



# Closing the Guantanamo Detention Center: Legal Issues

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## Summary

Following the terrorist attacks of 9/11, Congress passed the Authorization for the Use of 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. Although nearly 800 persons have been held at Guantanamo since early 2002, the substantial majority of Guantanamo detainees have been transferred to another country for continued detention or release. Those detainees who remain fall into three categories: (1) persons placed in non-penal, preventive detention to stop them from rejoining hostilities; (2) persons who face or are expected to face criminal charges; and (3) persons who have been cleared for transfer or release, whom the United States continues to detain pending transfer. Although the Supreme Court ruled in *Boumediene v. Bush* that Guantanamo detainees may seek *habeas corpus* review of the legality of their detention, several legal issues remain unsettled.

In January 2009, President Obama issued an Executive Order to facilitate the closure of the Guantanamo detention facility within a year. This deadline was not met, but the Administration has repeatedly stated its intent to close the facility. In March 2011, President Obama issued a new Executive Order establishing a process to periodically review whether the continued detention of a lawfully held Guantanamo detainee is warranted, which resulted in some 80 detainees being cleared for release and transfer to a foreign country. Efforts to transfer these prisoners and close Guantanamo have been hampered by a series of congressional enactments limiting executive discretion to transfer or release detainees into the United States, including, most recently, the National Defense Authorization Act for FY2013 (2013 NDAA; P.L. 112-239) and the Consolidated and Further Continuing Appropriations Act, 2013 (2013 CAA; P.L. 113-6 ). By prohibiting funds from being used to transfer or release detainees into the United States, or to assist in the transfer or release of detainees into the country, these acts seem to ensure that the Guantanamo detention facility remains open at least through the 2013 fiscal year, and perhaps for the foreseeable future. Moreover, the measures appear to make military tribunals the only viable forum by which Guantanamo detainees could be tried for criminal offenses, as no civilian court operates within Guantanamo, unless efforts to close the facility are successfully renewed. Upon signing each of these measures into law, President Obama issued a statement describing his opposition to the restrictions imposed on the transfer of Guantanamo detainees, and asserted that his Administration will work with Congress to mitigate their effect.

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

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## Introduction

Following the terrorist attacks of 9/11, Congress passed the Authorization for the Use of 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.<sup>1</sup> 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 were transported to Guantanamo from early 2002 through 2008,<sup>2</sup> the substantial majority of Guantanamo detainees have ultimately been transferred to a third country for continued detention or release.<sup>3</sup> 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<sup>4</sup>). Preventive detention of captured belligerents is non-penal in nature, and must be ended upon the cessation of hostilities.

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<sup>1</sup> P.L. 107-40.

<sup>2</sup> Most of the detainees (632) were brought to Guantanamo in 2002. In 2003, an additional 117 detainees were brought to Guantanamo; ten arrived in 2004; 14 in 2005; five in 2007; and one in 2008. *See* Guantanamo Review Task Force, Final Report, Jan. 22, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>. No detainees have been brought to Guantanamo since 2008.

<sup>3</sup> For a detailed description of the Guantanamo detainee population, see Andrei Scheinkman et al., “The Guantanamo Docket,” *New York Times*, <http://projects.nytimes.com/guantanamo> [hereinafter “Guantanamo Docket”]; “Names of the Detained in Guantanamo Bay, Cuba,” *Washington Post*, <http://projects.washingtonpost.com/guantanamo/>. *See also* Benjamin Wittes and Zaahira Wyne, *The Current Detainee Population of Guantánamo: An Empirical Study*, Brookings Institute, December 16, 2008 [hereinafter “Brookings Report”]. Updates to the Brookings Report that track developments in the Guantanamo detainee population are available at [http://www.brookings.edu/reports/2008/1216\\_detainees\\_wittes.aspx](http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx) (last updated October 21, 2009) [hereinafter “Brookings Report Update”].

<sup>4</sup> In March 2009, the Obama Administration announced a new definitional standard for the government’s authority to detain terrorist suspects, which does not use the phrase “enemy combatant” to refer to persons who may be properly detained. The new standard is similar in scope to the “enemy combatant” standard used by the Bush Administration to detain terrorist suspects. Like the former standard, the new standard would permit the detention of members of the Taliban, Al Qaeda, and associated forces, along with persons who provide support to such groups, regardless of whether such persons were captured away from the battlefield in Afghanistan. However, in contrast to the former standard, the new definition specifies that persons may be detained on account of support provided to Al Qaeda, the Taliban, or associated forces only if such support is “substantial.” Department of Justice, “Department of Justice Withdraws ‘Enemy Combatant’ Definition for Guantanamo Detainees,” press release, March 13, 2009, <http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html>; *In re Guantanamo Bay Detainee Litigation*, Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held At Guantanamo Bay, No. 08-0442, filed March 13, 2009 (D.D.C.). In October 2009, Congress modified rules for military commissions pursuant to the Military Commissions Act of 2009, enacted as part of the National Defense Authorization Act for Fiscal Year 2010, including by providing commissions with jurisdiction over alien “unprivileged enemy belligerents.” P.L. 111-84, §1802 (amending, *inter alia*, 10 U.S.C. §§948a-948b). Commissions previously could exercise jurisdiction over alien “unlawful enemy combatants.” 10 U.S.C. §948c (2008). Despite the difference in nomenclature, the two terms are used to refer to similar categories of persons. In January 2010, a three-judge panel of the D.C. Circuit Court of Appeals held that, at minimum, the executive’s authority to detain persons in the conflict with Al Qaeda and the Taliban covered those persons subject to the jurisdiction of military commissions. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 1814 (2011). Section 1021 of the National Defense Authorization Act for 2012, P.L. 112-81, essentially codified detention authority standards along the lines of the definition the Obama Administration employed in the litigation above, but it refers to “covered persons” and does not use the terms enemy belligerents or enemy combatants.

- 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.
- 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.<sup>5</sup>

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.<sup>6</sup> As a result, Guantanamo detainees may seek *habeas* review of the legality of their detention. Nonetheless, several legal issues were not definitively settled by the *Boumediene* decision, 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.<sup>7</sup> Litigation addressing these matters is ongoing in the D.C. Circuit, with several rulings being issued by the circuit court of appeals. These rulings have generally been favorable to the legal position advanced by the government.<sup>8</sup> The Supreme Court has denied certiorari with

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<sup>5</sup> Memorandum from the Office of Legal Counsel, Department of Justice, for William J. Haynes, General Counsel, Department of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba*, December 28, 2001.

<sup>6</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>7</sup> For background, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Michael John Garcia; CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

<sup>8</sup> See CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

respect to all such decisions thus far, but may prove willing to take on another Guantanamo case in the future. In the meantime, it appears that the circuit court's rulings will remain controlling.

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

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

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<sup>9</sup> 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”].

<sup>10</sup> *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.

<sup>11</sup> Executive Order 13491, “Ensuring Lawful Interrogations,” 74 *Federal Register* 4893, January 22, 2009; Executive Order 13493, “Review of Detention Policy Options,” 74 *Federal Register* 4901, January 22, 2009. On July 20, 2009, the Special Task Force on Detainee Disposition, which was required to issue a final report by July 21, 2009, “unless the Co-Chairs determine that an extension is necessary,” extended by six months the period in which the Task Force will conduct its work and submit a final report. The Task Force issued a preliminary report 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 issued recommendations to the President in August 2009. 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>.

Guantanamo detainees to the United States<sup>12</sup>). Ghailani was convicted and sentenced to life imprisonment for his part in the conspiracy.<sup>13</sup>

On October 28, 2009, the National Defense Authorization Act for FY2010 (P.L. 111-81) was signed into law, and modified rules governing military commissions. Soon thereafter, the Departments of Justice and Defense made an announcement regarding the forums in which 10 other Guantanamo detainees, who had previously been charged before military commissions, would be tried.<sup>14</sup> The Attorney General and Secretary of Defense determined that military commission proceedings against five Guantanamo detainees may be resumed<sup>15</sup> However, the Department of Justice stated that it intended to bring charges against five detainees in the U.S. District Court for the Southern District of New York for criminal offenses related to the 9/11 terrorist attacks,<sup>16</sup> and the charges brought before these individuals before military commissions were withdrawn without prejudice in January 2010.<sup>17</sup>

The decision to try some Guantanamo detainees in federal civilian court proved controversial. Plans to bring charges in federal court against Khalid Sheik Mohammed, the alleged mastermind of the 9/11 attacks, were placed on hold until the Attorney General announced in April 2011 that the Administration had reversed course and the 9/11 conspirators would be tried before military commissions.<sup>18</sup> The November 2010 conviction of Ahmed Ghailani for one of the more than 280 charges he faced in connection to the 1998 embassy bombings has fueled the debate over terrorism trials. While some have characterized Ghailani's conviction as demonstrating that federal civilian courts serve as an appropriate forum for the prosecution of some Guantanamo detainees, others view Ghailani's acquittal of most charges as evidence that civilian courts are an inappropriate forum for the criminal prosecution of wartime detainees.<sup>19</sup>

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<sup>12</sup> The Supplemental Appropriations Act, 2009 (P.L. 111-32), which was enacted within weeks of Ghailani's transfer to the United States, restricted the subsequent use of funds to transfer any detainee into the United States, except for prosecution or detention during legal proceedings, provided that the executive fulfilled a 45-day reporting requirement prior to any such transfer occurring. Later restrictions enacted after the Attorney General's proposal to try the 9/11 conspirators in New York eliminated the exceptions to transfers to the United States, including that for prosecutions. *See, e.g.*, P.L. 112-81 §1027.

<sup>13</sup> Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, WASH. POST, January 25, 2011. Ghailani is appealing his conviction and sentence.

<sup>14</sup> 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"].

<sup>15</sup> *Id.* 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](http://a.abcnews.go.com/images/Politics/Final_Brief.pdf).

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

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

<sup>18</sup> *Vindicating Guantanamo*, WALL ST. J. ONLINE, April 5, 2011. The Department of Defense announced that charges have been sworn against the five accused 9/11 conspirators. Dept. of Defense, "DOD Announces Charges Sworn Against Five Detainees Allegedly Responsible for 9/11 Attacks," press release, May 31, 2011, <http://www.defense.gov/releases/release.aspx?releaseid=14532>.

<sup>19</sup> For more information about the Ghailani case, see CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

On January 22, 2010, the Guantanamo Task Force issued its final report concerning the appropriate disposition of each detainee held at Guantanamo. The Task Force concluded that 36 detainees remained subject to active criminal investigations or prosecutions; 48 detainees should remain in preventive detention without criminal trial, as they are “too dangerous to transfer but not feasible for prosecution”; and the remaining detainees could be transferred, either immediately or eventually, to a foreign country.<sup>20</sup>

In December 2009, President Obama issued a memorandum directing the Attorney General and Secretary of Defense to take steps to acquire the Thomson Correctional Facility in Thomson, IL, so that at least some Guantanamo detainees may be relocated there for continued internment.<sup>21</sup> Beginning in FY2011, however, Congress began including a provision in annual appropriations or defense authorization enactments that barred funds from being used to construct or modify a facility in the United States to house detainees who remain under the custody or control of the Department of Defense (DOD).<sup>22</sup> Although the Thomson facility was purchased in 2012, Administration officials have averred that it will not be used to house Guantanamo detainees, but instead serve to hold high-security prison inmates.<sup>23</sup>

Although the original deadline for the closure of the Guantanamo detention facility established by Executive Order 13492 was not met, the Administration has stated that it still intends to close the facility as expeditiously as possible. Efforts by the executive branch to close the facility have been hampered by a series of congressional enactments limiting executive discretion to transfer or release detainees into the United States, with the most significant limitations initially established by the Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA; P.L. 111-383), which was signed into law on January 7, 2011, and the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (2011 CAA; P.L. 112-10). By prohibiting funds from being used to transfer or release detainees into the United States, or to assist in the transfer or release of detainees into the country,<sup>24</sup> these and subsequent similar acts seem to ensure that the Guantanamo detention facility remains open for the foreseeable future. Moreover, the measures

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<sup>20</sup> Guantanamo Review Task Force, Final Report, January 22, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

<sup>21</sup> Presidential Memorandum Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantanamo Bay Naval Base, 75 *Federal Register* 1015, December 15, 2009. Legislation was introduced to prevent the construction or modification of a U.S. facility to house Guantanamo detainees. See H.R. 5822, Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2011 (111<sup>th</sup> Cong.) (House-passed version), §516.

<sup>22</sup> The first such prohibition is found in the Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA), P.L. 111-383, §1034(a)-(b) and applied only to DOD funds for FY2011. Later versions of the prohibition found in continuing appropriations legislation have extended it to all funds made available under any act. See Department of Defense and Full-Year Continuing Appropriations Act, 2011 (2011 CAA), P.L. 112-10, §1114; Consolidated and Further Continuing Appropriations Act, 2012 (2012 Minibus), P.L. 112-55, §533; Consolidated Appropriations Act, 2012 (2012 CAA), P.L. 112-74, Div. A, §8121, Div. H, §511; Consolidated and Further Continuing Appropriations Act, 2013 (2013 CAA), P.L. 113-6, Div. B, §531, Div. C, §8111.

<sup>23</sup> U.S. Congress, Senate Committee on the Judiciary, *Oversight of the U.S. Department of Justice*, 112<sup>th</sup> Cong., June 12, 2012 (statement by Attorney General Holder, in response to question by Sen. Durbin, pledging not to use the Thomson facility to house Guantanamo detainees).

<sup>24</sup> 2011 NDAA, P.L. 111-383, §1032 (prohibiting the use of military funds to transfer or assist in the transfer or release of Guantanamo detainees into the United States); 2011 CAA, P.L. 112-10, §1112 (barring the use of funds appropriated or otherwise made available by the 2011 CAA or any other act); 2012 Minibus, P.L. 112-55, §532; 2012 CAA, P.L. 112-74, Div. A, §8119, Div. D, §542; National Defense Authorization Act for FY2012 (2012 NDAA), P.L. 112-81, §1027; 2013 CAA, P.L. 113-6, Div. B, §530, Div. C, §8109; National Defense Authorization Act for FY2013 (2013 NDAA), P.L. 112-239, §1027.



appear to make military tribunals the only viable forum by which Guantanamo detainees could be tried for criminal offenses, as no civilian court operates within Guantanamo. When signing each of these measures into law, President Obama issued a statement expressing his opposition to those provisions limiting executive discretion to transfer detainees into the United States or to the custody of certain foreign governments or entities.<sup>25</sup> While highly critical of these provisions' effect, President Obama's signing statements did not allege that the restrictions on transfers to the United States represented an unconstitutional infringement upon executive authority, or claim that the executive branch was not legally bound to comply with the provisions' requirements.<sup>26</sup> President Obama did, however, state that his "Administration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future."<sup>27</sup>

On March 7, 2011, President Obama issued Executive Order 13567, establishing a process for the periodic review of the continued detention of persons currently held at Guantanamo who have either been (1) designated for preventive detention under the laws of war or (2) referred for criminal prosecution, but have not been convicted of a crime and do not have formal charges pending against them.<sup>28</sup> The Executive Order establishes a Periodic Review Board (PRB) to assess whether the continued detention of a covered individual is warranted in order "to protect against a significant threat to the security of the United States." In instances where a person's continued detention is not deemed warranted, the Secretaries of State and Defense are designated responsibility "for ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States" and relevant legal requirements. An initial review of each individual covered by the Order, which involves a hearing before the PRB in which the detainee and his representative may challenge the government's basis for his continued detention and introduce evidence on his own behalf, must occur within a year of the Order's issuance. Those persons deemed to be subject to continued detention will have their cases

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<sup>25</sup> In a statement issued upon signing the 2011 NDAA into law, President Obama expressed concern that the provision limiting detainee transfers into the United States "represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees...." White House Office of the Press Secretary, Statement by the President on H.R. 6523, January 7, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523> [hereinafter "Presidential Signing Statement on the 2012 NDAA"]. He further stated that the provision limiting executive discretion to transfer detainees to the custody of foreign entities would "interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations" regarding the transfer of persons captured in an armed conflict. See also White House Office of the Press Secretary, Statement by the President on H.R. 1473, April 15, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473> (disapproving of similar restrictions on detainee transfers established by the 2011 CAA). On signing more comprehensive measures into law as part of the 2012 NDAA, however, the President argued that some application of the restrictions might violate constitutional separation of powers principles, in particular the bar on detainee transfers to the United States in Sections 1027 and 1028 curtailing the President's authority to transfer detainees abroad. White House, Office of the Press Secretary, Statement by the President on H.R. 1540, December 31, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>. For more information about detainee measures in the 2012 and 2013 NDAA, see CRS Report R42143, *The National Defense Authorization Act for FY2012 and FY2013: Detainee Matters*, by Jennifer K. Elsea and Michael John Garcia.

