidentiary Issues

Federal civilian courts, courts-martial, and military commissions all possess procedural rules governing the admission of hearsay evidence. Procedural rules applicable to federal courts under 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.[191] 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, which were 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.[192] The FED. R. EVID. and the MIL. R. EVID. also recognize a residual exception for statements which have "equivalent circumstantial guarantees of trustworthiness."[193] Examples of statements that have been held to qualify under the

(...continued)

explore the fourth category, or other categories, further.

Id. at 615-16.

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

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

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

[192] 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.

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

residual exception include interviews of child abuse victims by specially trained FBI agents[194] and statements contained within the files of a foreign intelligence agency.[195]

One important aspect of the definition of hearsay is that statements made by co-conspirators in furtherance of a conspiracy are not considered hearsay.[196] 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.[197]

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. Initially, hearsay evidence could be admitted in commission proceedings if either (1) it would be admitted under rules of evidence applicable in trial by general courts-martial; or (2) more broadly, if the proponent of the evidence makes known to the adverse party the intention to offer such evidence, and as well as the particulars of the evidence.[198] In the latter case, the accused would only have such evidence excluded if he could demonstrate by a preponderance of evidence that the hearsay evidence was unreliable under the totality of the circumstances.[199]

The rules for admissibility of hearsay evidence in military commission proceedings were modified by the National Defense Authorization Act for FY2010. Under the new rule, hearsay evidence that would not be admissible in general courts-martial proceedings may be admitted in a trial by military commission if

> (i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and
>
> (ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that –
>
> (I) the statement is offered as evidence of a material fact;
>
> (II) the statement is probative on the point for which it is offered;

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

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

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

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

[198] 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.

[199] *Id.* at 803(C).

> (III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and
>
> (IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.[200]

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

Constitutional Issues

The Constitution imposes its own limitations on the admission of hearsay evidence in criminal cases. The protections afforded under the Confrontation Clause apply to both civilian and military proceedings.[201] 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,[202] 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 not had a prior opportunity for cross-examination.[203] Although the definition of testimonial

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[200] 10 U.S.C. § 949a(b)(3) (as amended by P.L. 111-84, § 1802 (2009)).

[201] *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)).

[202] 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).

[203] *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 (continued...)

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."[204] 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.[205] In contrast, the Supreme Court has held that statements made "to enable police assistance to meet an ongoing emergency"[206] were not testimonial, because, objectively determined, the purpose of the statements was to request assistance and not to act "as a witness."[207]

Many of the individuals detained at the naval base at Guantanamo Bay were apprehended on the battlefield in Afghanistan or other locations, as a consequence of their alleged actions there. Evidence against these potential defendants may include statements regarding their activities by persons also engaged in that conflict and subsequently captured. Sixth Amendment concerns may be raised if prosecutory authorities attempt to introduce statements made by other persons or detainees without presenting those declarants to personally testify in court. In these situations, the admissibility of the statements against the defendants would appear to turn on whether the character of the statements made is testimonial or not.[208]

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 evidentiary rules for federal civilian courts, general courts-martial, and military commissions may permit different amounts of hearsay initially, prosecutors in each forum would be subject to the requirements of the Confrontation Clause regarding testimonial hearsay against the defendant, at least with respect to proceedings occurring within the United States. Lastly, non-testimonial hearsay against the defendant, including statements which a reasonable person would

(...continued)

clearly testimonial, would have been admissible.

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

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

[206] *Id.* at 822.

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

[208] 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.

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.[209] In January 2010, it was reported that the Obama Administration intends to bring charges against about 35 detainees in military or civilian court.[210] The Sixth Amendment guarantees a right to a speedy trial for the accused in all criminal prosecutions.[211] The protection is triggered "when a criminal prosecution has begun."[212] The invocation of the right may occur prior to indictment or formal charge, when "the actual restraints imposed by arrest and holding" are made.[213] The right has been found to extend to civilian and military courts,[214] though the nature of the right's application to military courts may differ from its application in the civilian context.[215] 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,[216] and that denial of this right compels a reviewing court to dismiss the charges against them.[217]

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

[209] 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.

[210] Finn, *supra* footnote 16.

[211] 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").

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

[213] *Id.* at 320.

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

[215] 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).

[216] 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.

[217] *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.[218]

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."[219] 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."[220] 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,[221] 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.[222] 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.[223] 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."[224] Presumably, many of the same factors that are important in considering constitutional issues relating to a right

[218] *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).

[219] *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).

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

[221] *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).

[222] 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 Trial Act and the Interstate Agreement on Detainers. *See* 18 U.S.C. Appendix 2, § 2, Articles III-VI.

[223] 18 U.S.C. § 3161(b),(c).

