

## Law Enforcement as a Counterterrorism Tool

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In January 2011, Congress enacted legislation prohibiting the use of federal funds to transfer to the United States any individuals currently detained at Guantánamo Bay, Cuba.<sup>1</sup> Among the purposes of this provision, observers commented, was to prevent the prosecution of these detainees in federal court in the United States.<sup>2</sup> President Obama signed the legislation into law as part of the Defense Authorization Act, but he also issued a statement strongly objecting to the provision and pledging to seek its repeal:<sup>3</sup>

[This provision] represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantánamo detainees, based on the facts and the circumstances of each case and our national security interests. The prosecution of terrorists in Federal court is a powerful tool in our efforts to protect the Nation and must be among the options available to us. Any attempt to deprive the executive branch of that tool undermines our Nation's

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1. See The Ike Skelton National Defense Authorization Act for Fiscal Year 2011, H.R. 6523, 111th Cong. §1032, enacted as Pub. L. No. 111-383 (Jan. 7, 2011). During the spring of 2011, other bills with similar provisions were pending in Congress. For example, Sections 1039 and 1046 of H.R. 1540, the National Defense Authorization Act for Fiscal Year 2012, which was passed by the House of Representatives on May 26, 2011, would prohibit Defense Department appropriated funds for 2012 from being used to "transfer or release an individual detained at Guantanamo . . . to or within the United States," and require trial by military commission for certain terrorists if they are "subject to trial . . . by a military commission."

2. See, e.g., David B. Rivkin, Jr., & Lee A. Casey, Editorial, *The Wrong Way To Stop Civilian Terror Trials*, WALL ST. J., Dec. 21, 2010, at A17 (noting that the apparent purpose of the defense authorization provision is to prevent the prosecution of Guantánamo Bay detainees in federal court).

3. Statement by the President on H.R. 6523, 111th Cong. (Jan. 7, 2011).

counterterrorism efforts and has the potential to harm our national security.<sup>4</sup>

The Congressional action and the President's response are part of a broader public debate about the role of law enforcement as a counterterrorism tool. Some question the effectiveness of the U.S. criminal justice system and argue that it should *never* be used against terrorists, or at least some kinds of terrorists. In contrast, some others argue that law enforcement is the *only* legitimate way to detain terrorists, and that they should either be prosecuted in the civilian courts or released.<sup>5</sup>

This article argues that we should continue to use all of the military, law enforcement, intelligence, diplomatic, and economic tools at our disposal, selecting in each case the particular tool that is most effective under the circumstances, consistent with our laws and values. The discussion proceeds in five main parts.

Part I reviews the recent history of our national counterterrorism strategy, focusing in particular on the origins and evolution of the Justice Department's National Security Division (NSD), which I led from March 2009 until March 2011.<sup>6</sup> Knowing a little about NSD is important because NSD is a key part of how the country came to a consensus, at least until recently, about the appropriate role of law enforcement as a counterterrorism tool.

Part II sketches a conceptual framework for thinking about the role of law enforcement in the current conflict, and more generally as a counterterrorism tool. The idea here is to identify the right questions, and the right way of approaching the policy debate in which we are now engaged as a country. Identifying the right questions is difficult but important.

Part III answers the questions posed in Part II. It briefly describes some of the empirical evidence about how law enforcement has been used to

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4. *Id.*

5. See, e.g., Benjamin Weiser, *Top Terror Prosecutor Is a Critic of Civilian Trials*, N.Y. TIMES, Feb. 19, 2011, available at <http://www.nytimes.com/2010/02/20/nyregion/20-prosecutor.html> (quoting Andrew McCarthy, formerly an Assistant U.S. Attorney, as saying, "A war is a war. A war is not a crime, and you don't bring your enemies to a courthouse."). However, McCarthy has supported enhancements to the criminal justice system designed to make it more effective against some terrorists in the post-9/11 era. See, e.g., *Material Support to Counterterrorism*, NATIONAL REVIEW ONLINE, Dec. 14, 2004, available at <http://www.nationalreview.com/articles/213131/material-support-counter-terrorism/andrew-c-mccarthy>). On the other side of the debate, the ACLU has argued: "If the government has enough credible evidence against a detainee, it should prosecute him in a federal court, which are [sic] well positioned to accommodate the government's legitimate national security interests without compromising the fundamental rights of defendants. Where there is not, detainees should be repatriated to their home countries or, if there is a risk of torture or abuse, transferred to countries where human rights will be respected." See [www.closegitmo.com](http://www.closegitmo.com).

6. *The National Security Division*, <http://www.justice.gov/nsd/index.html>.

combat terrorism, and, in particular, how it has been used to disrupt plots, incapacitate terrorists, and gather intelligence. This serves as the basic, affirmative case for retaining law enforcement as one of our counterterrorism tools. Part III also explores some of the arguments *against* using law enforcement for counterterrorism, and explains why (in my view) those arguments are wrong. Part III closes with a discussion of pragmatism and perception, and the role of values in counterterrorism.

Part IV offers a comparison between civilian law enforcement, detention under the law of war,<sup>7</sup> and prosecution in a military commission. We need such a comparison to make smart decisions about public policy as well as decisions about the disposition of individual cases. The chief goal of Part IV is to explain the major pros and cons of each system.<sup>8</sup>

Finally, Part V discusses how law enforcement can be made more flexible and more effective as a counterterrorism tool. In particular, it addresses how the public-safety exception to *Miranda* should apply in the context of terrorism investigations.<sup>9</sup>

#### I. THE RECENT HISTORY OF LAW ENFORCEMENT AS A COUNTERTERRORISM TOOL

We often hear that before 9/11, the United States took a “law enforcement approach” to counterterrorism.<sup>10</sup> There is some truth in that, but I think it oversimplifies the situation. In fact, the 9/11 Commission

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7. Law of war detention as used in this paper refers to detention pursuant to the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), as informed by law of war principles. The procedural discussion on law of war detention focuses on any such detention that has been held to be subject to habeas corpus.

8. There are two appendices to this article: Appendix 1 is a description of some of the significant cooperation and intelligence activities of terrorist groups that the U.S. government has obtained from terrorism suspects via the criminal justice system. Appendix 2 is a chart comparing the criminal justice system and the reformed system of military commissions and law of war detention.

9. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); see *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (finding a public safety exception to the requirement of *Miranda* warnings where law enforcement is acting to protect the public and that the availability of that exception does not depend on the motivation of the individual officers involved).

10. See, e.g., *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary* 111th Cong. (June 17, 2009) (statement of Sen. Jeff Sessions), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3913&wit\\_id=515](http://judiciary.senate.gov/hearings/testimony.cfm?id=3913&wit_id=515) (expressing concern that Department of Justice “would operate under [a] pre-9/11, criminal law mindset when fighting terrorists”); Andrew C. McCarthy, *Kerry’s Exaggerated Terror Problem*, NAT’L REV. ONLINE (Mar. 30, 2004), <http://old.nationalreview.com/comment/mccarthy200403300858.asp> (“In the eight years from 1993 to 2001, when terrorism was regarded as a law enforcement issue, we managed to prosecute about 40 terrorists in trials that generally took six months or more, and terrorist attacks nevertheless continued apace. On the other hand, since October 2001, our military has killed or captured thousands of terrorists and there have been no domestic attacks.”); Peter D. Feaver, *The Clinton Mind-Set*, WASH. POST, Mar. 24, 2004, at A21.

found that before 9/11, “the CIA was plainly the lead agency confronting al Qaeda”; law enforcement played a “secondary” role; and military and diplomatic efforts were “episodic.”<sup>11</sup> I was involved in national security before 9/11, and that seems roughly accurate to me.

After 9/11, of course, all of our national security agencies ramped up their counterterrorism activities. As our troops deployed to foreign battlefields and the Intelligence Community expanded its operations, the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) also evolved. We began with the important legal change of tearing down the so-called “FISA wall,” under which law enforcement and intelligence were largely separate enterprises and law enforcement was correspondingly limited as a counterterrorism tool.<sup>12</sup>

The Foreign Intelligence Surveillance Act, or FISA, is a federal statute enacted by Congress in 1978 that governs electronic surveillance and physical searches of foreign intelligence targets in the United States.<sup>13</sup> It is an extremely powerful investigative tool, and one that is vitally important to our national security. FISA does not allow, and never has allowed, surveillance or searches of ordinary criminals like Bonnie and Clyde. It applies only to foreign intelligence threats, such as Robert Hanssen or Osama bin Laden. Under the FISA wall, however, intelligence and law enforcement had to remain relatively separate even with respect to investigations of spies and international terrorists. In other words, the price of using FISA – or preserving the option to use FISA – was a requirement to keep law enforcement and intelligence at arm’s length.<sup>14</sup> In some cases, for example, parallel law enforcement and intelligence investigations of the same terrorism targets had to be run by separate squads of FBI agents.

This wall was built on the premise that a powerful intelligence tool like FISA should not be used for the primary purpose of supporting criminal prosecution, even if that prosecution targeted terrorists (as opposed to ordinary criminals). It was derived in part from an interpretation of the FISA statute and the Fourth Amendment.<sup>15</sup> Proponents of the wall recognized that FISA could be used to gather information needed to neutralize terrorists through intelligence, diplomatic, or military action; but

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11. NATIONAL COMMISSION ON THE TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 400-401 (2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf> (“Before 9/11, the CIA was plainly the lead agency confronting al Qaeda. The FBI played a very secondary role. The engagement of the departments of Defense and State was more episodic. Today the CIA is still central. But the FBI is much more active, along with other parts of the Justice Department. The Defense Department effort is now enormous.”) [hereinafter 9/11 COMMISSION REPORT].