<sup>26</sup> For discussion of the legal effect of presidential signing statements, see CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by Todd Garvey.

<sup>27</sup> Presidential Signing Statement on the 2012 NDAA, *supra* footnote 25.

<sup>28</sup> Executive Order 13567, "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to Authorization to Use Military Force," 76 *Federal Register* 13277, March 10, 2011 [hereinafter "Executive Order on Periodic Review"].

reviewed periodically thereafter. The Order also specifies that the process it establishes is discretionary; does not create any additional basis for detention authority or modify the scope of authority granted under existing law; and is not intended to affect federal courts' jurisdiction to determine the legality of a person's continued detention.

On the same day that Executive Order 13567 was issued, the White House also released a statement concerning matters relevant to U.S. detention policy generally and to Guantanamo specifically.<sup>29</sup> Among other things,<sup>30</sup> the statement reaffirmed the executive's commitment to close the Guantanamo detention facility. The statement also announced that the Secretary of Defense would authorize the swearing and referring of new charges to military commissions—a practice which had been halted following the issuance of Executive Order 13492 in January 2009. The White House statement also reaffirmed the Administration's commitment to prosecute some detainees in Article III courts, and declared that it would work to repeal legislation that bars it from transferring detainees into the country for trial before civilian courts.

Congress has enacted similar restrictions as part of subsequent defense authorization legislation and other measures. The National Defense Authorization Act of FY2012, P.L. 112-81, authorizes the detention of certain categories of persons and requires the military detention of a subset of them (albeit not necessarily in Guantanamo and subject to waiver by the President); regulates status determinations for persons held pursuant to the AUMF, regardless of location; regulates periodic review proceedings concerning the continued detention of Guantanamo detainees; and continues funding restrictions that relate to Guantanamo detainee transfers to foreign countries. Despite an earlier threat to veto the bill,<sup>31</sup> President Obama signed the 2012 NDAA into law while issuing a signing statement claiming that certain of its detainee-related restrictions violate separation-of-powers principles.<sup>32</sup> Congress continued the funding restrictions on transfers of detainees from Guantanamo in the National Defense Authorization Act for FY2013 (2013 NDAA), P.L. 112-239.<sup>33</sup> President Obama objected to these provisions in a signing statement,

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<sup>29</sup> White House, Office of the Press Secretary, "Fact Sheet: New Actions on Guantanamo and Detainee Policy," March 7, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

<sup>30</sup> The statement also described the Administration's view regarding the 1977 Additional Protocols to the 1949 Geneva Conventions. While the United States is a party to all four of the 1949 Conventions, it has not ratified either of the 1977 Additional Protocols. The Administration announced its support for the ratification of the Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), which was submitted to the Senate in 1987 for its advice and consent but has not been agreed upon by the body. The Obama Administration also announced that, while opposing aspects of the Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I), it would nonetheless "choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict," presumably due to a belief that the principles contained in Article 75 reflect customary international law. Article 75 establishes fundamental guarantees for the treatment of persons captured by opposing forces in an international armed conflict, including rights associated with a fair trial. According to the White House statement, the requirements contained in Additional Protocol II and Article 75 of Additional Protocol I are consistent with current U.S. policies and practices.

<sup>31</sup> See Exec. Office of the Pres., Statement of Administration Policy on H.R. 1540 (May 24, 2011), available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r\\_20110524.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf) (objecting in particular to Section 1039 [barring transfer of detainees to the United States] as a "dangerous and unprecedented challenge to critical Executive branch authority to determine when and where to prosecute detainees, based on the facts and the circumstances of each case and our national security interests"). At the time these objections were made public, the bill did not yet contain the provision requiring military commission trials.

<sup>32</sup> Presidential Signing Statement on H.R. 1540, *supra* footnote 25.

<sup>33</sup> P.L. 112-239, §§1022 (prohibition of funds to construct or modify detention facilities in U.S. territory), 1027 (barring detainee transfers into the United States), and 1028 (restricting detainee transfers to other countries).

complaining that “The Congress designed these sections, and has here renewed them once more, in order to foreclose my ability to shut down the Guantanamo Bay detention facility. I continue to believe that operating the facility weakens our national security by wasting resources, damaging our relationships with key allies, and strengthening our enemies.”<sup>34</sup>

The President also charged that the restrictions could violate the Constitution:

My Administration will interpret these provisions as consistent with existing and future determinations by the agencies of the Executive responsible for detainee transfers. And, in the event that these statutory restrictions operate in a manner that violates constitutional separation of powers principles, my Administration will implement them in a manner that avoids the constitutional conflict.<sup>35</sup>

The President reiterated his intention to work toward the closure of Guantanamo in remarks he made at a press conference on April 30, 2013.<sup>36</sup> Criticizing the Guantanamo detention policy as counterproductive in terms of international support for counterterrorism efforts and as providing a recruiting tool for extremists, he stated that his Administration would review possible administrative actions and reengage with Congress to bring about the closure of the detention facility.<sup>37</sup>

The closure of the Guantanamo detention facility would raise a number of legal issues with respect to the individuals presently interned there, particularly if those detainees were transferred to the United States. The nature and scope of constitutional protections owed to detainees within the United States may be different from those available to persons held at Guantanamo or elsewhere. This may have implications for the continued detention or prosecution of persons transferred to the United States. The transfer of detainees to the United States may have additional consequences, as some detainees might qualify for asylum or other protections under immigration law. The Executive Order issued by President Obama to effectuate the closure of Guantanamo also contemplates that the Administration “work with Congress on any legislation that may be appropriate” relating to the transfer of detainees to the United States.<sup>38</sup>

This report provides an overview of major legal issues that are likely to arise in the event 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

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<sup>34</sup> White House, Office of the Press Secretary, Statement by the President on H.R. 4310, available at <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310>.

<sup>35</sup> *Id.*

<sup>36</sup> See Charlie Savage, *Amid Hunger Strike, Obama Renews Push to Close Cuba Prison*, NY TIMES, May 1, 2013, at A1.

<sup>37</sup> *Id.* A transcript of the President’s remarks is available online at <http://www.nytimes.com/2013/05/01/us/politics/transcript-of-obamas-news-conference.html?ref=us>.

<sup>38</sup> Executive Order, *supra* footnote 9, at §4(c)(5).

are likely to be relevant not only to the treatment of Guantanamo detainees, but also to other terrorist suspects or enemy belligerents apprehended by the United States in the future.

## **Detainee Transfer or Release from Guantanamo**

Any proposal to close the Guantanamo detention facility must necessarily address the transfer of persons currently detained there. While some detainees may be transferred to other countries for continued detention, supervision, or release, some proposals to close the Guantanamo detention facility have contemplated transferring at least some detainees to the United States, either for continued detention or, in the case of some detainees who are not considered a threat to U.S. security, possible release.<sup>39</sup>

### **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.<sup>40</sup> 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.<sup>41</sup> 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 to be transferred to the control of another government for his release.<sup>42</sup> The DOD has also transferred enemy belligerents to other countries for continued detention, investigation, or prosecution when those

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<sup>39</sup> Initially, the Obama Administration considered the possibility of releasing at least some Guantanamo detainees who are not considered a threat into the United States. See Director of National Intelligence Dennis Blair, “Media Roundtable Discussion,” March 26, 2009, available at [http://www.dni.gov/interviews/20090326\\_interview.pdf](http://www.dni.gov/interviews/20090326_interview.pdf). Congress subsequently enacted a series of appropriations and authorization measures that barred funds from being used to release Guantanamo detainees into the United States or specified U.S. territories. See P.L. 111-32, §14103(a); P.L. 111-84, §1041(a); P.L. 111-83, §552(a); P.L. 111-88, §428(a); P.L. 111-117, §532(a); P.L. 111-118, §9011(a). Most of these restrictions concerned funds appropriated for the 2010 fiscal year. Through the enactment of a series of continuing resolutions which temporarily fund federal agencies, Congress has effectively extended the restrictions imposed by FY2010 appropriation enactments. Further, the 2011 NDAA bars military funds appropriated for the 2011 fiscal year from being used either to release a detainee into the United States, or to assist in the release of a detainee into the country. P.L. 111-383, §1032. The 2011 CAA imposed similar funding restrictions upon other government agencies for the 2011 fiscal year. P.L. 112-10, §1112. The 2012 NDAA and 2013 NDAA have continued the ban through FY2013. See P.L. 112-81, §1027 and P.L. 112-239, §1027. Other government agencies are covered in various continuing appropriations measures. See *supra* footnote 24.

<sup>40</sup> See Guantanamo Docket, *supra* footnote 3.

<sup>41</sup> 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); Guantanamo Task Force Report, *supra* footnote 20, at 16-17 (discussing criteria used by Guantanamo Task Force when determining whether a detainee was eligible for transfer).

<sup>42</sup> Benkert Declaration, *supra* footnote 41.

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.<sup>43</sup>

On March 7, 2011, President Obama issued Executive Order 13567, which establishes a process to periodically review whether the continued detention of a lawfully held Guantanamo detainee is warranted. The Order provides that a Periodic Review Board (PRB), composed of officials from several departments and agencies,<sup>44</sup> shall review the grounds for the continued detention of any person currently held at Guantanamo who has either been (1) designated as being subject to detention under the laws of war (i.e., a captured enemy belligerent) or (2) referred for criminal prosecution, but has yet to be formally charged with an offense.<sup>45</sup> The Order also establishes a Review Committee, composed of relevant department heads and officials,<sup>46</sup> to annually review the sufficiency and efficacy of transfer efforts. Following the completion of the PRB's initial review of the disposition of detainees, and every four years thereafter, the Committee is also charged with assessing "whether a continued law of war detention policy remains consistent with the interests of the United States, including national security interests."<sup>47</sup>

The PRB is required to assess whether the continued detention of any person covered by the Order "is necessary to protect against a significant threat to the security of the United States." In cases where the continued detention of a Guantanamo detainee is not deemed warranted, the Secretaries of State and Defense are charged with "ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States," consistent with U.S. obligations not to transfer persons to countries where they may face torture.<sup>48</sup> The PRBs were to begin reviewing the grounds for the continued detention of covered individuals within a year of the issuance of Executive Order 13567;<sup>49</sup> however, this process has not yet begun,<sup>50</sup> possibly delayed due to new requirements for status reviews imposed under Section

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<sup>43</sup> *Id.* In April 2010, a federal habeas court dismissed on mootness grounds the petitions of 105 former Guantanamo detainees, including some who were transferred to the custody of a foreign country for further detention, on the grounds that such persons were no longer "in custody under or by color of the authority of the United States," as is required for a court to exercise jurisdiction under the federal habeas statute. *In re Petitioners Seeking Habeas Corpus Relief In Relation To Prior Detentions At Guantanamo Bay*, 700 F. Supp. 2d 119 (D.D.C. 2010) (Hogan, J.). In reaching this decision, the *habeas* court placed significant weight upon government declarations that the United States relinquishes complete custody and control over detainees when they are transferred into the hands of foreign governments.

<sup>44</sup> The Executive Order provides that the PRB shall be composed of "senior officials... one appointed by each of the following departments and offices: the Departments of State, Defense, Justice, and Homeland Security, as well as the Offices of the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff." Executive Order on Periodic Review, *supra* footnote 28, at §9(b).

<sup>45</sup> *Id.* at §1(a). Accordingly, the review would not cover persons who have been determined not to be lawfully detained (e.g., those who have been ordered released by a federal *habeas* court) who remain in U.S. custody pending their repatriation or resettlement to a foreign country.

<sup>46</sup> Specifically, the Review Committee is composed of the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. *Id.* at §9(d).

<sup>47</sup> *Id.* at §5(b).

<sup>48</sup> *Id.* at §4(a).

<sup>49</sup> *Id.* at §3(a).

<sup>50</sup> Press Release, Human Rights First, Two Years After Executive Order, Guantanamo Periodic Review Board Proceedings Yet to Begin (March 6, 2013), available at <http://www.humanrightsfirst.org/2013/03/06/two-years-after-executive-order-guantanamo-periodic-review-board-proceedings-yet-to-begin/>.

1023 of the 2012 NDAA.<sup>51</sup> The Pentagon published implementing guidelines for the PRB process in May 2012.<sup>52</sup>

Under the Order, the individual undergoing a review is to be provided with an unclassified summary of the factors and information to be considered by the PRB.<sup>53</sup> A hearing is then to be held in which the detainee, with assistance from a government-appointed representative (along with private counsel, if obtained by the detainee at no expense to the government), may argue that his continued detention is unwarranted.<sup>54</sup> The detainee has a right to present a statement to the PRB, introduce relevant information, and to call willing and reasonably available witnesses to provide information on his behalf.<sup>55</sup> The detainee's representative, who generally is to be provided with all information contained in the government's disposition recommendation to the PRB (or in certain circumstances, a sufficient substitute or summary of such information), is authorized to challenge the government's information and present information in support of the detainee.<sup>56</sup> If the PRB's initial review does not result in the individual being designated for transfer, the PRB will continue to periodically review the grounds for continued detention, through a review of case files every six months thereafter. Further, it must conduct a full review and hearing every three years following its initial review.<sup>57</sup> If the PRB does not reach a unanimous conclusion as to whether a detainee's continued detention is warranted, the case shall be considered by the Review Committee for further review;<sup>58</sup> however, the Order does not explain the procedures used by the Review Committee in its consideration of PRB decisions, or clearly describe the effect that its review has upon the final disposition of a detainee's case.<sup>59</sup>

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

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<sup>51</sup> It has also been suggested that delays have been caused by disagreement over how to handle evidence elicited through torture. *See Savage, supra* footnote 36.

<sup>52</sup> Directive Type Memorandum (DTM) 12-005, Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13567 [hereinafter "PRB Implementing Guidelines"], available at <http://www.dtic.mil/whs/directives/corres/pdf/DTM-12-005.pdf>.

<sup>53</sup> Executive Order on Periodic Review, *supra* footnote 28, at §3(a)(1).

<sup>54</sup> *Id.* at §3(a)(2).

<sup>55</sup> *Id.* at §3(a)(3).

<sup>56</sup> *Id.* at §3(a)(2). The Order provides that the government-appointed representative must have appropriate security clearance. A PRB may permit a government-appointed representative to be provided with a summary or substitute for government information only in "exceptional circumstances where it is necessary to protect national security, including intelligence sources and methods." A substitute or summary may be provided to private counsel in lieu of underlying government information in a broader range of circumstances, including when the *government*, rather than the PRB, "determines that the need to protect national security, including intelligence sources and methods, or law enforcement or privilege concerns" warrants such action.

<sup>57</sup> *Id.* at §3(b)-(c).

<sup>58</sup> *Id.* at §3(d). Neither the government nor the detainee is granted a right to appeal PRB rulings to the Review Committee.

<sup>59</sup> For example, it is unclear whether the Review Committee's consideration of a detainee's continued detention would necessarily result in a final determination as to whether continued detention is warranted, or whether the Committee might remand the case to the PRB for further consideration of a particular issue or piece of evidence.

likely than not”) that they would be subjected to torture.<sup>60</sup> 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.”<sup>61</sup>

Nonetheless, both the Bush and Obama Administrations have stated that “it is the policy of the United States, consistent with the approach taken by the United States in implementing ... [CAT], not to repatriate or transfer ... [Guantanamo detainees] to other countries where it believes it is more likely than not that they will be tortured.”<sup>62</sup> 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.<sup>63</sup> The use of diplomatic assurances in Guantanamo transfer decisions is similar to the practice sometimes employed by U.S. authorities when determining whether the extradition of a person or the removal of an alien by immigration authorities would comply with CAT requirements. In January 2009, President Obama issued an Executive Order creating a special task force to review U.S. transfer policies to ensure compliance with applicable legal requirements.<sup>64</sup> In August of that year, the task force issued recommendations to ensure that U.S. transfer practices comply with applicable standards and do not result in the transfer of persons to face torture.<sup>65</sup> These recommendations include strengthening procedures used to obtain assurances from a country that a person will not face torture if transferred there, including through the establishment of mechanisms to monitor the treatment of transferred persons. If implemented, such measures might impede the transfer of some Guantanamo detainees to third countries. In April 2009, a D.C. Circuit panel held that a government determination that a detainee would not be tortured if transferred to a particular country is not subject to district court review in *habeas* proceedings challenging the proposed transfer.<sup>66</sup>

Of the persons held at Guantanamo who have been cleared for transfer or release, even prior to the enactment of statutory restrictions, several dozen remained at Guantanamo either because no country was willing to accept the detainee, or because human rights concerns have caused the United States to refrain from transferring the detainee to a country willing to accept him. According to the final report of the Guantanamo Task Force, a plurality of detainees who have

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<sup>60</sup> 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.