[224] 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.[225]

In *United States v. al-Arian*, the United States charged four men with having provided material support to terrorists, among other charges.[226] 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.[227] 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.[228] 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.[229] 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.[230]

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.[231] 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.[232] 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.[233] 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.[234]

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

[225] 18 U.S.C. § 3161(h)(8)(B)(ii).

[226] 267 F. Supp.2d 1258, 1264 (M.D. Fla. 2003).

[227] *Id.* at 1260.

[228] *Id.* at 1267.

[229] *Id.* at 1264.

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

[231] 10 U.S.C. § 948b(d) (other provisions of the UCMJ specifically excluded include those related to compulsory self-incrimination and the requirement for pretrial investigation). The National Defense Authorization Act for FY2010 retains this provision.

[232] 10 U.S.C. § 810.

[233] 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).

[234] 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,[235] 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.[236] 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,[237] 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.[238] 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.[239]

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."[240] 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.[241] Courts-martial and military commissions also have procedures concerning a defendant's right to confront secret evidence.[242] The rules governing the disclosure of classified information in

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

[236] 10 U.S.C. § 810.

[237] *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).

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

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

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

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

[242] MIL. R. EVID. 505, MIL. COMM. R. EVID. 505. Following the enactment of the National Defense Authorization Act for FY2010, the Military Commission Rules of Evidence will likely be modified to reflect the new statutory requirements for the usage of classified evidence in military commission proceedings.

military commissions were amended by the National Defense Authorization Act for FY2010 to more closely resemble the practices employed in federal civilian court under CIPA and in general courts-martial.[243]

Prosecutions implicating classified information can be factually varied, but an important distinction that may be made among them is from whom information is being kept. In some situations, the defendant seeks to introduce classified information of which he is already aware because he held a position of trust with the U.S. government. The interests of national security require sequestration of that information from the general public.[244] In the case of ordinary terrorism prosecutions, the more typical situation is likely to be the introduction of classified information as part of the prosecution's case against the defendant. In these cases, preventing disclosure to the defendant, as well as to the public, may be required. Preventing the accused from having access to evidence to be used against him at trial raises concerns under the Confrontation Clause of the Constitution. Both CIPA and the Federal Rules of Criminal Procedure (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.[245] The judge may permit the prosecution to provide an unclassified summary or substitute statement so long as this procedure provides the defendant with substantially the same ability to make his defense as disclosure of the classified information itself would provide. Such a substitute submission might redact, for example, sources and methods of intelligence gathering so long as enough information is made available to give the defendant a fair opportunity to rebut the evidence or cast doubt on its authenticity.

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

Withholding Classified Information During Discovery

The mechanics of discovery in federal criminal litigation are governed primarily by the 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*,[246] 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

[243] 10 U.S.C. §§ 949p-1 – 949p-1 (as added by P.L. 111-84, § 1802 (2009)).

[244] 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.

[245] 18 U.S.C. app. 3 § 3; FED. R. CRIM. P. 16(d)(1).

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

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,"[247] but, whether information held exclusively by elements of the intelligence community could fall within this category does not appear to have been addressed.[248]

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*,[249] the Court noted the high impeachment value a witness's prior statements can have, both to show inconsistency or incompleteness of the in court testimony. Subsequently, this requirement was codified by the Jencks Act.[250]

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.[251] 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.[252]

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.[253] Under the FED. R. CRIM. P., a defendant may request a deposition in order to preserve testimony at trial.[254] 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

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

[248] *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*).

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

[250] *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.

[251] 18 U.S.C. app. 3, § 4.

[252] *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).

[253] *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

[254] 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.

disqualified the defendant for the death penalty.[255] However, the government refused to produce the deponents citing national security concerns.[256]

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.[257] 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.[258] Here, the Fourth Circuit seemed to indicate that government-produced summaries of the witnesses's statements, with some procedural modifications, could be adequate substitutes for depositions.[259]

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.[260] 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.[261] 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.[262] 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.[263]

As amended by the National Defense Authorization Act for FY2010, disclosure of classified information during a military commission is governed by 10 U.S.C. §§ 949p-1 – 949p-9. The act provides that "[t]he judicial construction of the Classified Information Procedures Act … shall be authoritative" in interpreting the statutory requirements governing the use of classified information in military commission proceedings, "except to the extent that such construction is inconsistent with the specific requirements" of these statutory provisions.[264] 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.[265] However, in a departure from the rules governing courts-martial, the convening authority is replaced by the military judge

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

[256] *Id.* at 459.

[257] *Id.* at 477.

[258] *Id.*

[259] *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.

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

[261] *Id.*

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

[263] *Id.*

[264] 10 U.S.C. § 949p-1(d) (as added by P.L. 111-84, § 1802 (2009)).