12. See, e.g., David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL’Y REV. 487 (2006) [hereinafter *Rise and Fall*].

13. Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§1801-1885c (2008).

14. See *Rise and Fall*, supra note 12.

15. *Id.*

they treated law enforcement efforts to neutralize terrorists as a separate undertaking. Thus, for example, while FISA could (at least in theory) be used for the primary purpose of collecting information to allow the Department of Defense (DoD) to locate, target, and capture or kill a terrorist on the battlefield abroad, it could not be used for the primary purpose of collecting information to allow the DOJ to prosecute, convict, incarcerate, or execute a terrorist in the United States. The wall limited information-sharing and coordination between intelligence officers and law enforcement officers,<sup>16</sup> and this hindered efforts to combat terrorism.<sup>17</sup>

The demise of the FISA wall reflected, and also reinforced, the conclusion that law enforcement helps protect national security. This is not to say that law enforcement is the only way to protect national security, or even that it is the best way. But I do believe we came to a national consensus, in the years immediately after 9/11, that law enforcement is one important way of protecting national security. Some of the evidence for that conclusion is set out below.

The wall came down as a result of combined legislative, executive, and judicial decisions – including the USA PATRIOT Act, new Attorney General Guidelines, and an unprecedented decision of the Foreign Intelligence Surveillance Court of Review.<sup>18</sup> When Congress enacted the PATRIOT Act, it included a provision making clear its view that law enforcement protects against terrorism. Section 504 of the Act provided explicitly that intelligence officials using FISA “may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against . . . international terrorism,” reflecting an understanding that both intelligence and law enforcement officials in fact play a protective role in counterterrorism efforts.<sup>19</sup> As Senator Patrick Leahy explained at the time, “consultation and coordination is authorized for the enforcement of laws that protect against international terrorism,” and, indeed, “the use of FISA to gather evidence for the enforcement of these laws was contemplated” in 1978 when the statute was first enacted.<sup>20</sup>

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16. See 9/11 COMMISSION REPORT, *supra* note 11, at 78-79 (describing legal constraints on the FBI and origins of “the wall”); *Rise and Fall*, *supra* note 12.

17. See 9/11 COMMISSION REPORT, *supra* note 11, at 270-72 (describing how “the wall” hampered efforts to investigate and locate some of the 9/11 hijackers).

18. See *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272, codified as amended in various sections of the U.S. Code; Memorandum from Att’y Gen. John Ashcroft to Various Dep’t of Justice and FBI Officials, “Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI” (Mar. 6, 2002), *available at* [www.fas.org/irp/agency/doj/fisa/ag030602.html](http://www.fas.org/irp/agency/doj/fisa/ag030602.html); *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

19. The law was later amended to permit coordination with state and local officials as well. See 50 U.S.C. §§1806(k) (2006), 50 U.S.C.A. 1824(k) (West 2010).

20. 147 Cong. Rec. S11,004 (Oct. 25, 2001).

In its effort to tear down the wall in 2002, the government relied on the PATRIOT Act to argue to the Foreign Intelligence Surveillance Court of Review that “[p]rosecution is often a most effective means of protecting national security.”<sup>21</sup> It explained that while FISA was designed to acquire information necessary to “protect” against international terrorism and other threats to national security, the statute did “not limit *how* the government may use the information to achieve that protection. In other words,” the government argued, “the [law] does not discriminate between protection through diplomatic, economic, military, or law enforcement efforts.”<sup>22</sup> The government’s claims on this topic included an example of how law enforcement helps protect against terrorism:

[T]he recent prosecution of Ahmed Ressam, who was charged with attempting to destroy Los Angeles International Airport, protected the United States by incapacitating Ressam himself from committing further acts, and by deterring others who might have contemplated similar action. Moreover, as a result of his conviction and sentence, Ressam agreed to cooperate with the government and provided information about the training he received at an al Qaeda camp overseas. That kind of prosecution thus protects the United States directly, by neutralizing a threat, and indirectly, by generating additional foreign intelligence information.<sup>23</sup>

The court agreed strongly with the idea that law enforcement can both neutralize terrorists and obtain intelligence from them:

The government argues persuasively that arresting and prosecuting terrorist agents of, or spies for, a foreign power [such as an international terrorist group] may well be the best technique to prevent them from successfully continuing their terrorist or espionage activity. The government might wish to surveil the agent for some period of time to discover other participants in a conspiracy or to uncover a foreign power’s plans, but typically at some point the government would wish to apprehend the agent and it might be that only a prosecution would provide sufficient

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21. Brief for the United States at 32, *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Serv. Ct. Rev. 2002) (No. 02-001), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv23.pdf> (pagination different in internet copy). The brief was signed by, among others, Attorney General John Ashcroft and Solicitor General Theodore Olson, who argued the case. I was its principal author.

22. *Id.* (emphasis in original).

23. *Id.* at 33.

incentives for the agent to cooperate with the government. Indeed, the threat of prosecution might be sufficient to “turn the agent.”<sup>24</sup>

In 2005, the bi-partisan Weapons of Mass Destruction (WMD) Commission – co-chaired by one of the judges from the Foreign Intelligence Surveillance Court of Review<sup>25</sup> – reported to the President that “[t]he Department of Justice’s primary national security elements . . . should be placed under a new Assistant Attorney General for National Security.”<sup>26</sup> The Report went on to explain that “[t]his Assistant Attorney General would serve as a single focal point on all national security matters. The Assistant Attorney General would be responsible for reviewing FISA decisions and determining what more can be done to synthesize intelligence and law enforcement investigations.”<sup>27</sup> The core idea was that this “synthesis” of intelligence and law enforcement would make the government more effective against terrorists.

Shortly thereafter, President Bush endorsed the WMD Commission’s recommendation, explaining that “[t]he United States Department of Justice has a vital role in the protection of the American people from threats to their security, including threats of terrorist attack.”<sup>28</sup> Congress responded in 2006 by creating the National Security Division,<sup>29</sup> noting that doing so was

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24. *In re Sealed Case*, 310 F.3d at 724.

25. Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit.

26. COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT 471 (2005), available at [http://www.fas.org/irp/offdocs/wmd\\_report.pdf](http://www.fas.org/irp/offdocs/wmd_report.pdf).

27. *Id.* at 473.

28. See Memorandum from the President for the Vice President, Sec’y of State, Sec’y of Def., Att’y Gen., Sec’y of Homeland Sec., Dir. of Office of Mgmt. and Budget, Dir. of Nat’l Intelligence, Assistant to the President for Nat’l Sec. Affairs, and Assistant to the President for Homeland Sec’y and Counterterrorism (June 29, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/06/20050629-1.html>.

29. See PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, §506, 120 Stat. 192 (2006), codified in various sections of Titles 18 and 50 of the U.S. Code. During this same period following 9/11, Congress enacted other legislation supporting and enhancing the use of law enforcement as a counterterrorism tool. For example, in 2001 the PATRIOT Act added new terrorism offenses, enhanced existing offenses, stiffened penalties, and expanded extraterritorial jurisdiction. These included expanding the definition of terrorism, extending the statute of limitations of certain terrorism offenses, increasing the maximum penalties for certain terrorism offenses, making it a crime to harbor or conceal terrorists, criminalizing certain attacks on mass transit systems, expanding the biological weapons statute, and others. See PATRIOT Act, §§801-811. Congress also made numerous changes to FISA and other laws designed to enhance the FBI’s ability to track and intercept potential terrorist communications and conduct searches for counterterrorism purposes. See *id.* §§201-219. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) directed the FBI to “develop and maintain a specialized and integrated national intelligence workforce,” see IRTPA §2001(c)(1), Pub. L. No. 108-458, 118 Stat. 3638 (2004), and the FBI responded by creating an Intelligence Career Service which more than doubled the

“consistent with [the] recommendation by the WMD Commission.”<sup>30</sup> As the Senate Intelligence Committee explained in a report on a related bill, “NSD is expected to actively participate in the Intelligence Community’s mission to prevent and otherwise neutralize threats to the national security,” even though it also “should be considered a law enforcement agency, albeit one that specializes in the prevention, detection, investigation, neutralization, and prosecution of crimes that threaten the national security.”<sup>31</sup>

In September 2006, NSD was officially established with the swearing in of the first Assistant Attorney General (AAG) for National Security.<sup>32</sup> By statute, the AAG is the Justice Department’s liaison to the Director of National Intelligence, who heads the U.S. Intelligence Community,<sup>33</sup> and by regulation NSD is charged with authority and responsibility to oversee prosecutions of federal crimes involving national security, administer FISA, develop and implement intelligence policy, and conduct legal oversight of intelligence activities.<sup>34</sup> In the current era, federal prosecutors and other law enforcement officials enjoy the authority and the ability to participate fully in intelligence investigations and to cooperate with the Intelligence Community. More specifically – and of particular personal interest to me in my recent role as its AAG – NSD combines in one organizational unit both terrorism and espionage prosecutors and intelligence lawyers and professionals. Even adjusting for my bias, they are, I believe, working extremely well together to produce the synthesis, and the synergy, that will make the country safer.

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number of intelligence analysts at the FBI since 9/11. *See Concerning Implementation of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. at 4 (Jan. 25, 2007) (statement of John S. Pistole, Deputy Dir. of the FBI), *available at* <http://intelligence.senate.gov/070125/pistole.pdf>. The IRTPA also further amended the key statutes prohibiting material support to terrorism or foreign terrorist organizations to expand their scope and ensure they could be applied extraterritorially. *See* IRTPA §6603(b) (2004), amending 18 U.S.C. §§2339A and B. Two years later, in the USA PATRIOT Improvement and Reauthorization Act, Congress once again enacted new terrorism offenses and made other changes to enhance our arsenal of criminal laws targeting terrorist activity. These changes included, among others, adding offenses to the definition of federal crimes of terrorism, strengthening offenses punishing attacks on transportation systems, strengthening asset forfeiture provisions for terrorism-related offenses, and creating new offenses for transporting terrorists or dangerous materials to be used for terrorist purposes. *See* USA PATRIOT Improvement and Reauthorization Act, §§110-112, 305 (2005).