<sup>61</sup> 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>.

<sup>62</sup> Benkert Declaration, *supra* footnote 41, at para. 6. *See also* Guantanamo Task Force Report, *supra* footnote 20, at 15 n.11.

<sup>63</sup> Benkert Declaration, *supra* footnote 41, para. 7. The PRB Implementing Guidelines, *supra* footnote 52, state that they are to be implemented consistent with CAT.

<sup>64</sup> Executive Order No. 13491, “Ensuring Lawful Interrogations,” 74 *Federal Register* 4893, January 22, 2009.

<sup>65</sup> 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.

<sup>66</sup> *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (“*Kiyemba II*”), rehearing *en banc* denied (July 27, 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

been cleared for transfer but remain at Guantanamo “cannot be repatriated due to humane treatment or related concerns in their home countries . . . and thus need to be resettled in a third country....”<sup>67</sup>

Additionally, a significant number of detainees could potentially be transferred to other countries for continued detention or supervision if the United States was assured that the receiving country could manage the threat they pose.<sup>68</sup> In January 2010, President Obama announced that, in light of terrorist activities emanating from Yemen, including alleged involvement by Yemeni nationals in the failed 2009 bomb attack on an airplane that was landing in Detroit, the United States “will not be transferring additional detainees back to Yemen at this time.”<sup>69</sup> The final report of the Guantanamo Task Force identified 30 detainees from Yemen who

were designated for “conditional” detention based on the current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.<sup>70</sup>

On May 23, 2013, President Obama announced that the moratorium on detainee transfers to Yemen would be lifted, and the feasibility of such transfers would be reviewed on a case-by-case basis.<sup>71</sup>

Whether future diplomatic efforts will effectuate the transfer of some or all of these persons to third countries remains to be seen. It has been reported that the U.S. refusal to resettle detainees on its territory may be contributing to the reluctance of other countries to accept more detainees for resettlement.<sup>72</sup>

Beginning with the Supplemental Appropriations Act, 2009 (P.L. 111-32), Congress passed several appropriations or authorization measures that contained 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

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<sup>67</sup> Guantanamo Task Force Report, *supra* footnote 20, at 16.

<sup>68</sup> 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 3, 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,” January 5, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-security-reviews>. On May 23, 2013, President Obama announced the lifting of this moratorium.

<sup>69</sup> White House, Office of the Press Secretary, “Remarks by the President on Security Reviews,” January 5, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-security-reviews>.

<sup>70</sup> Guantanamo Task Force Report, *supra* footnote 20, at ii.

<sup>71</sup> White House, Office of the Press Secretary, “Remarks of President Barack Obama,” May 23, 2012, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>.

<sup>72</sup> Carol Rosenberg, *How Congress helped thwart Obama’s plan to close Guantánamo*, MIAMI HERALD, January 22, 2011, online edition.



the receiving country concerning the acceptance of the individual, including any financial assistance related to the agreement.<sup>73</sup>

Despite President Obama's objections,<sup>74</sup> the 2011 NDAA placed more significant restrictions on detainee transfers. The act provides that, except in cases when a detainee transfer is done to effectuate an order by a U.S. court or tribunal,<sup>75</sup> a detainee may only be transferred to the custody or control of a foreign government or the recognized leadership of a foreign entity if, at least 30 days prior to the proposed transfer, the Secretary of Defense certifies to Congress that the foreign government or entity (1) is not a designated state sponsor of terrorism or terrorist organization; (2) maintains effective control over each detention facility where a transferred detainee may be housed; (3) is not facing a threat likely to substantially affect its ability to control a transferred detainee; (4) has agreed to take effective steps to ensure that the transferred person does not pose a future threat to the United States, its citizens, or its allies; (5) has agreed to take such steps as the Secretary deems necessary to prevent the detainee from engaging in terrorism; and (6) has agreed to share relevant information with the United States related to the transferred detainee that may affect the security of the United States, its citizens, or its allies.<sup>76</sup> Nearly identical certification requirements are found in the 2011 CAA,<sup>77</sup> the 2012 NDAA,<sup>78</sup> and 2013 NDAA,<sup>79</sup> as well as two continuing appropriations measures.<sup>80</sup>

The 2011 NDAA and CAA also prohibited the transfer of any detainee to the custody or control of a foreign government or entity if there is a confirmed case that a former Guantanamo detainee who was transferred to that government or entity subsequently engaged in terrorist activity.<sup>81</sup> However, these restrictions were subject to waiver by the Secretary of Defense if he fulfilled the certification process described in the preceding paragraph and also determined that the transfer is in the security interests of the United States.<sup>82</sup> The prohibitions also did not apply in cases where a transfer is done to effectuate an order by a U.S. court or tribunal. These prohibitions were continued in subsequent legislation.<sup>83</sup>

Current restrictions are found in the 2013 NDAA<sup>84</sup> and 2013 CAA,<sup>85</sup> and are substantially identical to those passed in the 2011 NDAA.<sup>86</sup> These provisions restrict the use of funds (NDAA

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<sup>73</sup> P.L. 111-32, §14103(e); P.L. 111-83, §552(e); P.L. 111-88, §428(e); P.L. 111-117, §532(e); P.L. 111-118, §9011(e).

<sup>74</sup> See Presidential Signing Statement, *supra* footnote 25.

<sup>75</sup> This would presumably include a federal *habeas* court order that a detainee must be released from military custody.

<sup>76</sup> P.L. 111-383, §1033(a)-(b).

<sup>77</sup> P.L. 112-10, §1013.

<sup>78</sup> P.L. 112-81, §1028.

<sup>79</sup> P.L. 112-239, §1028.

<sup>80</sup> 2012 CAA, P.L. 112-74, Div. A, §8120; 2013 CAA, P.L. 113-6, §8110.

<sup>81</sup> P.L. 111-383, §1033(c) (imposing a one-year prohibition on such transfers); P.L. 112-10, §1013(c) (imposing a restriction on such transfers when effectuated using funds appropriated or made available by the 2011 CAA or any earlier act).

<sup>82</sup> P.L. 111-383, §1033(c); P.L. 112-10, §1013(c).

<sup>83</sup> The 2012 NDAA also applied the restrictions on transfer to foreign countries or entities to transfers of "covered persons" whose detention is required by Section 1022 of that statute, notwithstanding location of the detention (that is, for those detained outside of Guantanamo). P.L. 112-81, §§1022 & 1028. The restriction is not tied to funds, but is waivable in the interest of national security. *Id.* §1022.

<sup>84</sup> P.L. 112-239, §1028 (bars funds available to DOD for FY2013).

<sup>85</sup> P.L. 113-6, §8110 (bars funds available under "this or any other Act").

funds or funds under any act, respectively) to transfer a detainee to a foreign country or entity unless the Secretary of Defense certifies, with the agreement of the Secretary of State and in consultation with the Director of National Intelligence, that

(1) the government of the foreign country or the recognized leadership of the foreign entity to which the individual detained at Guantanamo is to be transferred—

(A) is not a designated state sponsor of terrorism or a designated foreign terrorist organization;

(B) maintains control over each detention facility in which the individual is to be detained ... ;

(C) is not, as of the date of the certification, facing a threat that is likely to substantially affect its ability to exercise control over the individual;

(D) has taken or agreed to take effective actions to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future;

(E) has taken or agreed to take such actions as the Secretary of Defense determines are necessary to ensure that the individual cannot engage or reengage in any terrorist activity; and

(F) has agreed to share with the United States any information that—

(i) is related to the individual or any associates of the individual; and

(ii) could affect the security of the United States, its citizens, or its allies; and

(2) includes an assessment, in classified or unclassified form, of the capacity, willingness, and past practices (if applicable) of the foreign country or entity in relation to the Secretary's certifications.

The prohibition on transferring detainees to any country or entity that has experienced a case of “prior confirmed recidivism,” subject to limited waiver, is also continued. The certification requirements and recidivism prohibition do not apply in the case of a detainee who must be released or transferred pursuant to a court order or, in the case of 2013 CAA provision, a plea agreement under a military commission entered prior to enactment of the CAA. A few detainees have been transferred under this exception.

The Secretary of Defense may waive two of the certification requirements and the recidivism prohibition if alternate assurances can be arranged. Specifically, the requirements of D and E above (regarding agreements by the recipient country to implement measures to prevent the detainee from posing a threat or reengaging in terrorist or militant behavior) may be waived, as

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(...continued)

<sup>86</sup> The 2013 NDAA provision differs from previous versions in that it (1) eliminates the exception for transfers pursuant to a plea agreement at a military commission (although this might effectively be covered by the exception for transfers pursuant to the order of a competent tribunal); and (2) provides that the Secretary of Defense may give favorable consideration to detainees who have substantially cooperated with U.S. intelligence or law enforcement officials pursuant to a plea agreement and arrangements are made for the continuation of such cooperation after the transfer. The 2013 CAA does not contain these changes.

can the prohibition regarding countries with confirmed prior recidivism, if the Secretary of Defense, with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence, certifies that (1) all of the other certification requirements are met; (2) alternative measures to D and E are put in place to avert the threats; and (3) the national security interests of the United States are served by permitting the transfer to go forward. The national security waiver for the certification requirements additionally requires a certification that “it is not possible to certify that the risks addressed in the paragraph to be waived have been completely eliminated,” but that the alternative actions to be taken will “substantially mitigate such risks with regard to the individual to be transferred.” A waiver of the recidivism prohibition requires an additional certification that the Secretary has considered any case of recidivism associated with the destination country or entity and that the alternative measures will mitigate any risk with respect to the individual to be transferred. The certification requirements involving security conditions in the recipient country or entity, its ability to maintain control over detention facilities, and its status as a supporter of terrorism may not be waived.

## **Transfer of Detainees into the United States**

Most proposals to end the detention of foreign belligerents at Guantanamo contemplate the transfer of at least some detainees into the United States, either for continued preventive detention, prosecution before a military or civilian court, or in the case of detainees who are not deemed a threat to U.S. security, possible release. As mentioned earlier, several appropriations and authorization measures enacted by Congress have barred funds from being used to effectuate the release of Guantanamo detainees into the United States. Moreover, Congress has enacted several measures barring funds from being used to transfer detainees into the United States or its territories or possessions; the most significant beginning in the 2011 NDAA and CAA, which bar funds appropriated during the 2011 fiscal year from being used to transfer detainees into the United States for any purpose.<sup>87</sup> These restrictions have continued through the 2013 NDAA and CAA without modification.<sup>88</sup>

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.<sup>89</sup> 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.<sup>90</sup> 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.

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<sup>87</sup> P.L. 111-383, §1032 (applying to military funds); P.L. 112-10, §1012 (applying to any funds appropriated by the 2011 CAA or any prior act).

<sup>88</sup> P.L. 112-55, §532; P.L. 112-74, Div. A, §8119, Div. D, §542; P.L. 112-81, §1027; P.L. 113-6, Div. B, §530, Div. C, §8109; P.L. 112-239, §1027.

<sup>89</sup> 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.

<sup>90</sup> 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.<sup>91</sup> 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),<sup>92</sup> 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.<sup>93</sup>

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."<sup>94</sup> The entry

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<sup>91</sup> See *United States ex rel. Bradley v. Watkins*, 163 F.2d 328 (2d 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."

<sup>92</sup> 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 January 16, 2004) (per curiam) (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).

<sup>93</sup> 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.

<sup>94</sup> 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].”<sup>95</sup> 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.<sup>96</sup>

As discussed later, an alien’s physical presence in the United States, even in cases where the alien has been paroled into the country, may result in the alien becoming eligible for asylum or other forms of immigration-related relief from removal. In recent years, several legislative proposals have been introduced that address the application of federal immigration laws to the transfer of detainees into the United States and clarify the immigration status of detainees brought into the country.<sup>97</sup> Notably, the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83), contained 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.<sup>98</sup>

The Consolidated Appropriations Act, 2010 (P.L. 111-117) contained a similar restriction on using the funds it appropriates to provide a Guantanamo detainee with an immigration benefit.<sup>99</sup> The funding restrictions contained in both enactments applied to funds appropriated for the 2010 fiscal year. Congress did not enact any FY2011 regular appropriations acts before the 2010 fiscal year expired, but instead passed a series of continuing resolutions that temporarily extended funding for federal agencies, subject to the terms and conditions of FY2010 appropriations enactments.<sup>100</sup> In appropriating funds for the duration of FY2011, the 2011 CAA specified that the terms and conditions of most appropriations enactments in FY2010 remained in effect for the duration of the 2011 fiscal year.<sup>101</sup> The complete bar against transporting detainees from Guantanamo into the United States has apparently obviated the need for renewal of the measure past 2011.

The FY2010 Department of Homeland Security Appropriations Act also amended Title 49 of the United States Code to require the placement of any person who has been detained at Guantanamo

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<sup>95</sup> *Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958).

<sup>96</sup> Such authority was used when Ahmed Ghailani was transferred from Guantanamo to the United States in 2009 to face criminal charges before an Article III court.

<sup>97</sup> *See, e.g.*, S. 108, S. 147, H.R. 374, 111<sup>th</sup> Cong. (2009); S. 553, 112<sup>th</sup> Cong. (2011).

<sup>98</sup> P.L. 111-83, §552(f).

<sup>99</sup> P.L. 111-117, §532(f).

<sup>100</sup> Additional Continuing Appropriations Amendments, 2011, P.L. 112-6 (continuing funding through April 8, 2011). Congress had previously passed five continuing resolutions to temporarily fund federal agencies after the expiration to FY2010. P.L. 111-242 (extending funding for federal agencies at FY2010 levels through December 3, 2010); P.L. 111-290 (further extending funding through December 18, 2010); P.L. 111-317 (extending funding through December 21, 2010); P.L. 111-322 (continuing funding through March 4, 2011); P.L. 112-4 (providing funding through March 18, 2011).

<sup>101</sup> P.L. 112-10, Div. B.

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.<sup>102</sup>

## 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.<sup>103</sup> A divided Supreme Court also declared that “a state of war is not a blank check for the president,” and ruled that persons who had been deemed “enemy combatants” by the Bush Administration had the right to challenge their detention before a judge or other “neutral decision-maker.”<sup>104</sup>

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.”<sup>105</sup> 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 which activities constitute “engage[ment] in an armed conflict.”

In December 2008, the Supreme Court agreed to hear an appeal of an *en banc* ruling by the Fourth Circuit in the case of *al-Marri v. Pucciarelli*, in which a majority of the Court of Appeals found that the 2001 AUMF permits the detention as an “enemy combatant” of a resident alien alleged to have planned to engage in hostile activities within the United States on behalf of Al Qaeda, but who had not been part of the conflict in Afghanistan.<sup>106</sup> However, prior to the Supreme

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<sup>102</sup> P.L. 111-83, §553. Unlike other restrictions imposed by the act on detainee transfers and eligibility for immigration benefits, which apply only to the use of appropriated funds for the fiscal year, the amendment to Title 49 constitutes a permanent statutory change.

<sup>103</sup> *Hamdi*, 542 U. S. at 518 (O’Connor, J., plurality opinion), 588-589 (Thomas, J., dissenting).

<sup>104</sup> *Id.* at 536-537 (O’Connor, J., plurality opinion).

<sup>105</sup> *Id.* at 526.

<sup>106</sup> *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4<sup>th</sup> Cir. 2008), *cert. granted* by 129 S. Ct. 680 (2008), *vacated and remanded* by *Al-Marri v. Spagone*, 555 U.S. 1220 (2009). *See also* *Al-Marri v. Wright*, 487 F. 3d 160 (4<sup>th</sup> Cir. 2007).