[265] 10 U.S.C. § 949p-2 (as added by P.L. 111-84, § 1802 (2009)).

with respect to the modification or substitution of classified information. Pursuant to modifications made by the National Defense Authorization Act, the military judge shall, upon request by either party, "hold such conference *ex parte* to the extent necessary to protect classified information from disclosure, in accordance with the practice of the Federal courts under the Classified Information Procedures Act."[266] The military judge may not authorize discovery or access to the classified information unless the judge finds that the information "would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing, in accordance with standards generally applicable to discovery of or access to classified information in Federal criminal cases."[267] The military judge, upon motion of the government's counsel, has the authority to modify and/or substitute classified evidence during discovery, and ultimately may dismiss the charges or specifications if he feels that the fairness of the proceeding will be compromised without disclosure of the classified evidence.[268]

The Use of Secret Evidence at Trial

The use of secret evidence at trial also implicates constitutional concerns. As described above, there may be instances where disclosure of classified information to the defendant would be damaging to the national security. In these instances, the prosecution may seek to present evidence at trial in a manner that does not result in full disclosure to the defendant. One proposed scenario might be the physical exclusion of the defendant from those portions of the trial, while allowing the defendant's counsel to remain present.[269] However, such proceedings could be viewed as unconstitutionally infringing upon the defendant's Sixth Amendment right to confrontation.[270]

Historically, defendants have had the right to be present during the presentation of evidence against them, and to participate in their defense.[271] 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.[272] 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.[273] Here, the Fourth Circuit cited the protection of national security as satisfying the "important public policy" requirement.

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[266] *Id.*

[267] 10 U.S.C. § 949p-4 (as added by P.L. 111-84, § 1802 (2009)).

[268] 10 U.S.C. § 949p-6 (as added by P.L. 111-84, § 1802 (2009)).

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

[270] *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").

[271] *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).

[272] *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.

[273] *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).

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.[274]

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.[275] 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, CIPA § 3 authorizes 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 pretrial hearing. As with the case in discovery, the government may seek to replace classified information with redacted versions or substitutions. However, in this context, the adequacy of a substitute or redacted version is determined in an adversarial proceeding in which both prosecutors and defense counsel have full access to the substitute and may argue whether it provides the defendant with "substantially the same ability to make his defense" as the underlying classified information would provide.[276]

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.[277] 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.[278] 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.[279] 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.[280]

In trials before military commissions, the military judge shall permit, upon motion of the government, the introduction of otherwise admissible evidence while protecting from disclosure

[274] *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).

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

[276] 18 U.S.C. app. 3 § 6(c)(1). For a discussion of the "substantially the same" standard, see *United States v. Collins*, 603 F. Supp. 301, 304 (S.D. Fla. 1985).

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

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

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

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

the sources, methods, or activities by which the United States obtained the evidence.[281] An *in camera* hearing may be held to determine how classified information is to be handled, from which the detainee may be excluded in order to maintain the classified nature of the material.[282] 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.[283] The detainee will have access to all evidence that will be viewed by the commission members. [284]

If constitutional standards required by the Sixth Amendment are applicable to military commissions, commissions may be open to challenge for affording the accused an insufficient opportunity to contest evidence. An issue may arise as to whether, where the military judge is permitted to assess the reliability of evidence based on *ex parte* communication with the prosecution, adversarial testing of the reliability of evidence before the panel members meets constitutional requirements. If the military judge's determination as to the reliability of *ex parte* evidence is conclusive, precluding entirely the opportunity of the accused to contest its reliability, the use of such evidence may serve as grounds to challenge the verdict.[285] On the other hand, if evidence resulting from classified intelligence sources and methods contains "'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to [its] reliability," it may be admissible and survive challenge.[286]

Conclusion

Since its inception, the policy of detaining suspected belligerents at Guantanamo has been the subject of controversy. In particular, there has been significant international and domestic criticism of the treatment of detainees held there, as well as detainees' limited access to federal courts to challenge aspects of their detention. Defenders of the policy argue that Guantanamo offers a safe and secure location away from the battlefield where suspected belligerents can be detained, and prosecuted for war crimes when appropriate. They contend that enemy belligerents should not receive the same access to federal courts as civilians within the United States.

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.

[281] 10 U.S.C. § 949p-6(c) (as added by P.L. 111-84, § 1802 (2009)).

[282] 10 U.S.C. § 949p-6(a)(3) (as added by P.L. 111-84, § 1802 (2009)).

[283] *Id.*

[284] 10 U.S.C. § 949p-1(b) (as added by P.L. 111-84, § 1802 (2009)).

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

[286] *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.").

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 have been introduced in the 111th Congress which address some of these issues. The ultimate effect of any measure will be shaped by constitutional constraints.

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

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