30. H.R. Conf. Rep. No. 109-133, at 202 (2006).

31. S. Rep. No. 109-142, at 31-32 (2006).

32. U.S. DEP’T OF JUSTICE, NATIONAL SECURITY DIVISION PROGRESS REPORT 1, 39 (2008), *available at* <http://www.justice.gov/nsd/docs/2008/nsd-progress-rpt-2008.pdf>.

33. *See* 28 U.S.C. §507A (2006).

34. *See* Nat’l Sec. Div., 28 C.F.R. §0.72 (2008); U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, §9-90.010-.020 (1997).



Similarly, FBI Director Robert Mueller and the Attorneys General he has served since 2001 have integrated intelligence and law enforcement functions with respect to counterterrorism, and dramatically increased the FBI's resources and focus on intelligence collection and analysis.<sup>35</sup> The FBI has long been the Intelligence Community element with primary responsibility for collecting and coordinating intelligence about terrorist threats in the United States,<sup>36</sup> and since 9/11 it has made this mission its highest priority.<sup>37</sup> The FBI now has a National Security Branch, comprised of the Counterterrorism Division, the Counterintelligence Division, a Directorate of Intelligence, and a WMD Directorate, as well as field intelligence groups in each of its 56 field offices, all of which put into practice FBI priorities and the emphasis on integration of criminal and intelligence efforts.<sup>38</sup>

These developments reflect the mainstream, consensus view that law enforcement – along with military, intelligence, and diplomatic efforts – helps protect national security. Obviously, developing this consensus was not easy: it required multiple, sequential action from all three branches of the federal government, and it took several years. Along the way, the process addressed concerns – sincerely held and strongly expressed – that the FISA wall was necessary to protect civil liberties, and that intelligence and law enforcement should remain distinct.<sup>39</sup> In the end, those concerns, although sincere, appeared misguided, and the process showed, in

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35. U.S. DEP'T OF JUSTICE, FACT SHEET: SHIFTING FROM PROSECUTION TO PREVENTION, REDESIGNING THE JUSTICE DEPARTMENT TO PREVENT FUTURE ACTS OF TERRORISM (2002), available at <http://www.justice.gov/archive/ag/speeches/2002/fbireorganizationfactsheet.htm>.

36. See Exec. Order No. 12,333, *United States Intelligence Activities*, §§1.3(b)(20)(A), 1.7(g), 2.3(b), 46 Fed. Reg. 59,941 (Dec. 8, 1981), as amended by Exec. Order No. 13,470, §2, 73 Fed. Reg. 45,325 (July 30, 2008).

37. See, e.g., *Confronting the Terrorist Threat to the Homeland: Six Years After 9/11: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. (Sept. 10, 2007) (statement of Robert S. Mueller, III, Dir., Fed. Bureau of Investigation), available at <http://www2.fbi.gov/congress/congress07/mueller091007.htm> (“In response to those attacks – and to other acts and threats of terrorism – the FBI realigned its priorities – making counterterrorism, counterintelligence, and cyber security its top three priorities – and shifted resources to align with those priorities. Since 9/11, the FBI has set about transforming itself into a national security agency, expanding our mission, overhauling our intelligence programs and capabilities, and undergoing significant personnel growth.”).

38. See Statement of John S. Pistole, Deputy Dir. of the FBI, *supra* note 29, at 1, 3.

39. See, e.g., Brief for American Civil Liberties Union, et al. as Amici Curiae Supporting Appellee at 1-2, *In re Sealed Case*, 310 F.3d 717 (2002) (No. 02-001), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/fisaapp091902amicus.pdf> (“[E]xpanding the scope of secret surveillance under FISA would violate the Fourth Amendment and the Due Process guarantees of the Fifth Amendment, and would jeopardize the First Amendment right to engage in lawful public dissent.”); Kate Martin, *Intelligence, Terrorism, and Civil Liberties*, HUM. RTS. MAG. (Winter 2002), available at <http://www.abanet.org/irr/hr/winter02/martin.html>.

particular, that the demise of the wall and the increased involvement of law enforcement in counterterrorism did not threaten civil liberties, but did significantly enhance our national security.<sup>40</sup> The consensus, I believe, was that national security was better achieved through law enforcement and intelligence together than through either alone.

Today, however, the consensus that emerged in the aftermath of 9/11 shows some signs of unraveling. We seem to be witnessing a resurgence of arguments to keep law enforcement out of counterterrorism. This time, however, the arguments are not coming from civil libertarians, but from the other side of the spectrum – those who are concerned about the *effectiveness* of criminal justice in protecting national security. The arguments rest on the theory that law enforcement cannot – or should not – incapacitate or collect intelligence from suspected terrorists, and that we should treat all terrorists as military targets to be dealt with exclusively by military or intelligence agencies other than the FBI. The Obama administration supports the use of military commissions,<sup>41</sup> and recognizes the need, at least in some cases, for detention (rather than prosecution) under the law of war.<sup>42</sup> Accordingly, at this particular moment in our

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40. See, e.g., *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process: Hearing Before the S. Comm. on the Judiciary*, 107 Cong. (Sept. 10, 2002) (statement of David S. Kris, Assoc. Deputy Att’y Gen.), available at <http://www.access.gpo.gov/congress/senate/pdf/107hr/87866.pdf>; *Rise and Fall*, *supra* note 12.

41. In 2009, the General Counsel of the Department of Defense, Jeh Charles Johnson, and I were the government’s chief witnesses in support of amendments to the Military Commissions Act that later became law. We testified before both the House and Senate Armed Services and Judiciary Committees. See *On Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, Panel I: Hearing Before the S. Comm. on the Armed Servs.*, 111th Cong. (2009) (LexisNexis Congressional); *The Military Commissions Act of 2006 and Detainee Policy: Hearing Before the H. Comm. on the Armed Servs.*, 111th Cong. (2009) (LexisNexis Congressional); *Prosecuting Terrorists: Civilian and Military Trials for Guantanamo and Beyond: Hearing Before the Subcomm. on Terrorism and Homeland Sec. of the S. Comm. on the Judiciary*, 111th Cong. (2009) (LexisNexis Congressional); *Proposals for Reform of the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009) (LexisNexis Congressional). Here is an excerpt from my testimony before the House Armed Services Committee, *supra*:

[A]s the President stated in his speech at the National Archives [*see infra* note 42], we need to use all elements of our national power to defeat our adversaries. And that is including, but not limited to, prosecution in both Article III courts and in military commissions. . . . Article III courts, which have unquestioned legitimacy, are also effective in protecting national security; and military commissions, as we propose to reform them, which have unquestioned effectiveness, are also fair and legitimate. Now, I suspect that there are many people in this room, or perhaps elsewhere, who might agree only with the first part of the sentence that I just stated, and there will be others who agree only with the second part; but we think both parts are right.

42. As the President recognized in his speech at the National Archives on May 21, 2009, while the Administration is “going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country,” once the comprehensive review of

history, there is no question of excluding these weapons from our counterterrorism arsenal. The only question is whether to exclude law enforcement. I will turn to that question now.

## II. A FRAMEWORK FOR EVALUATING THE ROLE OF LAW ENFORCEMENT IN COUNTERTERRORISM

As I understand it, the argument for excluding law enforcement from counterterrorism is basically the following:

- (1) We are at war.
- (2) Our enemies in this war are not common criminals.
- (3) Therefore we should fight them using military and intelligence methods, not law enforcement methods.

This is a simple and rhetorically powerful claim, and precisely for that reason it may be attractive to some.<sup>43</sup>

In my view, however, and with all due respect, the argument is not correct. And it will, if adopted as policy, make us less safe. Of course, I do not contend that law enforcement is *always* the right tool for combating terrorism. But it is not the case that it is *never* the right tool. The reality, I think, is that it is *sometimes* the right tool.

And whether it is the right tool in any given case depends on the specific facts of that case. Here is my version of the argument:

- (1) We are at war. The President and Attorney General have said this many times.<sup>44</sup>

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all detainees at Guantánamo is completed, “there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States,” and this Administration is “not going to release individuals who endanger the American people.” President Barack Obama, Remarks by the President on National Security (May 21, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

43. This argument is not merely rhetorical. As noted in the introduction, in the 2011 Defense Department authorization legislation, Congress enacted a prohibition on the use of federal funds to transfer individuals currently detained at Guantánamo Bay to the United States for any purpose. *See* H.R. 6523, §1032, *supra* note 1. While this provision does not expressly prohibit federal civilian trials, its purpose at least in part may be to prevent such trials of these detainees from taking place. *See, e.g.,* Rivkin & Casey, *supra* note 2.

44. In his inaugural address, the President said, “[o]ur nation is at war against a far-reaching network of violence and hatred,” and warned “those who seek to advance their aims by inducing terror and slaughtering innocents” that “we will defeat you.” The President’s inaugural address is available at <http://www.whitehouse.gov/blog/inaugural-address/>. Similarly, in his speech at the National Archives in May 2009, the President

- (2) In war, the goal is to *win* – no other goal is acceptable.
- (3) To win the war, we need to use *all* available tools that are consistent with the law and our values, selecting in any case the tool that is best under the circumstances.