Court considering the merits of the case, al-Marri was indicted by a federal grand jury for providing material support to Al Qaeda and conspiring with others to provide such support. The government immediately requested that the Supreme Court dismiss al-Marri's pending case and authorize his transfer from military to civilian custody for criminal trial. In March 2009, the Supreme Court granted the government's application concerning the transfer of al-Marri, vacated the Fourth Circuit's judgment, and remanded the case back to the appellate court with instructions to dismiss the case as moot.<sup>107</sup>

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

In January 2010, a three-judge panel of the D.C. Circuit Court of Appeals considered the scope of executive detention authority in the case of *Al-Bihani v. Obama*.<sup>108</sup> In an opinion supported in full by two members of the panel,<sup>109</sup> the appellate court recognized that, at a minimum, the President was authorized to detain persons who were subject to the jurisdiction of military commissions established pursuant to the Military Commissions Acts of 2006 and 2009; namely, any person who was "part of forces associated with Al Qaeda or the Taliban," along with "those who purposefully and materially support such forces in hostilities against U.S. Coalition partners."<sup>110</sup> While the panel concluded that either purposeful and material support for or membership in an AUMF-targeted organization may be independently sufficient to justify detention,<sup>111</sup> it declined "to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard."<sup>112</sup> It did, however, note that this standard would, permit the

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<sup>107</sup> *Al-Marri v. Spagone*, 555 U.S. 1220 (2009).

<sup>108</sup> *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 1814 (2011).

<sup>109</sup> A third member of the panel issued a separate opinion concurring with the majority's judgment. However, the opinion did not clearly endorse the majority's view as to the scope of the executive's detention authority. *See id.* at 883-885 (Williams, J., concurring) (arguing that petitioner was detainable on account of being "part of" an AUMF-targeted organization, but not deciding whether a person could be detained on account of "support" for a targeted organization that he was not also a "part of").

<sup>110</sup> *Al-Bihani* at 872 (quoting 2006 MCA, P.L. 109-366, §3, and 2009 MCA, P.L. 111-84, Div. A, §1802).

<sup>111</sup> While it has been recognized in subsequent circuit rulings that *Al-Bihani* establishes, at a minimum, that the executive may lawfully detain persons who are "part of" organizations targeted under the AUMF, there is arguably some ambiguity as to whether its conclusion that persons may also be lawfully detained on account of providing support to such entities is binding precedent or merely dicta. *Compare, e.g.,* *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011) (per curiam panel decision) (finding that district court ruling that military could only detain person who was "part of" Al Qaeda or the Taliban was "directly contrary to *Al-Bihani v. Obama*, which held that 'those who purposefully and materially support' al-Qaida or the Taliban could also be detained"); *Alsabri v. Obama*, 764 F. Supp. 2d 60, 69 (D.D.C. 2011) (Urbina, J.) ("This Circuit has stated that the AUMF authorizes the government to detain two categories of persons: (1) individuals 'part of' forces associated with al-Qaida or the Taliban and (2) individuals who purposefully and materially support such forces in hostilities against the United States."); *Almerferdi v. Obama*, 725 F. Supp. 2d 18 (D.D.C. 2010) (Friedman, J.) (recognizing that *Al-Bihani* established that detention under the AUMF could be justified either on grounds that person was either a member of or provided substantial support to an AUMF-targeted organization), *rev'd on other grounds* 654 F.3d 1 (D.C. Cir. 2011); *with Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) (describing circuit jurisprudence in the aftermath of *Al-Bihani* as having "made clear... that the AUMF authorizes the Executive to detain, at the least, any individual who is functionally part of al Qaeda").

<sup>112</sup> *Al-Bihani* at 873-874. The *Al-Bihani* panel recognized that the executive was authorized to detain, at a minimum, those persons who were triable by military commissions under either the 2006 or 2009 versions of the MCA; namely, "those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners." *Id.* at 872.

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.”<sup>113</sup> The D.C. Circuit Court of Appeals thereafter denied a petition for an *en banc* rehearing the *Al-Bihani* case,<sup>114</sup> and the Supreme Court denied certiorari.<sup>115</sup> Accordingly, the standard endorsed by the panel is controlling in the D.C. Circuit unless the Supreme Court agrees to take up the issue in a future case.

The D.C. Circuit has also recognized that, when determining whether an individual was “part of” an AUMF-targeted organization, the government is not required to demonstrate that the person was part of the organization’s “command structure” in order to justify his detention.<sup>116</sup> Instead, a determination as to whether an individual is “part of” al Qaeda or the Taliban “must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.”<sup>117</sup>

Congress enacted a provision as part of the 2012 NDAA to clarify executive authority to detain “covered persons” pursuant to the law of war.<sup>118</sup> The provision appears intended to codify the D.C. Circuit’s approach to determining who is subject to detention under the AUMF. Section 1021(b)(2) of the 2012 NDAA includes among “covered persons” subject to detention under the authority of the AUMF: “A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.”<sup>119</sup>

The NDAA provision did not attempt to provide additional clarification for terms such as “substantial support,” “associated forces,” or “hostilities.” For that reason, it may be subject to an evolving interpretation that effectively permits a broadening of the scope of the conflict. Certain “covered persons” are required to be militarily detained, at least until their ultimate disposition under the measure is determined.<sup>120</sup> It is not clear whether the provisions apply to persons

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<sup>113</sup> *Id.* at 872-873. The panel found that even if petitioner was not a member of an AUMF-targeted organization, his service as a cook for a military brigade affiliated with Taliban and Al Qaeda forces, in addition to his accompaniment of the brigade during military operations, constituted sufficient grounds for his detention. *Id.*

<sup>114</sup> A concurring opinion joined by the majority of the active appellate court judges characterized certain aspects of the panel’s decision, concerning the application of international law of war principles in interpreting the AUMF, to be non-binding dicta. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring).

<sup>115</sup> 131 S. Ct. 1814 (2011).

<sup>116</sup> *See, e.g., Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 1814 (2011).

<sup>117</sup> *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) *See also* *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010) (a person who “joined and was accepted by al-Qaida fighters who were engaged in hostilities against Afghan and allied forces ... could properly be considered ‘part of’ al-Qaida even if he never formally received or executed any orders”); *Awad*, 608 F.3d at 11.

<sup>118</sup> P.L. 112-81, §1021.

<sup>119</sup> The definition also includes “a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.” *Id.* §1021(b)(1).

<sup>120</sup> *Id.* §1022. (mandating military detention of a person covered under Section 1021 who is determined “(A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and (B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners”).



arrested or captured within the United States,<sup>121</sup> but it appears intended to cover any Guantanamo detainees who may be transferred into the United States and who meets those criteria.

Nevertheless, some detainees may be determined to fall outside the criteria for detention under the AUMF, as clarified by the 2012 NDAA. 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.<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup> Following a final order of removal,<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup> However, those aliens who are specially dangerous to the

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<sup>121</sup> *Id.* §1021(e) (providing that nothing in the section is to be construed to “affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or *any other persons who are captured or arrested in the United States*”) (emphasis added).

<sup>122</sup> 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).

<sup>123</sup> 18 U.S.C. §3144.

<sup>124</sup> 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.

<sup>125</sup> 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).

<sup>126</sup> 8 U.S.C. §1231(a)(2).

<sup>127</sup> In *Zadvydas v. Davis*, the Supreme Court concluded that the indefinite detention of deportable aliens (i.e., aliens admitted into the United States who were subsequently ordered removed) would raise significant due process concerns. The Court interpreted an applicable immigration statute governing the removal of deportable and inadmissible aliens as only permitting the detention of aliens following an order of removal for so long as is “reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.” *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The Court found that the presumptively reasonable limit for the post-removal-period detention is six months, but indicated that continued detention may be warranted when the policy is limited to specially dangerous individuals and strong procedural protections are in place. *Id.* at 690, 701. Subsequently, the Supreme Court ruled that aliens who have been paroled into the United States also could not be indefinitely detained, but the Court's holding was based on statutory construction of the applicable immigration law, and it did not consider whether such aliens were (continued...)

community may be subject to continued detention beyond the six-month period, 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.<sup>128</sup> Some reviewing courts, however, have determined that these regulations are not based on a permissible construction of the immigration statute governing detention following an order of removal.<sup>129</sup>

Proposals have 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,<sup>130</sup> the scope and effect of proposals requiring the detention of specified categories of persons other than enemy combatants may be subject to constitutional challenges.

## **Treatment of Detained Persons**

In the absence of new legislation, 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).<sup>131</sup> The Field Manual requires all detainees to be treated in a manner consistent with

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(...continued)

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).

<sup>128</sup> 8 C.F.R. §241.14.

<sup>129</sup> *Thai v. Ashcroft*, 366 F.3d 790 (9<sup>th</sup> Cir. 2004) (immigration statute authorizing continued detention of certain aliens following 90-day removal period did not authorize indefinite detention of aliens whose removal was not foreseeable, including those deemed specially dangerous under immigration regulations); *Tran v. Mukasey*, 515 F.3d 478 (5<sup>th</sup> Cir. 2008) (similar). *But see* *Marquez-Coromina v. Hollingsworth*, 692 F. Supp. 2d 565 (D. Md. 2010) (finding that immigration regulations authorizing continued detention of specially dangerous aliens ordered removed but whose removal was not foreseeable was based on a reasonable interpretation of immigration detention statute).

<sup>130</sup> The Alien Enemy Act, which was originally enacted in 1798 as part of the Alien and Sedition Act, grants the President broad authority, during a declared war or presidentially proclaimed “predatory invasion,” to institute restrictions affecting alien enemies, including possible detention and deportation. 50 U.S.C. §§21-24. In its current form, the act applies to aliens within the United States who are fourteen years or older, and who are “natives, citizens, denizens, or subjects of the hostile nation or government” at war with the United States. 50 U.S.C. §21. This authority was used frequently during World War I and World War II, and reviewing courts viewed such measures as constitutionally permissible. *See generally* CRS Report R42337, *Detention of U.S. Persons as Enemy Belligerents*, 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.

<sup>131</sup> P.L. 109-148, Title X, §1002 (2005); P.L. 109-163, Title XIV, §1402 (2006).

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.<sup>132</sup> 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.”<sup>133</sup> Although the Supreme Court in *Boumediene* held that the constitutional writ of *habeas corpus* extends to Guantanamo, it did not elaborate as to the extent to which other constitutional provisions apply to noncitizens held at the detention facility.<sup>134</sup> 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.<sup>135</sup> In October 2009, the Supreme Court granted certiorari to review the *Kiyemba* ruling, but in March 2010 it vacated the appellate court’s opinion and remanded the case in light of changed circumstances surrounding the *Kiyemba* petitioners.<sup>136</sup> The circuit court thereafter reinstated its earlier opinion,<sup>137</sup> but the Supreme Court denied certiorari.<sup>138</sup>

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

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<sup>132</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>133</sup> *Zadvydas*, 533 U.S. at 693.

<sup>134</sup> 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*, 555 U.S. 1083 (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*, 558 U.S. 969 (October 20, 2009), *vacated*, 559 U.S. 131 (2010), *reinstated, as modified*, by 605 F.3d 1046 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 1631 (2011).

<sup>135</sup> *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).

<sup>136</sup> *Kiyemba v. Obama*, 559 U.S. 131 (2010). The *Kiyemba* case involved several Guantanamo detainees who, despite no longer being considered enemy combatants, have not been returned to their home country of China because of concerns that they would be subjected to torture. Two of the petitioners have been resettled in Switzerland, and Palau has agreed to take five others, although the five have not accepted Palau’s offer. Because the Supreme Court had granted certiorari on the understanding that no remedy was available for the petitioners other than release into the United States, it returned the case to the D.C. Circuit to review the ramifications of the new circumstances. The D.C. Circuit thereafter reinstated its earlier decision, as modified to take into account subsequent congressional enactments limiting the use of funds to release any Guantanamo detainee into the United States. 605 F.3d 1046 (D.C. Cir. 2010), *petition for en banc rehearing denied*, September 9, 2010. The Supreme Court then denied certiorari, 130 S. Ct. 1880 (2010).

<sup>137</sup> 605 F.3d 1046 (D.C. 2010).

<sup>138</sup> *Kiyemba v. Obama*, 131 S. Ct. 1631 (2011).

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.<sup>139</sup>

## 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."<sup>140</sup>

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."<sup>141</sup> 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.<sup>142</sup> While measures that eliminate detainees' ability to pursue statute- or treaty-based challenges to aspects of their detention may be deemed permissible by a reviewing court,<sup>143</sup>

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<sup>139</sup> P.L. 109-148, Title X, §1003; P.L. 109-163, Title XIV, §1402; P.L. 109-366, §6(c).

<sup>140</sup> 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.

<sup>141</sup> *Boumediene*, 553 U.S. at 792.

<sup>142</sup> In April 2009, a D.C. Circuit panel interpreted this court-stripping provision's use of the phrase "any other action" as referring to legal claims other than a petition for a writ of *habeas corpus*. *Kiyemba II*, 561 F.3d at 513. In that case, the panel found that *habeas* courts could consider not only Guantanamo detainees' challenges to the legality of their detention, but also their proposed transfer to another country (though *habeas* review of such transfers may be quite limited). *Id.* at 513-514. Accordingly, whether Guantanamo detainees may challenge their conditions of confinement may depend on whether a reviewing court considers these conditions to be "a proper subject of ... *habeas* relief." *Id.* at 513. *Habeas* courts have thus far rejected challenges by Guantanamo detainees relating to their conditions of detention. *See, e.g.,* *Khadr v. Bush*, 587 F. Supp. 2d 225, 235 (D.D.C., 2008) ("the Supreme Court appears to have left ... [the MCA's bar on judicial review of conditions of detention] undisturbed"); *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 312, 314 (D.D.C. 2008) (Hogan, J.) ("Cognizant of the long-standing rule of severability, this Court, therefore, holds that MCA2006 MCA §7(a)(2) remains valid and strips it of jurisdiction to hear a detainee's claims that 'relat[e] to any aspect of the detention, transfer, treatment, trial, or conditions of confinement ...'"). *See also In re Guantanamo Bay Detainee Litigation*, 570 F. Supp. 2d 13 (D.D.C. 2008) (Urbina, J.) (holding that MCA §7(a)(2) was not invalidated by *Boumediene*, but declining to decide whether the constitutional writ of *habeas* permits challenges to conditions of confinement). The rejection of challenges to conditions of confinement may be based, at least in part, upon the opinion that any such claim by Guantanamo detainees does not derive from a constitutional protection to which they are entitled. *See Kiyemba I*, 555 F.3d at 1026-27 (finding that detainees at Guantanamo lacked rights under the Due Process Clause), *cert. granted*, 130 S. Ct. 458 (October 20, 2009), *vacated*, 130 S. Ct. 1235 (2010), *reinstated, as modified*, by 605 F.3d 1046 (D.C. Cir. 2010), *cert. denied* 131 S. Ct. 1631 (2011).

<sup>143</sup> *See Al-Bihani*, 590 F.3d at 875 (D.C. Cir. 2010) (2006 MCA precluded petitioner from raising claim that government's failure to accord him prisoner of war status violated Geneva Convention requirements), *cert. denied* 131 S. Ct. 1814 (2011); *Noriega v. Pastrana*, 564 F.3d 1290 (11<sup>th</sup> Cir. 2009) (2006 MCA precluded petitioner, a designated prisoner of war under the Geneva Conventions, from invoking Conventions in challenge to his proposed extradition to France), *cert. denied*, 130 S. Ct. 1002 (2010).

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.<sup>144</sup> Accordingly, detainees transferred to the United States might be able to more successfully pursue legal challenges against aspects of their detention in the United States that allegedly infringe upon constitutional protections owed to them.

## Removal of Detainees from the United States

If there are no longer legal 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 the transfer of persons from within the country.<sup>145</sup>

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<sup>144</sup> *Zadvydas*, 533 U.S. at 693 (“the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and . . . aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law”).