In other words, within the space defined by our values, we must be relentlessly pragmatic and empirical. We cannot afford to limit our options artificially, or yield to preconceived notions of suitability or “correctness.” We have to look dispassionately at the facts, and then respond to those facts using whatever methods will best lead us to victory.

Put in more concrete terms, we should use the tool that is best suited for the problem we face. When the problem looks like a nail, we need to use a hammer. When it looks like a bolt, we need to use a wrench. Hitting a bolt with a hammer makes a loud noise, and it can be satisfying in some visceral way, but it is not effective and it is not smart. If we want to win, we cannot afford to abandon the correct tool to solve the problem.

If you take this idea seriously, it complicates strategic planning, because it requires a detailed understanding of our various counterterrorism tools. If you are a pragmatist, focused relentlessly on winning, you cannot make policy or operational decisions at 30,000 feet. You have to come

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explained that his “single most important responsibility . . . is to keep the American people safe,” that “al Qaeda is actively planning to attack us again,” and that “we must use all elements of our power to defeat it.” Remarks by the President on National Security, *supra* note 42. On February 1, 2010, the President said, “it’s important to understand that we are at war against a very specific group – al Qaeda and its extremist allies,” that al Qaeda “is our target and . . . our focus,” and that “we have to fight them on all fronts.” Interview of President Barack Obama by YouTube at the White House (Feb. 1, 2010), *available at* <http://www.whitehouse.gov/the-press-office/interview-president-youtube>.

The Attorney General has made the same points many times. In his confirmation hearing on January 16, 2009, he said, “I don’t think there’s any question but that we are at war. And I think, to be honest, I think our nation didn’t realize that we were at war when, in fact, we were. When I look back at the ‘90s and the Tanzanian – the embassy bombings, the bombing of the [U.S.S.] *Cole*, I think we as a nation should have realized that, at that point, we were at war. We should not have waited until September the 11th of 2001, to make that determination.” *Nomination of Eric Holder To Be Attorney General in the Obama Administration: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (Jan. 16, 2009), *available at* <http://judiciary.senate.gov/resources/transcripts/111transcripts.cfm>. In a press conference held on February 22, 2010, he said that “we must use every weapon available to win [the] war.” Attorney General Eric Holder, Press Conference Announcing Guilty Plea by Najibullah Zazi (Feb. 22, 2010), *available at* <http://www.justice.gov/ag/speeches/2010/ag-speech-100222.html>. And in Congressional testimony given in November 2009, he said, “I know that we are at war. I know that we are at war with a vicious enemy who targets our soldiers on the battlefield in Afghanistan and our civilians on the streets here at home. I have personally witnessed that somber fact in the faces of the families who have lost loved ones abroad, and I have seen it in the daily intelligence stream I review each day.” *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (Nov. 18, 2009) (Statement of Eric Holder, Att’y Gen.) (LexisNexis Congressional).

down, and get into the weeds, and understand the details of our counterterrorism tools.

And that leads me to what I think are the right questions for today's debate. As compared to the viable alternatives, what *is* the value of law enforcement in this war? Does it in fact help us win? Or is it categorically the wrong tool for the job – at best a distraction, and at worst an affirmative impediment?

### III. LAW ENFORCEMENT IS AN EFFECTIVE COUNTERTERRORISM TOOL

Law enforcement helps us win this war. And I want to make clear, for the limited purpose of this article and in light of the nature of our current national debate, that this is not primarily a values-based argument. That is, I am not saying law enforcement helps us win in the sense that it is a shining city on a hill that captures hearts and minds around the world (although I do think our criminal justice system is widely respected). Values are critically important, both intrinsically and in terms of their effect on us, our allies, and our adversaries – and I will have more to say about values later<sup>45</sup> – but right now, in part because of the nature of our national debate on this topic, I am talking about something more direct and concrete.

When I say that law enforcement helps us win this war, I mean that it helps us disrupt, defeat, dismantle, and destroy our adversaries (without destroying us or our way of life in the process). In particular, law enforcement helps us in at least three ways – it *disrupts* terrorist plots through arrests, *incapacitates* terrorists through incarceration after prosecution, and it can be used to obtain *intelligence* from terrorists or their supporters through interrogation, and through recruiting them as cooperating assets.<sup>46</sup> Some of the evidence for that conclusion is set out below.

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45. See *infra* Part III.C.

46. I describe several specific examples of intelligence obtained through the criminal justice system provided by the FBI and career prosecutors in NSD's Counterterrorism Section in Appendix 1. All the examples have been cleared for release by the FBI. They are by no means a comprehensive account of the breadth of intelligence that has been obtained through the criminal justice system. For a variety of reasons explained in greater detail in the appendix, including the need to protect the safety of sources and their families, as well as to protect ongoing operations, the FBI and other intelligence agencies are extremely cautious about making public the results of their intelligence collection efforts. The examples that are contained in Appendix 1 are included there only after extensive and careful review by the FBI to ensure that they could be made public.

*A. Disruption, Incapacitation, Intelligence Collection*

Since 9/11, the DOJ has convicted hundreds of defendants as a result of terrorism-related investigations. Some of these convictions have involved per se terrorism offenses,<sup>47</sup> while others have not.<sup>48</sup> Many of the terrorism

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47. Here are 10 illustrative cases involving per se terrorism offenses, all from either the Southern District of New York or the Eastern District of Virginia:

- U.S. v. Oussama Kassir. Kassir was found guilty at trial of providing material support to al Qaeda, and other terrorism charges, for his efforts to establish a jihad training camp in the United States, and operate several terrorist websites. He was sentenced to life imprisonment on September 15, 2009.
- U.S. v. Ahmed Omar Abu Ali. Abu Ali was found guilty at trial of multiple terrorism charges based on his participation in an al Qaeda plot in Saudi Arabia to commit terrorist offenses in the United States, including a plot to assassinate the President. He was sentenced to life imprisonment on July 27, 2009.
- U.S. v. Monzer al Kassar. Kassar was found guilty at trial of conspiring to kill U.S. nationals and providing material support to the FARC in Colombia. He was sentenced to 30 years' imprisonment on February 24, 2009.
- U.S. v. Mohammed Mansour Jabarah. Jabarah pleaded guilty to terrorism charges stemming from his participation in a plot to bomb United States embassies in Singapore and the Philippines. He was sentenced to life imprisonment on January 18, 2008.
- U.S. v. Ahmed Abdel Sattar. Sattar, who was associated with Sheikh Abdel-Rahman and the Islamic Group, was found guilty at trial of conspiring to kill persons outside the United States. He was sentenced to 288 months' imprisonment on October 16, 2006.
- U.S. v. Zacarias Moussaoui. Moussaoui pleaded guilty to participation in the 9/11 conspiracy and admitted receiving funds and support from the 9/11 defendants. He was sentenced to life imprisonment on May 4, 2006.
- U.S. v. Masaud Khan. Khan was a "Virginia Jihad" defendant convicted of waging war against the United States and providing material support to Lashkar-e-Taiba. Other defendants in the Virginia Jihad case were sentenced to terms of imprisonment of 65 years, 20 years, 17 years, and 15 years; Khan was sentenced to life imprisonment on June 15, 2004.
- U.S. v. Iyman Faris. Faris pleaded guilty to casing a New York City bridge for al Qaeda, and researching and providing information to al Qaeda regarding possible attacks on U.S. targets. He was sentenced to 20 years' imprisonment on October 28, 2003.
- U.S. v. John Walker Lindh. Lindh pleaded guilty to bearing arms in support of the Taliban and admitted that he had been trained in an al Qaeda training camp in Afghanistan. He was sentenced to 20 years' imprisonment on October 4, 2002.
- U.S. v. Mokhtar Haouari. Haouari pleaded guilty to participating in a plot to bomb the Los Angeles International Airport during millennium celebrations in 1999. He was sentenced to 288 months' imprisonment on January 16, 2002.

48. Here are six illustrative cases that do not involve per se terrorism offenses:

- Fort Dix Plot (conspiracy to murder members of the U.S. military). In 2008, Ibrahim Shnewer, Dritan Duka, Shain Duka, Eljvir Duka, and Serdar Tatar were convicted for their involvement in a plot to kill members of the U.S. military as well as for violating various weapons statutes. The government's

convictions obtained in federal court both before and after 9/11 have

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evidence revealed that one member of the group conducted surveillance at several military bases in the United States, and that the group obtained a detailed map of Fort Dix, where they hoped to use assault rifles to kill as many soldiers as possible. The defendants performed small-arms training at a shooting range in the Poconos and watched training videos depicting American soldiers being killed and Islamic radicals urging jihad against the United States. Ibrahim Shnewer, Dritan Duka, and Shain Duka were each sentenced to life imprisonment plus thirty years; Eljvir Duka was sentenced to life imprisonment; and Serdar Tatar was sentenced to 33 years' imprisonment.