<sup>145</sup> U.S. law implementing CAT generally specifies that no judicial appeal or review is available for any action, decision or claim raised under CAT, except as part of a review of a final immigration removal order. FARRA, §2242(d). The ability of a person to raise a CAT-based claim in non-removal proceedings (e.g., in the case of extradition or military transfers), is the subject of debate and conflicting jurisprudence. *Compare* *Kiyemba v. Obama*, 561 F.3d 509, 514-515 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010) (wartime detainees held at Guantanamo could not bring CAT- or FARRA-based challenges to their proposed military transfer to a foreign country, as Congress had precluded judicial review of such claims except as part of a final order of immigration removal); *Mironescu v. Costner*, 480 F.3d 664 (4<sup>th</sup> Cir. 2007), *cert. dismissed*, 128 S. Ct. 976 (January 9, 2008) (finding that CAT-implementing legislation precludes review of CAT-based habeas petition in extradition proceedings); *with* *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2004), *opinion* of later appeal vacated on rehearing by 389 F.3d 1307 (9<sup>th</sup> Cir. 2004). *See also* *Khouzam v. Muckasey*, 549 F.3d 235 (3d Cir. 2008) (aliens who have shown a likelihood of facing torture have a right under the Due Process Clause of the Fifth Amendment to challenge the sufficiency of diplomatic assurances obtained by immigration authorities to effectuate their removal). It should also be noted that although U.S. legislation implementing CAT required all relevant agencies to adopt regulations implementing CAT Article 3 requirements, the DOD has yet to implement such measures. It could be argued that the DOD could not transfer a detainee from the United States to a third country until CAT-implementing regulations were promulgated. *See* Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006) (arguing that detainees may have a right to compel the DOD to promulgate CAT-implementing regulations).

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 overlapping 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.<sup>146</sup> 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.<sup>147</sup> 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. Former Secretary of Defense Gates stated that the Obama Administration will seek legislation from Congress addressing detainees' immigration status, possibly including barring them from asylum eligibility.<sup>148</sup> As previously mentioned, the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83) and the Consolidated Appropriations Act, 2010 (P.L. 111-117) contained provisions barring any funds they made available from being used to provide any immigration benefit to Guantanamo detainees brought to the United States, or to provide for a detainee's classification as a refugee or applicant for asylum.<sup>149</sup> Congress extended the restrictions imposed by FY2010 appropriation enactments through the 2011 fiscal year,<sup>150</sup> but has not renewed the restriction since that time.

## **Detainees' Rights in a Criminal Prosecution**

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

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<sup>146</sup> 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).

<sup>147</sup> 8 U.S.C. §1252.

<sup>148</sup> Yochi J. Dreazen, *Gates Seeks Congress's Help in Closing Guantanamo*, WALL ST. J., December 3, 2008.

<sup>149</sup> P.L. 111-83, §552(f); P.L. 111-117, §532(f).

<sup>150</sup> See *supra* footnote 100 (listing continuing resolutions enacted by Congress to temporarily fund agencies following the end of 2010 fiscal year, and which generally authorized continued funding subject to the same terms and conditions established by FY2010 appropriations measures); P.L. 112-10, Div. B (appropriating funds for the duration of FY2011, generally under the same terms and conditions of FY2010 appropriations enactments).

Secondly, would the choice of judicial forum—that is, civilian court, military commission, or court-martial—affect interpretations of constitutional rights implicated in detainee prosecutions?

As previously discussed, the nature and extent to which the Constitution applies to noncitizens detained at Guantanamo is a matter of continuing legal dispute. Although the Supreme Court held in *Boumediene* that the constitutional writ of *habeas* extends to detainees held at Guantanamo, it left open the nature and degree to which other constitutional protections, including those relating to substantive and procedural due process, may also apply. The *Boumediene* Court noted that the Constitution’s application to noncitizens in places like Guantanamo that are located outside the United States turns on “objective factors and practical concerns.”<sup>151</sup> The Court has also repeatedly recognized that at least some constitutional protections are “unavailable to aliens outside our geographic borders.”<sup>152</sup> 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.<sup>153</sup> The application of these constitutional requirements might nevertheless differ depending upon the forum in which charges are brought. The Fifth Amendment’s requirement that no person be held to answer for a capital or infamous crime unless on a presentment or indictment of a grand jury, and the Sixth Amendment’s requirements concerning trial by jury, have been found to be inapplicable to trials by military commissions or courts-martial.<sup>154</sup> 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.’”<sup>155</sup> 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.<sup>156</sup> 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.

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<sup>151</sup> *Boumediene*, 553 U.S. at 764.

<sup>152</sup> *Zadvydas*, 533 U.S. at 693. *See also* *Verdugo-Urquidez v. United States*, 494 U.S. 259, 270-71 (1990) (“aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country”).

<sup>153</sup> *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”).

<sup>154</sup> *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).

<sup>155</sup> *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)).

<sup>156</sup> *See supra* footnote 130 and accompanying citations.

There are several forums in which detainees could potentially be prosecuted for alleged criminal activity, including in federal civilian court, before military commissions, or possibly in general courts-martial proceedings. 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 initially authorized the establishment of military commissions with jurisdiction to try alien “unlawful enemy combatants” for offenses made punishable by the MCA or the law of war, and afforded the accused fewer procedural protections than would be available to defendants in military courts-martial or federal civilian court proceedings.<sup>157</sup> The statutory framework for military commissions was amended by the Military Commissions Act of 2009 (MCA 2009), enacted as part of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), so that the procedural protections afforded to the accused (now referred to as alien “unprivileged enemy belligerents”<sup>158</sup>) more closely resemble those found in military courts-martial proceedings, though differences between the two forums remain.<sup>159</sup> The modifications made by the MCA 2009 are discussed in detail in CRS Report R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, by Jennifer K. Elsea. Critics raised questions regarding the constitutionality of the military commission system initially established by the original MCA,<sup>160</sup> and some of these arguments may also be raised even following the amendments made by the MCA 2009. Courts have yet to rule on the constitutional legitimacy of many procedures used by military commissions. Military commissions are not statutorily restricted from exercising jurisdiction within the United States, and the Supreme Court has previously upheld the use of commissions against enemy belligerents tried in the country.<sup>161</sup>

In November 2009, the Department of Justice and Department of Defense announced that military commission prosecutions against five Guantanamo detainees, which had been halted following President Obama’s January 2009 Executive Order, may be resumed.<sup>162</sup> It appears likely that several other detainees will be tried before military commissions as well.<sup>163</sup>

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<sup>157</sup> 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).

<sup>158</sup> 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).

<sup>159</sup> See, generally, CRS Report R41163, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, by Jennifer K. Elsea.

<sup>160</sup> See Brookings Report, *supra* footnote 3, at p. 8. Information regarding ongoing and completed cases can be viewed at <http://www.defenselink.mil/news/commissions.html>.

<sup>161</sup> See *Quirin*, 317 U.S. at 31 (upholding military commissions used to try eight German saboteurs in the United States).

<sup>162</sup> DOJ Announcement, *supra* footnote 14.

<sup>163</sup> Peter Finn, *Justice Task Force Recommends about 50 Detainees Be Held Indefinitely*, WASH. POST, January 22, 2009. See also *Obaydullah v. Obama*, No. 09-5328, Brief for Respondent Department of Justice, at 8 Jan. 2010 (D.C. Cir.) (noting that “the Attorney General has determined that petitioner’s case is appropriate for prosecution and that a military commission is the appropriate venue for such a prosecution”).



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.<sup>164</sup> In June 2009, one detainee was transferred from Guantanamo to the United States for trial in federal court for his alleged role in the 1998 bombings of the U.S. embassies in Tanzania and Kenya.<sup>165</sup> In November 2009, the DOJ and DOD announced plans to bring charges in federal court against five detainees for their alleged role in the 9/11 terrorist attacks,<sup>166</sup> but opposition to the plan caused the Attorney General to place it on indefinite hold. The plan was eventually dropped in favor of trying the 9/11 conspirators by military commission, but Attorney General Holder did not foreclose civilian trials for other Guantanamo detainees. Currently, funding bars on transferring detainees to the United States seem to foreclose civilian trials for those detained at Guantanamo.

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.<sup>167</sup> 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.<sup>168</sup>

The executive currently retains at least technical discretion to determine the appropriate forum in which to prosecute detainees (though various funding measures have effectively precluded Guantanamo detainees from being tried in civilian court through the 2013 fiscal year, through their provisions barring the transfer of detainees into the United States for any purpose). The Administration has repeatedly expressed its desire to prosecute some Guantanamo detainees in Article III courts and others before military commissions. Legislative proposals have been introduced that would require prosecutions to occur in a particular forum or modify the procedural rules applicable to the prosecution of detainees.<sup>169</sup> 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.<sup>170</sup> Some commentators have proposed the creation of an entirely new forum for the prosecution of detainees, such as a national security court.<sup>171</sup> The

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<sup>164</sup> See 18 U.S.C. chapter 113B (terrorism-related offenses); 18 U.S.C. §2441.

<sup>165</sup> 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>. Ghailani was convicted and sentenced to life in prison.

<sup>166</sup> DOJ Announcement, *supra* footnote 14.

<sup>167</sup> 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.").

<sup>168</sup> *Id.*

<sup>169</sup> See, e.g., Detainee Trials at Gitmo Act, H.R. 388, 112<sup>th</sup> Cong. (2011).

<sup>170</sup> The original MCA provided that the Secretary of Defense may prescribe rules of evidence and procedure for military commissions not inconsistent with the MCA. Rules applicable to courts-martial under the UCMJ were to apply except as otherwise specified. 10 U.S.C. §949a(a). Pursuant to this authority, the Secretary of Defense published the Manual for Military Commissions, including the Rules for Military Commissions and the Military Commission Rules of Evidence. Under the amendments made by the MCA 2009, the Secretary of Defense retains authority to prescribe rules for military commissions that are not inconsistent with the act's requirements.

<sup>171</sup> See, e.g., Jack L. Goldsmith and Neal Katyal, op-ed, *The Terrorists' Court*, NY TIMES, July 11, 2007; Stuart Taylor, Jr., *The Case for a National Security Court*, THE ATLANTIC, February 27, 2008.

scope and effect of such proposals may be shaped by constitutional constraints, including with respect to the rights owed to the accused in criminal proceedings.

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

## **Right to Assistance of Counsel**

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

The Sixth Amendment guarantees a criminal defendant the right “to have the Assistance of Counsel for his defence.” This constitutional protection attaches at the time of indictment and affords a defendant the right to retain counsel of his or her choosing as well as an opportunity to consult with that counsel.<sup>172</sup> Where a criminal defendant cannot afford to retain a lawyer, counsel will be appointed by the court to serve at public expense,<sup>173</sup> in which case the defendant’s choice of counsel need not be heeded.<sup>174</sup> 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.<sup>175</sup> A defendant’s waiver is valid only if it is knowing, voluntary, and intelligent.<sup>176</sup> This standard does not require that the defendant fully and completely comprehend all of the consequences of that waiver.<sup>177</sup> The right to counsel also encompasses the right of a defendant to represent himself or herself, if the defendant intelligently and knowingly chooses to do so.<sup>178</sup> It appears that there is no constitutional right to continuity of appointed counsel,<sup>179</sup> although federal law requires that substitution of counsel serve “the interest of justice,”<sup>180</sup> and the military justice system authorizes substitution of detailed military counsel only for good cause.<sup>181</sup>

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<sup>172</sup> *Chandler v. Freytag*, 348 U.S. 3, 10 (1954).

<sup>173</sup> *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462, 463 (1938).

<sup>174</sup> *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006).

<sup>175</sup> *Walker v. Johnston*, 312 U.S. 275 (1941).

<sup>176</sup> *Iowa v. Tovar*, 541 U.S. 77 (2004).

<sup>177</sup> *Id.*

<sup>178</sup> *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](http://crs.gov/products/conan/Amendment06/topic_8_1_7.html). *See Indiana v. Edwards*, 554 U.S. 164 (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.

<sup>179</sup> *United States v. Ghailani*, 686 F. Supp. 2d 279, 299 (S.D.N.Y. 2009) (citing *United States v. Parker*, 469 F.3d 57, 61 (2d Cir. 2006)).

<sup>180</sup> 18 U.S.C. §3006A(c).

<sup>181</sup> Both the Manual for Courts-Martial and the Manual for Military Commissions require a showing of good cause for the substitution of detailed military counsel once an attorney-client relationship has been formed. R.C.M. 505(d) (continued...)

The Sixth Amendment right to counsel is the right to the effective assistance of counsel.<sup>182</sup> 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.<sup>183</sup> 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.<sup>184</sup>

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.<sup>185</sup> 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<sup>186</sup> or military counsel of the defendant's own selection. As in a civilian court, the defendant may also waive the right to be represented by counsel and may conduct the defense personally.<sup>187</sup>

A detainee subject to a military commission has the right to be represented by counsel.<sup>188</sup> The right is implemented by Rule 506 of the Rules for Military Commissions (R.M.C.), which provides an accused detainee with a detailed military defense counsel. 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.<sup>189</sup> As under the Rules for Courts-Martial, a defendant in a military commission proceeding may waive his right to counsel and may conduct the defense personally.<sup>190</sup> In a departure from the rules governing courts-martial under the earlier rules, the detainee did not have the right to be granted specific individual military counsel upon request. Pursuant to modifications to military commission procedures made by the MCA 2009, the accused is now able to request a military defense counsel of his choosing from the pool of qualified military attorneys, if that counsel is reasonably available.<sup>191</sup>

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(...continued)

(2012); R.M.C. 505(d) (2010).

<sup>182</sup> *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).

<sup>183</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>184</sup> *United States v. Cronin*, 466 U.S. 648, 658 (1984).

<sup>185</sup> FED. R. CRIM. P. 44(a).

<sup>186</sup> 10 U.S.C. §827.

<sup>187</sup> R.C.M. 506(d).

<sup>188</sup> 10 U.S.C. §§949a, 949c. Military defense counsel is to be appointed "as soon as practicable." 10 U.S.C. §948k.

<sup>189</sup> R.M.C. 502(d).

<sup>190</sup> R.M.C. 506(c).

<sup>191</sup> 10 U.S.C. §949c.

## 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.<sup>192</sup> The use of any such evidence, or evidence derived from it, in the criminal trial of a detainee would likely be subject to legal challenge under the Fifth Amendment on the ground that the statement was gained through undue coercion. As a general rule, statements made in response to coercive interrogation methods are inadmissible in U.S. courts. Fifth Amendment protections concerning the right against self-incrimination and due process serve as dual bases for exclusion of such evidence.<sup>193</sup>

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.<sup>194</sup> As a general rule, *Miranda* applies any time police question a defendant who is in "custody," broadly defined.<sup>195</sup> 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.<sup>196</sup>

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<sup>192</sup> 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), 110<sup>th</sup> Cong., February 5, 2008; Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. 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").

<sup>193</sup> U.S. CONST. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). See also *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (incorporating the Fifth Amendment self-incrimination clause to the states). Throughout the nineteenth century, courts excluded coerced statements under a common-law rule, which arose from a judicial concern that such statements were unreliable evidence. In *Bram v. United States*, the Supreme Court first introduced the self-incrimination clause rationale for excluding such statements. 168 U.S. 532, 542 (1887). Other twentieth century cases articulated a due-process rationale to exclude coerced statements. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1936) (holding that statements obtained by torturing an accused must be excluded under the Fourteenth Amendment due process clause, which forbids states to offend "fundamental principles of liberty and justice"). In *Miranda v. Arizona*, the Court affirmed the prominence of the *Baum* self-incrimination rationale for excluding coerced statements. 384 U.S. 436, 444-45 (1966). The Court has reiterated the due-process rationale in more recent cases. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 434 (2000) ("We have never abandoned [the] due process jurisprudence"). For information on more cases interpreting the Fifth Amendment right against self-incrimination, see CRS Report R41252, *Terrorism, Miranda, and Related Matters*, by Charles Doyle.

<sup>194</sup> 384 U.S. 436, 479 (1966).

<sup>195</sup> *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").

<sup>196</sup> *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.