- U.S. v. Sabri Benkahla (perjury, obstruction, false statements). In 2007, Benkahla was convicted of perjury before a grand jury, obstructing justice, and making false statements to the FBI. These false statements included denial of his involvement with an overseas jihad training camp in 1999, as well as his asserted lack of knowledge about terrorists with whom he was in contact, including Ibrahim Buisir of Ireland, and Manaf Kasmuri of Malaysia, both of whom are Specially Designated Global Terrorists. He was sentenced to 121 months' imprisonment on July 24, 2007.
- U.S. v. Mohammad Salman Farooq Qureshi (false statements). In 2005, Qureshi was convicted of making of false statements to the FBI regarding the nature and extent of his involvement with al Qaeda member Wadih El Hage, and Help Africa People, a non-governmental organization believed to have been used to provide cover identities and funds in connection with the 1998 attacks on the United States Embassies in Kenya and Tanzania. He was sentenced to 48 months' imprisonment on August 25, 2005.
- U.S. v. Soliman Biheiri (false statements and passport fraud). In 2003 and 2004, Soliman Biheiri was convicted of fraudulently procuring a passport, as well as making false statements to federal agents. The government's evidence showed that Biheiri had deliberately deceived federal agents during a June 2003 interview in which he denied having business or personal ties to Mousa Abu Marzook, a Specially Designated Global Terrorist and a leader of Hamas. In fact, the government's evidence showed that Biheiri had managed millions of dollars for Marzook both before and after Marzook was designated as a terrorist. He was sentenced to 13 months' imprisonment on January 14, 2005.
- U.S. v. Fawaz Damrah (citizenship fraud). In 2004, Fawaz Damrah was convicted of concealing material facts in his citizenship application. The government's evidence showed that in that application, Damrah concealed his membership in or affiliation with the Palestinian Islamic Jihad (PIJ) and his incitement of violent terrorist attacks against Jews and others. He was sentenced to two months' incarceration plus four months' house arrest and denaturalization on September 20, 2004.
- U.S. v. Akram Musa Abdallah (false statements). In 2009, Abdallah was convicted of making false statements to the FBI. These false statements were made during an interview in connection with an FBI investigation into the Holy Land Foundation for Relief and Development (HLF), which was pending trial at the time in federal court for crimes including providing material support to a foreign terrorist organization. During the interview, Abdallah denied involvement in numerous fundraising activities on behalf of HLF. In November 2008, HLF and seven of its principals were convicted on all charges. Abdallah was sentenced to 18 months' imprisonment on March 4, 2010.

resulted in long sentences, including the convictions of the first World Trade Center bomber, Ramzi Yousef, and the East Africa Embassy bombers, Richard Reid, Ahmed Omar Abu Ali, Masaud Khan, Zacarias Moussaoui, and Oussama Kassir, all of whom are now serving life sentences in federal prison.

Today, law enforcement efforts against terrorism continue. In 2009, as outside observers have remarked, the DOJ charged more individuals with significant terrorism-related offenses than in any year since 9/11.<sup>49</sup> That trend continued in 2010. Here are a few examples of recent terrorism charges or convictions: In June and August 2009, Syed Ahmed Harris and Ehsanul Islam Sadequee were each convicted in the Northern District of Georgia for providing material support to al Qaeda, including videotaping potential U.S. targets. They were sentenced to 13 and 17 years in prison, respectively.

In September 2009, Michael C. Finton was arrested and charged with terrorism offenses after he attempted to detonate an explosive device outside a federal building in Springfield, Illinois. That same month, Hosam Maher Husein Smadi was arrested and charged with attempting to detonate an explosive device outside an office building in Dallas, Texas. Smadi pleaded guilty in May 2010 to attempting to use a weapon of mass destruction, and he was sentenced in October 2010 to 24 years in prison. Finton is awaiting trial.

Also in September 2009, Najibullah Zazi was arrested just before carrying out a very serious plot to bomb the New York subway system; he pleaded guilty in February 2010 and is awaiting sentencing in the Eastern District of New York.

In October and December 2009, David Coleman Headley and Tahawwur Hussain Rana were charged in the Northern District of Illinois with conspiracy to attack a Dutch cartoonist overseas, and with assisting the terror attack in Mumbai, India that killed 164 people. Headley pleaded guilty in March 2010 to a dozen federal terrorism charges, admitting that he participated in planning both attacks, and he is awaiting sentencing; Rana is awaiting trial.

In May 2010, Faisal Shahzad was arrested in the Southern District of New York in connection with an attempted car bombing in Times Square; he pleaded guilty in June 2010 to all counts of the 10-count indictment against him, including conspiring and attempting to use a weapon of mass destruction, conspiring and attempting to commit an act of terrorism transcending national boundaries, attempting to use a destructive device during and in relation to a conspiracy to commit an act of terrorism

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49. See Devlin Barrett, *2009 Was Big Year of Terror Charges in U.S.*, PITTSBURG POST-GAZETTE, Jan. 17, 2010, at A1. Of course, in many of these cases, the charges have not been proven, and defendants enjoy a presumption of innocence unless and until proven guilty.



transcending national boundaries, and transporting an explosive, among other charges. In October 2010, Shahzad was sentenced to life imprisonment.

In October 2010, James Cromitie, David Williams, Onta Williams, and LaGuerre Pen were convicted in the Southern District of New York after a jury trial for their participation in a plot to bomb a synagogue and Jewish community center and to shoot military planes with Stinger surface-to-air guided missiles. Each faces a mandatory minimum sentence of 25 years and maximum of life imprisonment.

The examples go on to include Mohammed Warsame, the Minnesota al-Shabaab cases,<sup>50</sup> and Colleen LaRose (“Jihad Jane”), among others.<sup>51</sup>

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50. See Press Release, U.S. Dep’t of Justice, Fourteen Charged with Providing Material Support to Somalia-Based Terrorist Organization Al-Shabaab (Aug. 5, 2010), available at <http://www.justice.gov/opa/pr/2010/August/10-ag-898.html>.

51. Here are some of the other notable cases involving defendants who were charged or convicted in 2009 or 2010:

- January 2009 – Zubair Ahmed and Khaleel Ahmed (Northern District of Ohio): Cousins from Chicago pleaded guilty to conspiring to travel overseas to fight U.S. forces in either Iraq or Afghanistan. Zubair Ahmed was sentenced to ten years’ imprisonment and Khaleel Ahmed to eight years’ imprisonment.
- April 2009 – Ali al-Marri (Central District of Illinois): Pleaded guilty to providing material support to al Qaeda. He was sentenced to 100 months’ imprisonment.
- May 2009 – Mohammed Abdullah Warsame (District of Minnesota): Canadian of Somali descent who trained with al Qaeda in Afghanistan in 2000. Pleaded guilty to providing material support to al Qaeda. He was sentenced to 92 months’ imprisonment.
- July 2009 – Daniel Patrick Boyd (Eastern District of North Carolina): U.S. citizen, charged with seven others in connection with various activities in support of violent jihad abroad. In February 2011, Boyd pleaded guilty to conspiracy to provide material support to terrorists and conspiracy to murder, kidnap, maim, and injure persons in a foreign country and is awaiting sentencing.
- September 2009 – Abdul Tawala Ibn Ali Alishtari (Southern District of New York): Pleaded guilty to providing funding for terrorist training camps in Afghanistan. He was sentenced to 121 months’ imprisonment.
- November 2009 – Eight individuals linked to al Shabaab (District of Minnesota): Among fourteen men charged as part of ongoing investigation into the recruitment of persons from U.S. communities to train with or fight on behalf of extremist groups in Somalia.
- December 2009 – Umar Farouk Abdulmutallab (Eastern District of Michigan): Arrested and charged with terrorism offenses after he attempted to bring down Northwest Airlines flight 253 on Christmas day.
- February 2010 – Afia Siddiqui (Southern District of New York): Found guilty of attempt to murder U.S. personnel in Afghanistan. In September 2010, Siddiqui was sentenced to 86 years’ imprisonment.
- February 2010 – Zarein Ahmedzay and Adis Medunjanin (Eastern District of New York): Arrested and charged as part of ongoing investigation of

Not all of these cases made the headlines and not all of the defendants were hard-core terrorists or key terrorist operatives. The results of the cases vary according to several factors. First, as in traditional intelligence or criminal investigations, aggressive and wide-ranging counterterrorism efforts may net many small fish along with the big ones. Those small fish need to be dealt with, but – if they are indeed small fish – the charges will not necessarily yield the heavy penalties that accompany more serious offenses.<sup>52</sup> In some of these cases, moreover, a conviction will support

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Najibullah Zazi and others to attack New York subway system in September 2009. Ahmedzay pleaded guilty in April 2010 and is awaiting sentencing.

- March 2010 – Colleen LaRose (Eastern District of Pennsylvania): U.S. citizen arrested and charged with conspiring to murder a Dutch cartoonist and recruit jihadist fighters. LaRose pleaded guilty in February 2011 and is awaiting sentencing.
- May 2010 – Adnan Mirza (Southern District of Texas): Found guilty of conspiring to provide material support to the Taliban and unlawful possession of a firearm. He was sentenced to 15 years' imprisonment in October 2010.
- June 2010 – Barry Walter Bujol (Southern District of Texas): U.S. citizen arrested and charged with attempting to provide material support to Al Qaeda in the Arabian Peninsula.
- June 2010 – Mohamed Mahmood Alessa and Carlos Eduardo Almonte (District of New Jersey): U.S. citizens arrested and charged with conspiring to kill persons outside of the United States in connection with plot to join al Shabaab in Somalia.
- June 2010 – Hor Akl and Amara Akl (Northern District of Ohio): Dual citizens of the United States and Lebanon arrested and charged with conspiring to provide material support to Hizbollah, a designated foreign terrorist organization.
- July 2010 – Madhatta Asagal Haipe (District of Columbia): Philippines citizen and founding member of Abu Sayaff Group, a Philippines-based Islamist separatist group, pleaded guilty to hostage taking in connection with the 1995 abduction of 16 people, including four U.S. citizens in the Philippines. He was sentenced to 23 years imprisonment in December 2010.
- August 2010 – Russell DeFreitas, Abdul Khadir, Abdul Nur, Kareem Ibrahim (Eastern District of New York): DeFreitas and Khadir were convicted by a jury of plotting to blow up fuel tanks at John F. Kennedy International Airport. Khadir was sentenced to life imprisonment in December 2010. Nur pleaded guilty in June 2010 to his involvement in the plot and was sentenced to 15 years' imprisonment in January 2011. DeFreitas is awaiting sentencing and Ibrahim is awaiting trial.
- November 2010 – Ahmed Khalfan Ghailani (Southern District of New York): Convicted by a jury of conspiring to destroy property and buildings of the United States in connection with his role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania (and acquitted of related charges). Ghailani was sentenced to life imprisonment in January 2011.

52. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §9-27.300 (2007) (“[A] Federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant’s conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant’s conduct.”).

deportation (and a plea agreement may support rapid deportation), which can mitigate threats posed to the homeland.<sup>53</sup>

Alternatively, there are cases in which a seemingly small fish may in fact be a big one, yet it may not be feasible either to prove that he is, or to establish an alternative basis for detaining him, even under the law of war. These cases pose the traditional tension between the intelligence benefit of continued surveillance and the risk to public safety from leaving a suspected terrorist at large (in other words, a tension between the values of short-term disruption and long-term incapacitation). In some of these cases, the risk-benefit equation will demand immediate action, disrupting a terrorist plot through arrest and prosecution for whatever criminal conduct can be established. Sometimes, a sentence of even a few months or years can shatter a terrorist cell and cripple its operational ability.

Finally, of course, disruptive arrests may also generate valuable intelligence. Some small fish may be ripe for recruitment precisely because they are not fully radicalized. Such persons may be persuaded to cooperate, either before or after they are released. Moreover, arrests and other disruptive efforts may provoke statements or actions from others that provide an understanding of a terrorist network – such cases effectively “shake the tree” and show how suspects still at large respond to the arrest.

Since 2001, in fact, the criminal justice system has collected valuable intelligence about a host of terrorist activities. In effect, it has worked as what the Intelligence Community would call a HUMINT collection platform.<sup>54</sup> I will first explain how the system works as an intelligence collection platform – beginning with pre-arrest activity and ending with sentencing and beyond – and then turn to a few illustrative examples.

Pre-Arrest. Information can be obtained from the target of a criminal investigation or prosecution in a variety of ways. At the outset, in some investigations, the government may approach targets to assess their

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53. Cf. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) (“We have long recognized that deportation is a particularly severe ‘penalty’ . . . . Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context.” (citations omitted)). A recent example of deportation being used in the context of a criminal case, albeit one involving counterintelligence rather than counterterrorism, involves the Russian “illegal” agents who were arrested, pleaded guilty, were sentenced, and deported within a period of 12 days. See, e.g., Peter Baker & Benjamin Weiser, *Russian Spy Suspects Plead Guilty as Part of a Swap*, N.Y. TIMES, July 9, 2010, available at [http://www.nytimes.com/2010/07/09/world/europe/09russia.html?\\_r=1&ref=russian\\_spy\\_ring\\_2010](http://www.nytimes.com/2010/07/09/world/europe/09russia.html?_r=1&ref=russian_spy_ring_2010) (Westlaw).

54. “HUMINT,” or “Human Intelligence,” means intelligence obtained from human sources – as opposed to, for example, “SIGINT,” or intelligence obtained from communications signals.

willingness to be interviewed prior to arrest. Typically, such targets are in a non-custodial setting and have agreed to be voluntarily debriefed. (In some ways, this is not very different from human source recruitment efforts conducted by other elements of the Intelligence Community.) These debriefings may last hours, days, or weeks and may result in the targets later agreeing to plead guilty and continue cooperating. In other cases, targets may talk for a while and then cease cooperating (if sufficient evidence exists, they then can be charged, arrested, prosecuted, and convicted.). In this kind of situation, targets cooperate (or do not cooperate) within the criminal justice system much as they do (or do not) outside of the criminal justice system.<sup>55</sup>

**Arrest.** An arrest provides the next opportunity to gain intelligence from a target. At the time of arrest inside the United States, the FBI's long-standing and publicly known policy, reaffirmed most recently in 2008,<sup>56</sup> is generally to advise a target of his rights under *Miranda* prior to custodial interrogation except to the extent that the public-safety exception applies.<sup>57</sup>

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55. Although my primary focus here is on how law enforcement facilitates the collection of intelligence directly from human sources through such debriefings, there are of course a number of other ways in which law enforcement can and does obtain information that can be critical to counterterrorism efforts. These include, *inter alia*, FISA surveillance and searches; grand jury subpoenas, *see, e.g.*, *United States v. Calandra*, 414 U.S. 338, 343 (1974) (“The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.”); Title III wiretaps, *see* 18 U.S.C. §§2510-22 (2006); the use of pen registers and trap and trace devices, *see* 18 U.S.C. §§3121-3127 (2006); and undercover operations, physical surveillance, and searches (with or without warrants), *see, e.g.*, *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (finding that a search conducted pursuant to consent is one of the specifically established exceptions to requiring a warrant and probable cause). Through these various methods, law enforcement can monitor electronic communications, review telephone records, obtain e-mails and other computer information, examine financial transactions, and collect a host of other documentary and electronic materials – sometimes in real-time and in secret – that can be instrumental in corroborating leads, identifying targets and their networks, and ensuring effective and comprehensive disruption of terrorist plots. The collection of such intelligence information through these other means also helps to make the debriefings of terrorist suspects themselves more productive. For a more thorough discussion of investigative tools available in the criminal justice system, *see* DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS (2007).

56. The FBI's current policy vis-à-vis *Miranda* warnings for arrests inside the United States is articulated in its 2008 Domestic Investigations and Operations Guide (DIOG), and in the Legal Handbook for Special Agents, the relevant portions of which have been in effect for many years. This policy, which is consistent with the policy of all U.S. law enforcement agencies, is to provide *Miranda* warnings prior to custodial interrogation. As the DIOG explains “[w]ithin the United States, *Miranda* warnings are required to be given prior to custodial interviews . . . .” FBI DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 63 (2008). Of course, FBI policy also reminds agents that “standard booking questions and public safety questions” are not “interrogation” for purposes of *Miranda*. LEGAL HANDBOOK FOR SPECIAL AGENTS, §7-2.1(1).

57. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (“He must be warned prior to any [custodial] questioning that he has the right to remain silent, that anything he says can be

The question whether a target will waive or invoke his *Miranda* rights, like the question whether or not he will respond to interrogation without such an advice of rights, depends on the facts and circumstances of a particular case, the disposition and training of the target himself, and the skill of the interrogators. It is difficult to know exactly what effect *Miranda* warnings have, because experiments with Mirandized interrogation would not easily allow for a control group of identical, un-Mirandized subjects, but the FBI's experience over the years is that many arrestees waive their *Miranda* rights.<sup>58</sup> As FBI Director Mueller explained in a keynote speech at a conference sponsored by the Bipartisan Policy Center in October 2010, "I do believe that if you look at the number of recent cases we've had, *Miranda* has not stood in the way of getting extensive intelligence."<sup>59</sup> And

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used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."); see *Florida v. Powell*, 130 S. Ct. 1195 (2010) (upholding modified warnings as sufficient under *Miranda*); see also *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that *Miranda* is a constitutional rule). There is an important exception for questioning focused on protecting public safety, which does not require *Miranda* warnings. See *New York v. Quarles*, 467 U.S. 649, 655-656 (1984); *United States v. Khalil*, 214 F.3d 111, 121 (2d Cir. 2000).

58. In one study, approximately 83% of suspects who were advised of their *Miranda* rights waived these rights. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 861-71 (1996). While there is general agreement that the rate of waivers hovers in this range, scholars dispute the implications of this waiver rate. For example, one commentator has asserted that "the overwhelming majority of suspects (some 78-96%) waive their rights," and that "Miranda warnings have little or no effect on a subject's propensity to talk . . . . Next to the warning label on cigarette packs, Miranda is the most widely ignored piece of advice in our society." Richard A. Leo, *Questioning the Relevance of Miranda in the 21st Century*, 99 MICH. L. REV. 1000, 1012-1015 (2001); see also George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1961-62, 1972, tbl.2 (2004) (finding waivers in 68% of a sample of appellate cases, which would not include most cases in which defendants waive their rights, cooperate, and plead guilty). On the other hand, while noting that the empirical research is limited, Cassell and Hayman conclude, based on studies done in the immediate wake of *Miranda*, that "confession rates fell substantially after *Miranda*," Cassell & Hayman, 43 UCLA L. REV. at 846-849; see also Paul Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 417 (Winter 1996) (concluding that studies on the whole "report a drop in the confession rate after the Miranda decision, most in double digits"); Paul Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1061 (1998) (estimating *Miranda's* social cost as the loss of convictions in 3.8% of all arrests). These conclusions have in turn been criticized for their methodology and assumptions. See, e.g., Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 54 n.276 (Oct. 2001) (criticizing assumptions underlying Cassell's calculation of 3.8% conviction loss rate); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 501-507 (Winter 1996).

59. See Chris Strohm, *FBI says Miranda Readings Don't Hurt Bureau*, CONGRESS

of those that do not waive their *Miranda* rights, of course, many might refuse to talk even without warnings. Some defendants do not talk initially, but after being given an opportunity to discuss their case with an attorney decide that cooperation is in their best interest. It is fair to say that *Miranda* warnings do not increase the likelihood of immediate cooperation, but it is also accurate to say that the extent to which they *decrease* that likelihood is vastly overstated in certain quarters. The FBI believes that the warnings are far less relevant to the prospects for obtaining long-term cooperation in the criminal justice system, even once defense lawyers have become involved, than other factors – such as the strength of the criminal case against the target, the interrogator’s skill and expertise, his ability to develop a rapport with the target, and his background knowledge about the target and the subject matter. I will have more to say about *Miranda* in Part V.