However, the Court's recent jurisprudence has weakened *Miranda*'s effect by making clear that despite the holding's constitutional status,<sup>197</sup> there are cases in which it is appropriate to depart from strict adherence to *Miranda* warnings.<sup>198</sup> The *Miranda* exception possibly relevant to the Guantanamo detainees is the "public safety" exception, which the Court introduced in *New York v. Quarles*.<sup>199</sup> In *Quarles*, police officers apprehended a rape suspect in a supermarket and, on discovering his empty holster, inquired, "where's the gun?"<sup>200</sup> The Court held that the suspect's incriminating response, "The gun is over there," was admissible in court, despite the lack of a *Miranda* warning, because the question had been necessary to secure the public's safety in that moment.<sup>201</sup> Despite the Court's emphasis in *Quarles* on the time-sensitive nature of the safety risk in that case,<sup>202</sup> some commentators have argued that the *Quarles* "public safety" exception should be extended to reach interrogations of all captured terrorist suspects.<sup>203</sup> Attorney General Holder has stated that the "public safety" exception was used to question suspected Times Square bomber Faisal Shahzad and suspected Detroit airline bomber Umar Farouk Abdulmutallab prior to the reading of their *Miranda* rights.<sup>204</sup> An FBI memorandum from October 2010 advises agents that the circumstances surrounding the arrest of a terrorist operative or leader may warrant significantly more extensive "public safety questioning" than an ordinary arrest, and could include questions about "possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might pose an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks."<sup>205</sup> The memorandum further notes that in exceptional cases, an unwarned intelligence interrogation may be necessary to collect information related to less immediate threats, where the need to collect the information outweighs the government's need to use such statements in court.

A second *Miranda* exception possibly applicable to some detainees is an exception for statements made in response to questioning by foreign officials. In *United States v. Yosef*, the U.S. Court of Appeals for the Second Circuit held that "statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary."<sup>206</sup> The *Yosef* court identified two situations in which this exception does not apply: (1) situations where U.S. interrogators are working with

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<sup>197</sup> 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).

<sup>198</sup> 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*").

<sup>199</sup> 467 U.S. 649 (1984).

<sup>200</sup> *Id.* at 655.

<sup>201</sup> *Id.*

<sup>202</sup> *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).

<sup>203</sup> 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).

<sup>204</sup> Justice Department Budget, Hearing before the Senate Comm. on Appropriations, Subcomm. on Commerce, Justice, Science, And Related Agencies, May 6, 2010 (statement of Eric Holder).

<sup>205</sup> See Memorandum, U.S. Department of Justice Federal Bureau of Investigation, "Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States," October 21, 2010, <http://www.nytimes.com/2011/03/25/us/25miranda-text.html>.

<sup>206</sup> 327 F.3d 56, 145 (2d Cir. 2003), *cert. denied*, 540 U.S. 933 (2003).

foreign interrogators as part of a “joint venture”; and (2) situations that “shock the judicial conscience.”<sup>207</sup>

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.<sup>208</sup> 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.<sup>209</sup>

The constitutional standard of “voluntariness” is recognized as “the ultimate safeguard against coerced confessions.”<sup>210</sup> 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.’”<sup>211</sup> 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.”<sup>212</sup> The failure to provide *Miranda* warnings can serve as one factor in the totality-of-circumstances evaluation.<sup>213</sup>

Absent an exception, the failure to administer a *Miranda* warning to a suspect in custody results in the exclusion of any unwarned statements at trial as part of the prosecution’s case in chief. Evidence *derived* from an unwarned statement need not be excluded at trial under the “fruit of the poisonous tree” doctrine<sup>214</sup> unless, some courts have ruled, the evidence was uncovered (or witness identified) as a result of a coerced statement and the government cannot show that its subsequent discovery of the derivative evidence is so remote from the illegal action that the taint

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<sup>207</sup> *Id.* at 145-46. The Fourth Circuit articulated slightly different exceptions to this general rule in *Abu Ali*, holding that *Miranda* will apply to interrogations by foreign governments when the foreign interrogators are: “(1) engaged in a joint venture with, or (2) acting as agents of, United States law enforcement officers.” *United States v. Abu Ali*, 528 F.3d 210, 227-28 (4<sup>th</sup> Cir. 2008).

<sup>208</sup> *See Abu Ali*, 528 F.3d at 232 (“When *Miranda* warnings are unnecessary, as in the case of an interrogation by foreign officials, we assess the voluntariness of a defendant’s statements by asking whether the confession is ‘the product of an essentially free and unconstrained choice by its maker.’”) (citing *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

<sup>209</sup> *Id.* at 234 (“[W]e conclude that *Abu Ali*’s statements were voluntary. *Abu Ali* was intelligent, articulate, and comfortable with the language and culture of the country in which he was detained and questioned. The district court found, based upon copious record evidence, that he was not tortured, abused, threatened, held in cruel conditions, or subjected to coercive interrogations. On the basis of the totality of these circumstances, we conclude that *Abu Ali*’s statements were ‘the product of an essentially free and unconstrained choice.’”) (citing *Culombe*, 367 U.S. at 602)).

<sup>210</sup> *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).

<sup>211</sup> *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (citing *Bram*, 168 U.S. at 542-543).

<sup>212</sup> *Abu Ali*, 528 F.3d at 232.

<sup>213</sup> *Id.* at 233.

<sup>214</sup> *United States v. Patane*, 542 U.S. 630, 631-33 (2004).

is removed. In the trial of Ahmed Ghailani for conspiracy in relation to the 1998 embassy bombings, the defendant's allegedly abusive interrogation in CIA custody abroad did not persuade the judge to dismiss charges, but it did result in the exclusion of a government witness whose identity was uncovered during Ghailani's interrogation and whose cooperation with prosecutors was less than willing.<sup>215</sup>

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

Absent a court order requiring the reading of such statements, no member of the Armed Forces and no official or employee of the Department of Defense or a component of the intelligence community (other than the Department of Justice) may read to a foreign national who is captured or detained outside the United States as an enemy belligerent and is in the custody or under the effective control of the Department of Defense or otherwise under detention in a Department of Defense facility the statement required by *Miranda v. Arizona* ... or otherwise inform such an individual of any rights that the individual may or may not have to counsel or to remain silent consistent with *Miranda v. Arizona*.<sup>216</sup>

This provision is expressly made inapplicable to the Department of Justice,<sup>217</sup> 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.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup> A review of Army regulations pertaining to the treatment of war-time

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<sup>215</sup> United States v. Ghailani, 743 F. Supp. 2d 261 (S.D.N.Y. 2010).

<sup>216</sup> P.L. 111-84, §1040 (2009).

<sup>217</sup> *Id.*

<sup>218</sup> 10 U.S.C. §831(d). *See also* MIL. R. EVID. 305.

<sup>219</sup> 10 U.S.C. §831(a),(c).

<sup>220</sup> United States v. Baird, 271 U.S. App. D.C. 121 (D.C. Cir. 1988).

<sup>221</sup> 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 (continued...)

captives suggests that military authorities do not regard Article 31 as applicable to captured belligerents suspected of violating the law of war, regardless of their prisoner-of-war status.<sup>222</sup> Military courts have also recognized a “public safety” exception to *Miranda* requirements similar to the rule applied in federal courts.<sup>223</sup> The relationship between UCMJ Article 31 and the provision of the 2010 National Defense Authorization Act limiting the reading of *Miranda* rights is not immediately clear. A narrow reading of act’s limitation on *Miranda* warnings might not encompass Article 31 warnings because they technically differ from the warnings required by *Miranda*.

Persons subject to a military commission also have a statutory privilege against self-incrimination,<sup>224</sup> though this standard is less robust than that applicable in courts-martial proceedings. Statements obtained by the use of torture are statutorily prohibited.<sup>225</sup> Under the original MCA, military commissions were permitted to admit statements obtained in the course of harsh interrogation not rising to the level of torture, if certain criteria were met. Statements made on or after December 30, 2005, would not be admitted if the interrogation methods used to obtain them amounted to “cruel, inhuman, or degrading treatment” prohibited by the DTA.<sup>226</sup> The DTA’s prohibition applies to statements obtained through methods that, if they had occurred within the United States, would be considered unconstitutionally harsh.<sup>227</sup> The MCA’s requirement did not apply with respect to the admission of statements made prior to December 30, 2005,<sup>228</sup> meaning that statements elicited via “cruel, inhuman, or degrading treatment” could potentially have been introduced into evidence in military commission proceedings.

Pursuant to amendments made by the MCA 2009, all statements obtained via torture or “cruel, inhuman, or degrading treatment” are now inadmissible in military commission proceedings, regardless of when such statements were made, except when presented “against a person accused of torture or [cruel, inhuman, or degrading treatment] as evidence that the statement was made.”<sup>229</sup> A detainee cannot be required to testify against himself.<sup>230</sup> However, self-incriminating

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(...continued)

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).

<sup>222</sup> *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).

<sup>223</sup> *See* David A. Schleuter, *Military Criminal Justice* §5-4(B) (5<sup>th</sup> ed. 1999).

<sup>224</sup> 10 U.S.C. §948r(b).

<sup>225</sup> 10 U.S.C. §948r(a).

<sup>226</sup> 10 U.S.C. §948r(d) (2008).

<sup>227</sup> For further discussion, see CRS Report RL33655, *Interrogation of Detainees: Requirements of the Detainee Treatment Act*, by Michael John Garcia.

<sup>228</sup> 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).

<sup>229</sup> 10 U.S.C. §948r(a).

<sup>230</sup> 10 U.S.C. §948r(b).



statements made by the accused may be introduced into evidence during military commission proceedings when specific criteria are met. Specifically, the MCA 2009 provides that in order for a statement made by the accused to be admissible, the military commission judge must find that

- (1) ... the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
- (2) ... (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given.<sup>231</sup>

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.<sup>232</sup> 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.<sup>233</sup> The detainee was thereafter ordered released by the *habeas* court<sup>234</sup> and subsequently transferred to Afghanistan. In a separate case, however, a military judge permitted the use of a detainee's statements despite allegations that interrogators had threatened the youth by recounting stories of the prison rape of a fictitious Afghan youth.<sup>235</sup> The military commission in that case was not persuaded that any of the statements the government sought to introduce at trial had been elicited through such tactics.

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

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

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<sup>231</sup> 10 U.S.C. §948r(c). 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).

<sup>232</sup> *United States v. Jawad*, D-021 (November 19, 2008). The government appealed the commission's ruling to the Court of Military Commission Review, but the case was rendered moot when the accused was found to be unlawfully held by a reviewing habeas court and thereafter transferred by U.S. military authorities to Afghanistan for release.

<sup>233</sup> *Bacha v. Obama*, 2009 WL 2149949 (D.D.C., July 17, 2009) (Huvell, J.).

<sup>234</sup> *Bacha v. Obama*, 2009 WL 2365846 (D.D.C., July 30, 2009) (Huvell, J.).

<sup>235</sup> *United States v. Khadr*, Ruling on Motions to Suppress D-94 and D-111 (August 17, 2010), available at <http://www.mc.mil>.

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

## **Right Against Prosecution under *Ex Post Facto* Laws**

The ability to seek penal sanction against some detainees may be limited by ex post facto rules. Art. I, Section 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<sup>236</sup> “protects liberty by preventing the government from enacting statutes with ‘manifestly unjust and oppressive’ retroactive effects.”<sup>237</sup> 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 also invite due process challenges,<sup>238</sup> the Ex Post Facto Clause acts as an independent limitation on congressional power, going “to the very root of Congress’s ability to act at all, irrespective of time or place.”<sup>239</sup> 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.<sup>240</sup> However, it may be more difficult to prosecute

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<sup>236</sup> U.S. CONST., Art. I, §10, cl. 1, prohibits the states from enacting ex post facto laws.

<sup>237</sup> *Stogner v. California*, 539 U.S. 607, 612 (2003) (citing *Calder v. Bull*, 3 U.S. 386, 390-91 (1798)). In *Calder*, Justice Chase described the Ex Post Facto Clause as covering four categories of laws:

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

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

<sup>238</sup> 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”).

<sup>239</sup> *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).

<sup>240</sup> 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.

some detainees on account of other types of terrorist activity or material support that occurred abroad. In the early days of the conflict with the Taliban and Al Qaeda, many terrorism-related statutes did not apply to wholly extraterritorial acts committed by foreign nationals that did not injure U.S. persons. For instance, prior to 2004, federal criminal law generally did not extend to non-citizens with no ties to the United States who provided material support to a terrorist organization.<sup>241</sup>

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.<sup>242</sup> For some alleged offenses, in particular those that occurred prior to September 11, 2001, it may be difficult to establish that they were committed in the context of an armed conflict.

Statute of limitations concerns may affect the ability of U.S. authorities to prosecute persons for some of the offenses noted above. While the statute of limitations for most non-capital federal offenses is five years,<sup>243</sup> the period for terrorism-related offenses is typically eight years<sup>244</sup> unless the offense results in or raises a foreseeable risk of death or serious bodily injury. If such a risk is foreseeable, then, like capital offenses,<sup>245</sup> there is no limitation to the time within which an indictment may be found.<sup>246</sup>

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.<sup>247</sup> The UCMJ provides that general courts-martial have jurisdiction to “try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”<sup>248</sup> The UCMJ does not enumerate the offenses punishable under the law of war, instead relying on the common law of war to define the subject-matter jurisdiction in general courts-martial. In *Hamdan v. Rumsfeld*, a plurality of the Supreme Court recognized that, for an act to be triable under the common law of war, there must be “plain and unambiguous” precedent for treating it as such.<sup>249</sup> 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.<sup>250</sup>

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<sup>241</sup> 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).

<sup>242</sup> 18 U.S.C. §2441.

<sup>243</sup> 18 U.S.C. §3282.

<sup>244</sup> 18 U.S.C. §3286.

<sup>245</sup> 18 U.S.C. §3281. For background, see CRS Report RL31253, *Statutes of Limitation in Federal Criminal Cases: An Overview*, by Charles Doyle.

<sup>246</sup> 18 U.S.C. §3286(b).

<sup>247</sup> See *United States v. Gorski*, 47 M.J. 370 (1997) (ruling that the Ex Post Facto Clause applies to courts-martial proceedings); *Hamdan v. United States*, 801 F. Supp. 2d 1247 (U.S.C.M.C.R. 2011). (avoiding a decision on whether the Ex Post Facto Clause applies to military commission proceedings at Guantanamo by determining that Congress did not intend to create retroactive offenses).

<sup>248</sup> 10 U.S.C. §818.

<sup>249</sup> *Hamdan*, 548 U.S. at 602 (Stevens, J., plurality opinion).

<sup>250</sup> *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 (continued...)

Congress's post-*Hamdan* enactment of the original MCA exempted military commissions from many UCMJ requirements applicable to courts-martial proceedings. Although military commissions may exercise personal jurisdiction over a more limited category of belligerents than courts-martial,<sup>251</sup> the two forums share subject-matter jurisdiction over violations of the law of war. However, the systems differ in that Congress defined specific offenses punishable by military commissions, including, *inter alia*, murder of protected persons; murder in violation of the law of war; attacking civilians, civilian objects, or protected property; denying quarter; terrorism; providing material support for terrorism; and conspiracy to commit an offense punishable by military commission.<sup>252</sup> 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."<sup>253</sup> In enacting the original MCA, Congress asserted that it did "not establish new crimes that did not exist before its enactment," but rather codified "offenses that have traditionally been triable by military commissions."<sup>254</sup> Congress retained this language when it amended the statutory guidelines for military commissions pursuant to the MCA 2009.

The Court of Military Commission Review (CMCR) heard appeals on the question of *ex post facto* crimes in two cases, and in issuing its first two opinions, upheld Salim Hamdan's conviction for providing material support for terrorism<sup>255</sup> and Ali Hamza Ahmad Suliman al Bahlul's conviction for support of terrorism and conspiracy.<sup>256</sup> After reviewing historical evidence of what were arguably analogous crimes, the CMCR found that Congress could reasonably determine that these offenses violate the common law of war.<sup>257</sup> On appeal in the *Hamdan II* case, the D.C. Circuit disagreed and reversed. In its unanimous opinion, the three-judge panel found that Congress did not intend for the offenses it defined in the MCA to apply retroactively. Because the court agreed that the crime of material support of terrorism did not exist as a war crime under the international law of war at the time the relevant conduct occurred, which it found to be required

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(...continued)

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.

<sup>251</sup> 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").

<sup>252</sup> 10 U.S.C. §950t.

<sup>253</sup> 10 U.S.C. §948d.

<sup>254</sup> 10 U.S.C. §950p.

<sup>255</sup> *Hamdan v. United States*, 801 F. Supp. 2d 1247 (U.S.C.M.C.R. 2011).

<sup>256</sup> *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (U.S.C.M.C.R. 2011).

<sup>257</sup> *See* Docket for Salim Ahmed Hamdan, CMCR Case No. 09-002, available at <http://www.mc.mil/CASES/USCourtOfMilitaryCommissionReview.aspx>. The CMCR requested oral arguments on two questions in the *Hamdan* and *Al Bahlul* cases: whether "joint criminal enterprise" theory informs the *ex post facto* nature of any conviction for conspiracy, and whether the charge of aiding the enemy is limited to "those who have betrayed an allegiance or duty to a sovereign nation." (The government argued that the charge of "material support of terrorism" is essentially the same as the more familiar law of war offense "aiding the enemy"). Despite the relative dearth of cases in which persons with no allegiance or duty to the United States were prosecuted for "aiding the enemy" or similar crimes, the CMCR viewed the existence of such an allegiance or duty as an aggravating circumstance rather than a requirement for jurisdiction. The CMCR gave significant weight to the fact that many foreign domestic legal systems criminalize international terrorism, as is required by a number of international agreements, although these statutes and treaties generally do not treat terrorist offenses as war crimes. *Hamdan v. United States*, 801 F. Supp. 2d 1247 (U.S.C.M.C.R. 2011).

under pre-MCA law regarding military commissions, it found Hamdan's conviction invalid. The court also hinted that other offenses proscribed by the MCA might fall into the retroactive category. To avoid that fate, the court suggested, an offense must be shown to be "based on norms firmly grounded in international law."<sup>258</sup> Another panel of the D.C. Circuit followed *Hamdan II* to reverse Al Bahlul's conviction in a per curiam order.<sup>259</sup> The government asked for and was granted a petition for rehearing en banc in the *Al Bahlul* case, which will likely give it the opportunity to challenge the decision in *Hamdan* as well.<sup>260</sup>

In addition to these offenses, the crime of "murder in violation of the law of war," which punishes persons who, as unprivileged belligerents, commit hostile acts that result in the death of any persons, including lawful combatants, in the context of an armed conflict, may also be new, depending on how it is interpreted.<sup>261</sup> Whether the full D.C. Circuit, or possibly the Supreme Court, ultimately deems 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."<sup>262</sup> 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,<sup>263</sup> the standard may be more lenient when Congress acts pursuant to its constitutional authority to define war crime offenses.<sup>264</sup>

Ex post facto concerns could potentially be raised in other situations, such as when there is a change to the statute of limitation applicable to a crime or if there is an increase in a penalty. Statute of limitations concerns may arise in war crimes prosecutions under the UCMJ,<sup>265</sup> though

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<sup>258</sup> *Hamdan v. United States*, 696 F.3d 1238, 1250 n. 10 (D.C. Cir. 2012) (*Hamdan II*).

<sup>259</sup> *Al Bahlul v. United States*, 2013 WL 297726 (D.C. Cir. January 25, 2013).

<sup>260</sup> See CRS Report WSLG493, *Al Bahlul to be (Re)Heard by Full D.C. Circuit*, by Jennifer K. Elsea.

<sup>261</sup> Civilians (sometimes characterized as "unprivileged belligerents" or "unlawful combatants") have been tried by military tribunals for killing combatants in past wars, but the offense has been characterized as ordinary murder for which combatant immunity is unavailable as a defense rather than a violation of the law of war. The International Criminal Tribunal for the former Yugoslavia (ICTY) has found that war crimes in the context of non-international armed conflict include murder of civilians, but have implied that the killing of a combatant is not a war crime. *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1 (Trial Chamber), November 2, 2001, para. 124: ("An additional requirement for Common Article 3 crimes under Article 3 of the Statute is that the violations must be committed against persons 'taking no active part in the hostilities.'"); *Prosecutor v. Jelusic*, Case No. IT-95-10 (Trial Chamber), December 14, 1999, para. 34 ("Common Article 3 protects '[p]ersons taking no active part in the hostilities' including persons 'placed hors de combat by sickness, wounds, detention, or any other cause.'"); *Prosecutor v. Blaskic*, Case No. IT-95-14 (Trial Chamber), March 3, 2000, para. 180 ("Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective."). For further discussion, see CRS Report R41163, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, by Jennifer K. Elsea.

<sup>262</sup> U.S. CONST., Art. I, §10, cl. 8.

<sup>263</sup> *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).

<sup>264</sup> 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").

<sup>265</sup> 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...)

these limitations may not apply with respect to prosecutions before military commissions. These considerations may inform decisions by U.S. authorities as to whether to pursue criminal charges against detainees in civilian court or another forum. They may also be relevant in the crafting of any new legislative proposals concerning the prosecution of detainees. 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.<sup>266</sup>

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(...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).

<sup>266</sup> *Carmell v. Texas*, 529 U.S. 513, 530-31, 552 (2000); *cf., Stogner*, 539 U.S. at 615-16 (dicta). In *Carmell*, the Supreme Court considered an amendment to a statute concerning certain sexual offenses which authorized conviction for such offenses based on a victim's testimony alone, in contrast to the earlier version of the statute which required the victim's testimony plus other corroborating evidence to permit conviction. The Court held that application of the amendment to conduct that occurred before the amendment's effective date violated the constitutional prohibition against ex post facto laws. In *Stogner*, the Court found that the statute at issue was an ex post facto law, because it inflicted punishment where the defendant, by law, was not liable to any punishment. However, the Court noted in dicta, that

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

*Id.* at 615-16.

## 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 against Al Qaeda and associated forces 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,<sup>267</sup> or the government may be unwilling to make military and intelligence assets and personnel available for testimony.<sup>268</sup> 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 operate under procedural rules governing the admission of hearsay evidence. Procedural rules applicable to federal courts under the Federal Rules of Evidence and courts-martial proceedings under the Military Rules of Evidence impose largely similar restrictions on the usage of hearsay evidence. Under both the federal and the military rules of evidence, hearsay is generally inadmissible unless it qualifies under an exception to the hearsay rule.<sup>269</sup> For the most part, these exceptions require the hearsay evidence to be of a particular nature or context that gives it a greater degree of reliability than other out-of-court statements. Examples of exceptions to the hearsay rule include "excited utterances" made under the stress of excitement caused by a startling event; records of regularly-conducted activity; and statements of a self-incriminating nature.<sup>270</sup> Both sets of evidentiary rules recognize a residual exception for statements that have "equivalent circumstantial guarantees of trustworthiness."<sup>271</sup> Examples of statements that have been held to qualify under the residual exception include interviews of child abuse victims by specially trained FBI agents<sup>272</sup> and statements contained within the files of a foreign intelligence agency.<sup>273</sup>

One important aspect of the definition of hearsay is that statements made by co-conspirators in furtherance of a conspiracy are not considered hearsay.<sup>274</sup> For example, in prosecutions alleging

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<sup>267</sup> *E.g.*, *Abu Ali*, 528 F.3d at 239-240.

<sup>268</sup> *E.g.*, *United States v. Moussaoui*, 382 F.3d 453, 459 (4<sup>th</sup> 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).

<sup>269</sup> Federal Rules of Evidence (FED. R. EVID.) 802; Military Rules of Evidence (MIL. R. EVID.) 802.

<sup>270</sup> 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.

<sup>271</sup> FED. R. EVID. 807; MIL. R. EVID. 807.

<sup>272</sup> *United States v. Rouse*, 111 F.3d 561 (8<sup>th</sup> Cir. 1997).

<sup>273</sup> *United States v. Dumeisi*, 424 F.3d 566 (7<sup>th</sup> Cir. 2005).

<sup>274</sup> FED. R. EVID. 801(D)(2)(E); MIL. R. EVID. 801(d)(2)(E).

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.<sup>275</sup>

In comparison with the Federal Rules of Evidence and the Military Rules of Evidence, the procedural rules for military commissions under the Military Commission Rules of Evidence are much more permissive regarding the admissibility of hearsay evidence. Under the MCA 2006, 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.<sup>276</sup> In the latter case, the accused could 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.<sup>277</sup>

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

(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.<sup>278</sup>

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<sup>275</sup> FED. R. EVID. 801(D)(2); MIL. R. EVID. 801(d)(2).

<sup>276</sup> Military Commissions Rules of Evidence (MIL. COMM. R. EVID.) 802-803 (2007). The proponent of the evidence could 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.

<sup>277</sup> *Id.* at 803(c).

<sup>278</sup> 10 U.S.C. §949a(b)(3).



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

## Constitutional Issues

The Constitution imposes its own limitations on the admission of hearsay evidence in criminal cases. The protections afforded under the Confrontation Clause apply to both civilian and military proceedings.<sup>279</sup> 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,<sup>280</sup> 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.<sup>281</sup> Although the definition of testimonial statements has not been thoroughly explicated, lower courts have interpreted the proper inquiry to be "whether a reasonable person in the declarant's position would have expected his statements to be used at trial."<sup>282</sup> 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.<sup>283</sup> In contrast, the Supreme Court has held that statements made "to enable police assistance

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<sup>279</sup> 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)).

<sup>280</sup> In the case of *In re Yamashita*, 327 U.S. 1 (1946), the Supreme Court denied application of the writ of *habeas corpus* to a Japanese general who had been tried and convicted before a military commission in the Philippines. Having found that the Court lacked jurisdiction to review the proceedings, the Court declined to consider whether the procedures employed by the commission, which permitted significant use of hearsay evidence, violated constitutional requirements. While the Supreme Court has not definitively addressed the question of whether the Confrontation Clause applies to noncitizens at Guantanamo, the reliance on hearsay evidence in administrative determinations as to whether a detainee was an "enemy combatant" informed the Court's ruling in *Boumediene* that those proceedings were an inadequate substitute for habeas corpus. 553 U.S. at 781-83. 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).

<sup>281</sup> *Crawford v. Washington*, 541 U.S. 36 (2004). This constitutional prohibition on certain types of hearsay only prohibits the admission of statements to be used *against* the defendant. For example, in the *Moussaoui* case, involving the prosecution of an individual for involvement in the 9/11 terrorist attacks, the Fourth Circuit applied *Crawford* and prohibited the government from using statements in the substitutions for testimony from certain witnesses to show the defendant's guilt. *Moussaoui*, 382 F.3d at 481-482. Exculpatory statements in the deposition substitutions, which were clearly testimonial, would have been admissible.

<sup>282</sup> *United States v. Udeozor*, 515 F.3d 260 (4<sup>th</sup> Cir. 2008) (citing decisions by the First, Second, Third, Fourth, Seventh, and Tenth Circuits).

<sup>283</sup> See *Davis v. Washington*, 547 U.S. 813, 821, 830 (2006). The Supreme Court also recently held that affidavits from (continued...)

to meet an ongoing emergency”<sup>284</sup> were not testimonial, because, objectively determined, the purpose of the statements was to request assistance and not to act “as a witness.”<sup>285</sup>

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.<sup>286</sup>

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 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.

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forensic analysts are also testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (prosecution cannot prove that substance was cocaine using *ex parte* out-of-court affidavits). It is less clear whether the out of court statements upon which the in-court opinion of an expert witness relies would also be testimonial. *Williams v. Illinois*, 132 S. Ct. 2221, 2255 (2012) (plurality opinion) (Thomas, J. concurring) (agreeing with four dissenting justices that the statements upon which a DNA expert relied were hearsay, but finding no violation of the Confrontation Clause because the statements lacked the requisite “formality and solemnity”). While these cases concern narcotics and DNA evidence, the Confrontation Clause would likely apply similarly to other categories of chemical analyses, such as the identification of materials used for bombs or other explosive devices.

<sup>284</sup> *Id.* at 822.

<sup>285</sup> *Id.* at 827-828. The statements in this case were made during a 911 call describing a contemporaneous physical assault.

<sup>286</sup> 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.

## 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.<sup>287</sup> In January 2010, it was reported that the Obama Administration intends to bring charges against about 35 detainees in military or civilian court.<sup>288</sup> The Sixth Amendment guarantees a right to a speedy trial for the accused in all criminal prosecutions.<sup>289</sup> The protection is triggered “when a criminal prosecution has begun.”<sup>290</sup> The invocation of the right may occur prior to indictment or formal charge, when “the actual restraints imposed by arrest and holding” are made.<sup>291</sup> The right has been found to extend to civilian and military courts,<sup>292</sup> though the nature of the right’s application to military courts may differ from its application in the civilian context.<sup>293</sup> 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,<sup>294</sup> and that denial of this right compels a reviewing court to dismiss the charges against them.<sup>295</sup>

A reviewing court’s assessment of any speedy trial claim raised by a detainee is likely to balance any prejudice suffered by the accused with the public’s interest in delaying prosecution. Courts have employed a multi-factor balancing test to assess whether a defendant’s right to a speedy trial has been violated, taking into account the length of the delay, the reason for the delay, the defendant’s assertion of the right, and the prejudice to the defendant.<sup>296</sup> Because the remedy for

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<sup>287</sup> 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>.

<sup>288</sup> Finn, *supra* footnote 163.

<sup>289</sup> 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”).

<sup>290</sup> *United States v. Marion*, 404 U.S. 307, 313 (1971).

<sup>291</sup> *Id.* at 320.

<sup>292</sup> *See, e.g., United States v. Becker*, 53 M.J. 229 (2000).

<sup>293</sup> 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).

<sup>294</sup> 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.

<sup>295</sup> *See Strunk*, 412 U.S. at 438.

<sup>296</sup> *See Barker*, 407 U.S. at 530. Courts have recognized at least three types of prejudice, including “‘oppressive pretrial incarceration,’ ‘anxiety and concern of the accused,’ and ‘the possibility that the [accused’s] defense will be impaired’ by dimming memories and loss of exculpatory evidence.” *See Doggett v. United States*, 505 U.S. 647, 654 (1992) (citing *Barker*, 407 U.S. at 532; *Smith v. Hoey*, 393 U.S. 374, 377-379 (1969); *United States v. Ewell*, 383 U.S. 116, (continued...)

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."<sup>297</sup> 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."<sup>298</sup> 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,<sup>299</sup> which may affect a reviewing court's consideration of any speedy trial claims.

Ahmed Ghailani, the sole Guantanamo detainee to have been transferred to the United States to face trial in civilian court, sought dismissal of his indictment based on his claim that the government violated his Sixth Amendment right to a speedy trial due to the five-year delay between the time he was brought into U.S. custody and his production before the court.<sup>300</sup> The court denied the motion, finding that the time Ghailani spent in CIA detention was justified by the need to interrogate him for intelligence purposes, a process that was incompatible with prosecution in federal court.<sup>301</sup> The time between Ghailani's transfer to Guantanamo in 2006 and his transfer to New York in 2009 was held not to justify postponement of trial, because the need to prevent the defendant from returning to hostilities was not incompatible with federal prosecution.<sup>302</sup> The aborted military commission prosecution did not justify delay because the government had complete discretion as to where to prosecute the defendant.<sup>303</sup> However, although the Guantanamo portion of the delay was attributable to the government, it was assessed as a "neutral factor" because there was no evidence that its purpose had to do with a "quest for tactical advantage."<sup>304</sup> Because Ghailani was detainable as an "enemy combatant" with or without prosecution, the need to avoid excessive incarceration was also not a relevant factor under *Barker*

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120 (1966).

<sup>297</sup> *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).

<sup>298</sup> *Barker*, 407 U.S. at 527.

<sup>299</sup> 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).

<sup>300</sup> See *United States v. Ghailani*, 751 F. Supp. 2d 515 (S.D.N.Y. 2010).

<sup>301</sup> *Id.* at 533.

<sup>302</sup> *Id.* at 536. The court pointed out that the defendant had been "no more able to engage in hostilities against the United States while in the custody of the Bureau of Prisons pending trial on this indictment than he was at Guantanamo in the custody of the DoD. He could have been brought to this Court in 2006 or any subsequent date to face this 1998 indictment and, at the same time, prevented from engaging in hostilities against this country." *Id.*

<sup>303</sup> *Id.* at 537-38. The judge contrasted this factor against situations where delay is justified by ongoing state investigations and prosecutions.

<sup>304</sup> *Id.* at 541.

analysis. Because the court was not persuaded that Ghailani was prejudiced by the delay, it held there was no violation of his Sixth Amendment rights.