Presentment. Once an arrest is made, a target generally must be presented before a court without unnecessary delay, often within several hours, unless he waives the right to prompt presentment (which does sometimes occur).<sup>60</sup> At presentment, a Magistrate Judge typically advises the target that he is a criminal defendant, explains the charges against him, advises him that he has a right to a defense lawyer and to remain silent, and determines whether he should be detained or released pending trial.<sup>61</sup> The period from presentment onwards may provide another opportunity for engaging with the target, especially in situations where he has already provided inculpatory information (such as through post-arrest statements).

Although it is not widely understood, the reality is that when sophisticated defense attorneys determine that the government has strong, admissible evidence to support a conviction and lengthy sentence, they will often encourage their clients to cooperate. In this sense, defense lawyers can be very helpful. They are obviously advocates for the target, and indeed they may earn the trust of the target precisely because of that; but they know that the criminal justice system is impregnable – its basic legitimacy and operation is beyond challenge – and that it has produced convictions in hundreds of thousands of cases. They know that where the federal government targets someone with a terrorism-related indictment, it almost always hits with a conviction, and that the system will grind forward and put their clients in prison for a long time. This creates powerful incentives to work within the system – to cooperate and obtain a somewhat

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DAILY (Oct. 6, 2010), available at <http://www.bipartisanpolicy.org/news/articles/2010/10/fbi-says-miranda-readings-dont-hurt-bureau>.

60. See FED. R. CRIM. P. 5 (requiring presentment “without unnecessary delay”); *Corley v. United States*, 129 S. Ct. 1558, 1562 (2009) (prior to existence of Rule 5, “common law obliged an arresting officer to bring his prisoner before a magistrate judge as soon as he reasonably could”) (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 61-62 (1991)). Under 18 U.S.C. §3501(c) (2006), a confession “shall not be inadmissible solely because of delay” in presentment if “made voluntarily and . . . within six hours” of arrest.

61. See FED. R. CRIM. P. 5(d).

shorter sentence or improved conditions of confinement – rather than to challenge the system.<sup>62</sup> (Of course, these incentives do not always work, and defense lawyers do not always counsel cooperation.)

Proffer and Plea. The criminal justice system has an established mechanism, known as a “proffer agreement,” under which a target and his lawyer may provide information to the government that cannot be used directly to prosecute the target, but can be used for its intelligence value or to investigate others.<sup>63</sup> This often encourages candor from the target and provides the government with valuable, actionable intelligence at a relatively early stage. A successful proffer typically results in a guilty plea that requires further cooperation. A proffer agreement does not provide immunity from prosecution and almost always is made in connection with criminal charges that have already been filed.

Sentencing and Beyond. In rare situations, cooperation occurs after a conviction. Defense attorneys sometimes advise their clients to cooperate prior to sentencing so that they may receive a reduced sentence. Prosecutors may recommend that a cooperating target receive a downward departure from the otherwise applicable sentence pursuant to a provision of the U.S. Sentencing Guidelines.<sup>64</sup> In a smaller class of cases, terrorist targets may even agree to cooperate after sentencing due to the incentives created by a Federal Rule of Criminal Procedure which allows the judge to re-sentence a prisoner to a shorter term based on a government motion citing his cooperation.<sup>65</sup>

These mechanisms – the proffer agreement, and the pre- and post-sentencing cooperation provisions – allow the government to balance and re-balance over time the sometimes competing national security values of

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62. Then Judge Michael Mukasey, in considering the habeas corpus petition of José Padilla, who had been declared an enemy combatant in 2002, expressly rejected the argument that granting Padilla access to counsel for the purposes of contesting the factual basis for his detention would necessarily “jeopardize the two core purposes of detaining enemy combatants – gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America.” *Padilla v. Bush*, 233 F. Supp. 2d 564, 603-605 (S.D.N.Y. 2002), *reversed in part on other grounds*, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *reversed on other grounds*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Far from assuming that counsel would interfere with efforts to secure the detainee’s cooperation, Judge Mukasey found it “equally plausible” that if Padilla consulted with counsel, “the assured hopelessness of his situation would quickly become apparent to him . . . and he might then seek to better his lot by cooperating with his captors.” *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 52 (S.D.N.Y. 2003). He also referred to the “experience of federal courts under the U.S. Sentencing Guidelines” in arguing that “those facing the near certain prospect of custody have a fine appreciation of how to cut their losses.” *Id.* at n.7.

63. For a discussion of proffer agreements, *see, e.g.*, *United States v. Parra*, 302 F. Supp. 2d 226 (S.D.N.Y. 2004).

64. UNITED STATES SENTENCING GUIDELINES §5K1.1; *see* 18 U.S.C. §3553(b) (2006); *see also* 9 USAM, CRIMINAL RESOURCE MANUAL at 792.

65. FED. R. CRIM. P. 35.

disrupting and incapacitating a particular target (through long-term incarceration resulting from successful prosecution based on admissible evidence) and gathering intelligence from the target that may help disrupt and incapacitate other terrorists (in exchange for a somewhat shorter period of incarceration). For example, depending on the facts, it may well be worthwhile to reduce a 50-year sentence to 40 years in exchange for actionable intelligence that allows the government – the Intelligence Community, the military, or the Justice Department – to neutralize one or more high-level terrorists in the short run.

The description just provided minimizes the use of legalese or law enforcement vocabulary. For example, the words “terrorism targets” rather than the word “defendants” appear. The purpose of minimizing legalese and law enforcement vocabulary is to describe the role of the criminal justice system as an intelligence collection platform, in terms that members of the Intelligence Community find familiar. When the FBI and prosecutors meet in a hotel room or an office with a criminal defendant and his lawyer, and talk to him for days or weeks in an effort to persuade him to plead guilty and cooperate, they can be described, and should be understood, as trying to collect human intelligence much as the CIA does when it tries to recruit human sources overseas. Of course, the processes differ, but both activities are aimed at the same purpose – the collection of human intelligence about the activities of terrorist groups. The different vocabulary of the criminal justice system should not obscure that shared purpose or the similarities in the information being generated.

Results. In terms of actual results, there is a limit to what can be said publicly (and to how what is said can be sourced), but I can say that terrorism suspects in the criminal justice system have provided information on all of the following:

- Telephone numbers and email addresses used by al Qaeda;
- Al Qaeda recruiting techniques, finances, and geographical reach;
- Terrorist tradecraft used to avoid detection in the West;
- Locations of al Qaeda training camps;
- Al Qaeda weapons programs and explosives training;
- Locations of al Qaeda safehouses (including maps);
- Residential locations of senior al Qaeda figures;
- Al Qaeda communications methods and security protocols;
- Identification of operatives involved in past and planned attacks;
- and



- Information about plots to attack U.S. targets.<sup>66</sup>

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66. Here are some specific examples of intelligence obtained through the criminal justice system that have been provided by the FBI and career prosecutors in NSD's Counterterrorism Section:

- A terrorism suspect arrested in 2002 provided the FBI with information regarding the role of Khalid Sheikh Mohammed (KSM) as the principal architect of the 9/11 attacks, stated that KSM was continuing to plan terrorist plots against the United States, and provided the FBI with telephone numbers and email addresses that he had used to contact KSM immediately prior to his arrest. The individual also told the FBI that KSM and Hambali were directing his participation in a joint al Qaeda/Jemaah Islamiyah plot to bomb U.S. military targets and U.S. and Israeli Embassies in Singapore. Although the plot had been disrupted prior to the individual's arrest, he identified other participants and provided contact information for them. This was especially significant because neither KSM nor Hambali had been captured at the time.
- A terrorism suspect arrested in 2003 explained to the FBI that he had traveled to Afghanistan in March 2002 to train at an al Qaeda camp that he referred to as "the camp of Osama bin Laden." He advised the FBI that in addition to basic training, specialized training was carried out at the camp, including the use of anti-aircraft guns, explosives, suicide missions and poisons. He explained that other trainees in the camp were being taught how to attack locations by using poison gas. He also explained that he had met with Abu Hafs, then al Qaeda's military commander, who advised him of al Qaeda tradecraft that could be used to avoid suspicion when he traveled back to North America. The FBI believed that this individual had been dispatched by al Qaeda for an operation in the United States and that the operation was likely disrupted by his arrest and interviews.
- A terrorism suspect arrested in 2001 told the FBI that he met personally with Osama bin Laden at an al Qaeda poisons training facility near Kandahar, Afghanistan. He provided important information about bin Laden, such as that, since the September 11, 2001 attacks, bin Laden and his cadre of bodyguards moved every four hours to avoid capture, and a description of the vehicles used in bin Laden's convoy. He also explained that according to other al Qaeda members and training camp instructors, bin Laden had plans for additional attacks against the United States and had already dispatched operatives to carry out future attacks. This individual described in detail the training he had received from al Qaeda, the facilitators who aided his entry into training camps, and the camp instructors.
- A terrorism suspect provided information to the FBI on the potential hide-outs of Osama bin Laden in Afghanistan. He drew detailed maps of specific locations which were provided to the DoD prior to the U.S. invasion of Afghanistan.
- A terrorism suspect told the FBI, in the course of multiple interviews in the spring of 2003 prior to his arrest, about al Qaeda operations, leaders, and plans for attacks to be conducted in the United States. He provided detailed information and identified photos of Maqsood Khan, a high ranking al Qaeda associate who was involved with KSM and at the time was at large in Pakistan and being sought by the United States, including detailed descriptions of vehicles that Maqsood used to travel within Pakistan and his communication protocol and security measures. Using a map, he then identified the location of

The Intelligence Community, including the National Counterterrorism Center (NCTC), believes that the criminal justice system has provided useful information. For example, NCTC has explained that it “regularly receives and regularly uses . . . valuable terrorism information obtained through the criminal justice system – and in particular federal criminal proceedings pursued by the FBI and DOJ. Increasingly close coordination between the DOJ and NCTC has resulted in an increase in both the intelligence value and quality of reporting related to terrorism.”