## Statutory and Regulatory Requirements

In addition to these constitutional requirements, statutes and forum rules may impose speedy trial requirements of their own. The Federal Speedy Trial Act of 1974 delineates specific speedy trial rules in the context of federal courts.<sup>305</sup> 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.<sup>306</sup> 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."<sup>307</sup> Presumably, many of the same factors that are important in considering constitutional issues relating to a right to a speedy trial are also relevant when interpreting the statutory requirements of the Speedy Trial Act.<sup>308</sup>

In *United States v. al-Arian*, the United States charged four men with having provided material support to terrorists, among other charges.<sup>309</sup> 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.<sup>310</sup> 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.<sup>311</sup> 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.<sup>312</sup> 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.<sup>313</sup>

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<sup>305</sup> 18 U.S.C. §3161. Congress passed the Speedy Trial Act shortly after the Supreme Court, in *Barker v. Wingo*, rejected a specific, judicially imposed time period. 407 U.S. at 523. The *Barker* court held that such a specific timeframe would invade the province of the legislature. *Id.* The Speedy Trial Act is just the primary statute implementing the constitutional right for defendants in federal courts. If detainees were located in another country's jurisdiction, then the government would have to comply with both the Speedy Trial Act and the Interstate Agreement on Detainers. *See* 18 U.S.C. Appendix 2, §2, Articles III-VI.

<sup>306</sup> 18 U.S.C. §3161(b),(c).

<sup>307</sup> 18 U.S.C. §3161(h)(8)(A).

<sup>308</sup> 18 U.S.C. §3161(h)(8)(B)(ii).

<sup>309</sup> 267 F. Supp. 2d 1258, 1264 (M.D. Fla. 2003).

<sup>310</sup> *Id.* at 1260.

<sup>311</sup> *Id.* at 1267.

<sup>312</sup> *Id.* at 1264.

<sup>313</sup> *Id.* at 1264 n.16.

## Speedy Trials under Military System

There are no statutory or procedural rule requirements governing military commissions concerning enemy combatant's right to a speedy trial. While many UCMJ requirements apply to military commission proceedings, those relating to the right to a speedy trial do not.<sup>314</sup> 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.<sup>315</sup> 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.<sup>316</sup> 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.<sup>317</sup>

On their face, the statutory and procedural rules concerning speedy trial rights in courts-martial proceedings may pose a significant obstacle for their usage in prosecuting persons held at Guantanamo. While enemy combatants may be tried by a general court-martial for war crimes under the UCMJ,<sup>318</sup> 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.<sup>319</sup> 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,<sup>320</sup> 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

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<sup>314</sup> 10 U.S.C. §948b(d) (other provisions of the UCMJ specifically excluded include those related to compulsory self-incrimination and the requirement for pretrial investigation). The MCA 2009 retains this provision.

<sup>315</sup> 10 U.S.C. §810.

<sup>316</sup> 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).

<sup>317</sup> 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).

<sup>318</sup> *Id.* at 201(f)(1)(B).

<sup>319</sup> 10 U.S.C. §810 ("When any person subject to [the UCMJ] is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."). However, enemy combatants are subject to the UCMJ as defined in art. 2 only if they "belong[] to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War..." 10 U.S.C. §802(13).

<sup>320</sup> *See* United States v. Cummings, 21 M.J. 987, 988 (N.M.C.M.R. 1986) (after being notified that the accused is available for the immediate pickup from civilian custody, the government has a reasonable time to arrange for transportation of the accused before the speedy trial period begins to run), United States v. Reed, 2 M.J. 64, 67 (C.M.A. 1976) (holding "the military is not accountable for periods an accused is retained in civil confinement as a result of civil offenses irrespective of whether his initial confinement was by civil or military authority"), United States v. Stubbs, 3 M.J. 630, 636 (N.M.C.M.R. 1977) (confinement by the U.S. military pursuant to a Status of Forces Agreement, in order to ensure the presence of the accused at a judicial proceeding in a foreign jurisdiction, is not attributable to the government).

in this scenario, but the defense has the right to object to the trial on the basis of the speedy trial requirement.<sup>321</sup> Prosecution of detainees before a general court-martial may require modification of applicable statutes and forum rules relating to a defendant's right to a speedy trial.

Finally, even if the government complied with time constraints imposed by applicable statutes and forum rules and did not violate detainees' constitutional rights to a speedy trial under the Sixth Amendment, it is possible that a court could hold that the government violated a defendant's constitutional right to a fair trial under the Fifth Amendment Due Process Clause by "caus[ing] substantial prejudice to [the detainee's] right to a fair trial," typically by intentionally stalling prosecution in a case.<sup>322</sup>

## **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."<sup>323</sup> However, in the context of prosecuting persons seized in the armed conflict against Al Qaeda and associated forces, 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),<sup>324</sup> which formalized the procedures to be used by federal courts when faced with the potential disclosure of classified information during criminal litigation. Courts-martial and military commissions also have procedures concerning a defendant's right to confront secret evidence.<sup>325</sup> The rules governing the disclosure of classified information in military commissions were amended by the MCA 2009 to more closely resemble the practices employed in federal civilian court under CIPA and in general courts-martial.<sup>326</sup>

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, typically 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.<sup>327</sup> In the case of ordinary terrorism prosecutions, the more typical situation is likely to be the introduction of classified information as part of the prosecution's case against the defendant. In these cases, preventing disclosure to the defendant, as well as to the public, may be required. Preventing the accused from having access to evidence to be used against him at trial raises concerns under the Confrontation Clause of the Constitution. Both CIPA and the Federal Rules of Criminal Procedure authorize federal courts to issue protective orders preventing disclosure of classified

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<sup>321</sup> R.C.M. 707(c)(2).

<sup>322</sup> *Marion*, 404 U.S. at 324.

<sup>323</sup> U.S. CONST. amend. VI.

<sup>324</sup> P.L. 96-456, *codified at* 18 U.S.C. app. 3 §1-16. For more information about CIPA, see CRS Report R40603, *The State Secrets Privilege and Other Limits on Litigation Involving Classified Information*, by Edward C. Liu

<sup>325</sup> MIL. R. EVID. 505, MIL. COMM. R. EVID. 505.

<sup>326</sup> 10 U.S.C. §§949p-1 – 949p-1.

<sup>327</sup> 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.

information to various parties, including the defendant, in cases where nondisclosure would not unduly prejudice the rights of the accused.<sup>328</sup> The judge may permit the prosecution to provide an unclassified summary or substitute statement so long as this procedure provides the defendant with substantially the same ability to make his defense as disclosure of the classified information itself would provide. Such a substitute submission might redact, for example, sources and methods of intelligence gathering so long as enough information is made available to give the defendant a fair opportunity to rebut the evidence or cast doubt on its authenticity.

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

### **Withholding Classified Information During Discovery**

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

*Brady* material, named after the seminal Supreme Court case *Brady v. Maryland*,<sup>329</sup> refers to information in the prosecution's possession which is exculpatory, that is, tends to prove the innocence of the defendant. For example, statements by witnesses that contradict or are inconsistent with the prosecution's theory of the case must be provided to the defense, even if the prosecution does not intend to call those witnesses. Prosecutors are considered to have possession of information that is in the control of agencies that are "closely aligned with the prosecution,"<sup>330</sup> but, whether information held exclusively by elements of the intelligence community could fall within this category does not appear to have been addressed.<sup>331</sup>

*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*,<sup>332</sup> 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.<sup>333</sup>

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<sup>328</sup> 18 U.S.C. app. 3 §3; FED. R. CRIM. P. 16(d)(1).

<sup>329</sup> *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process requires prosecution to turn over exculpatory evidence in its possession).

<sup>330</sup> *United States v. Brooks*, 966 F.2d 1500, 1503 (1992).

<sup>331</sup> *But see* *United States v. Libby*, 429 F. Supp. 2d 1 (D.D.C. 2006) (holding that, on the facts of this case, the CIA was closely aligned with special prosecutor for purposes of *Brady*).

<sup>332</sup> *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).

<sup>333</sup> *Codified at* 18 U.S.C. §3500. The Jencks Act provides definitions for so-called "Jencks material" and requires (continued...)



The operation of *Jencks* and *Brady* may differ significantly in the context of classified information. Under Section 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.<sup>334</sup> 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.<sup>335</sup>

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.<sup>336</sup> Under the Federal Rules of Criminal Procedure, a defendant may request a deposition in order to preserve testimony at trial.<sup>337</sup> In *Moussaoui*, the court had determined that a deposition of the witnesses by the defendant was warranted because the witnesses had information that could have been exculpatory or could have disqualified the defendant for the death penalty.<sup>338</sup> However, the government refused to produce the deponents, citing national security concerns.<sup>339</sup>

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.<sup>340</sup> 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.<sup>341</sup> Here, the Fourth Circuit seemed to indicate that government-produced summaries of the witnesses' statements, with some procedural modifications, could be adequate substitutes for depositions.<sup>342</sup>

Within the courts-martial framework, the use of and potential disclosure of classified information is addressed in Rule 505 of the Military Rules of Evidence. Rule 505 applies at all stages of

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(...continued)

disclosure of such material to the defense, but only after the witness has testified.

<sup>334</sup> 18 U.S.C. app. 3, §4.

<sup>335</sup> See *United States v. O'Hara*, 301 F.3d 563, 569 (7<sup>th</sup> Cir. 2002) (holding that *in camera* examination and redaction of purported *Brady* material by trial court was proper).

<sup>336</sup> *United States v. Moussaoui*, 382 F.3d 453 (4<sup>th</sup> 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 (4<sup>th</sup> 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

<sup>337</sup> 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.

<sup>338</sup> *Moussaoui*, 382 F.3d at 458, 473-475.

<sup>339</sup> *Id.* at 459.

<sup>340</sup> *Id.* at 477.

<sup>341</sup> *Id.*

<sup>342</sup> *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.

proceedings, including during discovery.<sup>343</sup> 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.<sup>344</sup> 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.<sup>345</sup> 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.<sup>346</sup>

As amended by the MCA 2009, disclosure of classified information during a military commission is governed by 10 U.S.C. §§949p-1–949p-9. The act provides that “[t]he judicial construction of the Classified Information Procedures Act ... shall be authoritative” in interpreting the statutory requirements governing the use of classified information in military commission proceedings, “except to the extent that such construction is inconsistent with the specific requirements” of these statutory provisions.<sup>347</sup> 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.<sup>348</sup> However, in a departure from the rules governing courts-martial, the convening authority is replaced by the military judge with respect to the modification or substitution of classified information. Pursuant to modifications made by the MCA 2009, the military judge shall, upon request by either party, “hold such conference *ex parte* to the extent necessary to protect classified information from disclosure, in accordance with the practice of the federal courts under the Classified Information Procedures Act.”<sup>349</sup> 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.”<sup>350</sup> 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.<sup>351</sup>

## 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

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<sup>343</sup> MIL. R. EVID. 505(d).

<sup>344</sup> *Id.*

<sup>345</sup> MIL. R. EVID. 505(e).

<sup>346</sup> *Id.*

<sup>347</sup> 10 U.S.C. §949p-1(d).

<sup>348</sup> 10 U.S.C. §949p-2.

<sup>349</sup> *Id.*

<sup>350</sup> 10 U.S.C. §949p-4.

<sup>351</sup> 10 U.S.C. §949p-6.

damaging to the national security. In these instances, the prosecution may seek to present evidence at trial in a manner that does not result in full disclosure to the defendant. One proposed scenario (which is not authorized by the MCA) might be the physical exclusion of the defendant from those portions of the trial, while allowing the defendant's counsel to remain present.<sup>352</sup> However, such proceedings could unconstitutionally infringe upon the defendant's Sixth Amendment right to confrontation.<sup>353</sup>

Historically, defendants have had the right to be present during the presentation of evidence against them, and to participate in their defense.<sup>354</sup> But other courts have approved of procedures which do not go so far as to require the defendant's physical presence in the same room as witnesses to be confronted. For example, the government is in some cases permitted to use depositions in lieu of live witness testimony where the witness is beyond the subpoena power of federal courts, as is the case with foreign national witnesses overseas. In *United States v. Abu Ali*, the Fourth Circuit permitted video conferences to allow the defendant to observe, and be observed by, witnesses who were being deposed in Riyadh, Saudi Arabia.<sup>355</sup> 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.<sup>356</sup> Here, the Fourth Circuit cited the protection of national security as satisfying the "important public policy" requirement, where the government could not reasonably ensure that a defendant charged with serious terrorism offenses would remain in its custody if he were permitted to travel abroad. The cited procedural safeguards were the presence of mutual observation, the fact that testimony was given under oath in the Saudi criminal justice system, and the ability of defense counsel to cross examine the witnesses.<sup>357</sup>

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 Section 3 authorizes the court to issue protective orders preventing disclosure of classified information to the defendant by defense counsel, for example, in order to protect intelligence sources and methods by which evidence to be presented at trial was obtained.

Under CIPA, the admissibility of classified information at trial is determined at a pretrial hearing. As with the case in discovery, the government may seek to replace classified information with redacted versions or substitutions. However, in this context, the adequacy of a substitute or redacted version is determined in an adversarial proceeding in which both prosecutors and

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<sup>352</sup> See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 168 (D.D.C. 2004) (describing potential procedures under military commissions established by Presidential order).

<sup>353</sup> 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").

<sup>354</sup> See, e.g., *id.*; *Crawford*, 541 U.S. at 49 (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).

<sup>355</sup> *United States v. Abu Ali*, 528 F.3d 210, 239-240 (4<sup>th</sup> 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.

<sup>356</sup> *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).

<sup>357</sup> *Id.* See also *United States v. Bell*, 464 F.2d 667 (2d 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).

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.<sup>358</sup>

In the courts-martial context, Rule 505 of the Military Rules of Evidence governs the use of classified information during trial. When classified material is relevant and necessary to an element of the offense or a legally cognizable defense, the convening authority may obtain the information for use by the military judge in determining how to proceed with the trial, or may dismiss the charges against the accused rather than disclose the information in the interest of protecting the national security.<sup>359</sup> 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.<sup>360</sup> Additionally, the military judge has the authority to issue a protective order to prevent the disclosure of classified evidence that has been disclosed by the government to the accused.<sup>361</sup> 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.<sup>362</sup>

In trials before military commissions, the military judge shall permit, upon motion of the government, the introduction of otherwise admissible evidence while protecting from disclosure the sources, methods, or activities by which the United States obtained the evidence.<sup>363</sup> 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.<sup>364</sup> In this scenario, the detainee will not have access to the information pertaining to the source of the evidence, but his defense counsel will be able to argue for the release of the information on behalf of the detainee.<sup>365</sup> The detainee will have access to all evidence that will be viewed by the commission members.<sup>366</sup>

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.<sup>367</sup> On the other hand, if

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<sup>358</sup> 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).

<sup>359</sup> MIL. R. EVID. 505(f).

<sup>360</sup> MIL. R. EVID. 505(i).

<sup>361</sup> MIL. R. EVID. 505(g).

<sup>362</sup> MIL. R. EVID. 505(f).

<sup>363</sup> 10 U.S.C. §949p-6(c).

<sup>364</sup> 10 U.S.C. §949p-6(a)(3).

<sup>365</sup> *Id.*

<sup>366</sup> 10 U.S.C. §949p-1(b).

<sup>367</sup> *Cf. Crane v. Kentucky*, 476 U.S. 683 (1986) (evidence concerning the manner in which a confession was obtained should have been admitted as relevant to its reliability and credibility, despite court’s determination that the confession (continued...))

evidence resulting from classified intelligence sources and methods contains “‘particularized guarantees of trustworthiness’ such that adversarial testing would be expected to add little, if anything, to [its] reliability,” it may be admissible and survive challenge.<sup>368</sup>

## Conclusion

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

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

Criminal charges could also be brought against detainees in one of several forums—that is, federal trial courts, the courts-martial system, or military commissions. The procedural protections afforded to the accused in each of these forums may differ, along with the types of offenses for which persons may be charged. This may affect the ability of U.S. authorities to pursue criminal charges against some detainees. Whether the military commissions established to try detainees for war crimes fulfill constitutional requirements concerning a defendant’s right to a fair trial is likely to become a matter of debate, if not litigation. There is considerable prosecutorial discretion within the executive branch regarding which forum to utilize, but legislative enactments may potentially limit the exercise of such discretion, including by requiring detainees to be charged in a particular forum.

The issues raised by the proposed closure of the Guantanamo detention facility have broad implications. Executive policies, legislative enactments, and judicial rulings concerning the rights

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(...continued)

was voluntary and need not be suppressed).

<sup>368</sup> *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.”).

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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