In short, law enforcement is a strong counterterrorism tool. It can disrupt terrorist plots through arrests or other interventions. It can incapacitate terrorists for the long term through prosecution and conviction. And it can be used to obtain valuable intelligence that supports continuing efforts – including non-law enforcement efforts – against terrorism.

### *B. Counterarguments*

Given the basic affirmative case for law enforcement as a counterterrorism tool, what are some of the arguments opposing its use?

The first argument is that there is an inherent tension between national security and law enforcement. This argument confuses ends with means. The criminal justice system is a tool – one of several – for promoting national security, for protecting our country against terrorism. Sometimes it

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an al Qaeda safehouse and camp located near Kandahar, where he had previously met with Osama bin Laden. He also identified a photo of KSM and explained that he knew KSM by an alias, as a high ranking al Qaeda official whom he had met during his lunch with bin Laden; this was particularly significant because KSM had been captured only weeks before in Pakistan. He described meetings with KSM in which he was tasked to perform surveillance on specific targets in the United States, and noted that KSM was particularly interested in obtaining forged American drivers' licenses and social security cards for al Qaeda operatives so that they could enter the United States without suspicion. This individual also provided information to the FBI regarding links between KSM, Maqsood and other individuals sympathetic to al Qaeda located in the United States, including his contacts with Majid Khan, a high value detainee who had been arrested in Pakistan in the weeks prior to the individual's interview with the FBI.

- Appendix 1 further discusses these as well as some additional examples of intelligence on the activities of terrorist groups obtained through the criminal justice system. These examples have been cleared for release by the FBI. They are by no means a comprehensive account of the breadth of intelligence that has been obtained through the criminal justice system. For a variety of reasons explained in greater detail in the Appendix itself, including the need to protect the safety of sources and their families, as well as to protect ongoing operations, the FBI and other intelligence agencies are extremely cautious about making public the results of their intelligence collection efforts. The examples that are contained in Appendix 1 are included therein only after extensive and careful review by the FBI to ensure that they could be made public.

is the right tool; sometimes it is not, just as sometimes the best way to protect national security is through diplomacy, and sometimes that goal is better achieved through military action.

Another argument is that the criminal justice system is fundamentally incompatible with national security because it is focused on defendants' rights. This argument suffers from two basic flaws. First, the criminal justice system is not focused solely on defendants' rights – it strikes a balance between defendants' rights and the interests of government, victims, and society. And whatever that balance is in any given case,<sup>67</sup> the empirical fact is that when we prosecute terrorists we convict them around 90 percent of the time.<sup>68</sup> To be sure, the criminal justice system has its limits, and in part because of those limits it is not the right tool for every job. But when the executive branch concludes that it is the right tool – as it has many times since 9/11 – it in fact puts steel on target almost every time.

The second flaw in the “fundamental incompatibility” argument is equally significant. The criminal justice system is not alone in facing legal constraints. All of the U.S. government's activities must operate under the rule of law. For example, the U.S. military operates under rules that require it to forgo strikes against terrorists if the strikes will inflict disproportionate harm on civilians.<sup>69</sup> It also has rules governing who may be detained, how

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67. A Justice of the Supreme Court once famously observed that the reasonable-doubt standard used in the criminal justice system is bottomed on the determination that it is far worse to convict an innocent man than to let a guilty man go free. In *re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

68. *See, e.g.*, CTR. ON LAW AND SEC., N.Y. UNIV. LAW SCH., TERRORIST TRIAL REPORT CARD 4 (2010) (calculating that approximately 87% of terrorism prosecutions between September 11, 2001 and September 11, 2010 resulted in convictions, either after trial or after a guilty plea); RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, 2009 UPDATE AND RECENT DEVELOPMENTS 9 (2009) (calculating that over 91% of charges filed in terrorism prosecutions between September 12, 2001 and June 2, 2009, resulted in a conviction on some charge, whether after trial or after a guilty plea).

69. *See, e.g.*, Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 48-51, June 8, 1977, 1125 U.N.T.S. 3 (hereinafter Protocol I) (stating that civilians shall not be the object of attack, requiring parties to conflict to “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives,” and prohibiting “indiscriminate attacks,” including those “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”) (signed but not ratified by the United States); Convention (IV) Respecting The Laws And Customs of War on Land and its Annex: Regulation Concerning the Law and Customs of War On Land arts. 22-28, 18 October 1907, 36 Stat. 2277 (regulating the “[m]eans of injuring the enemy, sieges, and bombardments” including prohibitions on certain weapons; attacking undefended towns, villages, dwellings, or buildings; requiring “all necessary steps”

detainees have to be treated, and how long they can be held.<sup>70</sup> These limits are real, and they are not trivial, but they are not a reason to abandon or forbid the use of military force against al Qaeda.<sup>71</sup>

Some say that the criminal justice system should not be used to deal with terrorists because it treats them like common criminals, which they are not. (On the other hand, of course, others say that treating terrorists as combatants glorifies them as soldiers in a holy war and elevates them to a status they do not deserve.<sup>72</sup>) For the pragmatist, however, the key question

to spare artistic and historic buildings as well as hospitals) [hereinafter Hague IV]; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, ¶25 (Enemy Status of Civilians) (“[I]t is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them.”). *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

70. *See, e.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention]. The four Geneva Conventions govern, among other matters, the care and treatment of prisoners of war and the treatment of civilians during wartime; in particular Common Article 3 of the Geneva Conventions, governing non-international armed conflicts, mandates minimum treatment standards for all detainees, and two additional protocols, Additional Protocols I and II, amplify the Geneva Conventions on issues such as the treatment of combatants and civilians during international and non-international armed conflict respectively. The United States is a party to all four Geneva Conventions and is a signatory to, but has not ratified, the two additional protocols. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, ¶60-207 (mandating regulations for prisoners of war); DEP'T OF DEF. DIRECTIVE 2310.01E (Department of Defense Detainee Program) (regulating treatment of detainees, mandating humane treatment, and stating that all persons subject to it must apply at a minimum the standards articulated in Common Article 3), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>.

71. The point of this argument is not to equate the legal constraints in the two systems; they are in fact very different. The point is only to emphasize that *all* of our counterterrorism tools have legal limits – this is the price of living under the rule of law – and those limits inform judgments about which tool is best in any given case.

72. In imposing a life sentencing on Richard Reid, Judge William Young provided the following explanation:

This is the sentence that is provided for by our statutes. It is a fair and a just sentence. It is a righteous sentence. Let me explain this to you. We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect. . . . You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. . . . And we do not negotiate with terrorists. We do not treat with terrorists. We do not sign documents with terrorists. We hunt them down one by one and bring them to justice. . . . You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders . . . Look around this courtroom. Mark it well. The world is not going to long remember what you or I say here. Day after tomorrow it will be forgotten. But this, however, will long endure. Here, in this courtroom, and courtrooms all across America, the American people will gather to see that justice, individual justice, justice, not war, individual justice is in fact being done.

Judgment and Conviction and Statement of Reasons for Sentence at 5-6 United States v.

is not about labels *per se*, it is about whether the treatment of terrorists is *effective* (and consistent with our laws and values). The argument that somehow it is inherently “wrong” (strategically) to treat terrorists as criminals is problematic because it provides a theoretical and aesthetic answer to what is, or should be, an empirical and operational question.

Consider the “common criminals” argument as applied to the hypothetical case of a young man apprehended in the course of an attempted terrorist attack in the United States. Assume for purposes of discussion that one possibility may be to hold him under the law of war – he can be transferred to the custody of uniformed military personnel, detained without charges at a brig, and interrogated under the Army Field Manual.<sup>73</sup> There is a certain appeal to this approach because it is very forceful. But what if the Intelligence Community interrogators who have had direct contact with the young man, and their colleagues who have searched our databases for everything known about him, have a different view? What if they believe that transferring him to military custody will only fuel his belief that he is a holy warrior engaged in a noble, armed conflict against a powerful adversary, thus galvanizing his resistance to interrogation? What if they believe that the best thing is to hold him in civilian custody and invite his family to visit in an effort to persuade him to cooperate? For the pragmatist, this is an easy call: If a visit from his family is the best way to get him to talk, then he should have a visit from his family. This approach may provoke questions about why the terrorist is being treated like a common criminal, or otherwise being “coddled,” but if it actually works it is clearly preferable.

### *C. Pragmatism and Perception*

Rejecting the “common criminals” argument, of course, does not necessarily reject the idea that perception matters. Treating terrorists one way or another, and describing our treatment of them in one way or another, *does* send a message to our own people and to the people of other countries, which in turn may trigger responses with real-world effects. In advocating a pragmatic approach to counterterrorism, I have so far focused on particular matters and cases, assessing the effectiveness of our tools in that relatively narrow context (albeit with reference to nearly a decade’s worth of statistical data and experience). I have done so because I think a granular approach is valuable – indeed, indispensable – and also because I worry that it is underrepresented in our current policy debate. But I do not

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Richard Colvin Reid, No. 02 Cr. 10013-WGY (Jan. 31, 2003).

73. The legal authority for this detention with respect to individuals found in the United States is not yet settled, *see infra* notes 137 and 147, but that is irrelevant to the present discussion.

want to completely lose sight of the larger landscape, even if I continue to view it from a pragmatic perspective.

First, with respect to our own people, in advocating a pragmatic approach, we need to be on guard against operational bias. This means that those who work in the criminal justice system sometimes need to be reminded that the system is not the only answer to the terrorist threat. When law enforcement personnel encounter a terrorist, or someone who may know something about terrorism, they need to recognize that prosecution is not an end in itself. It is a means to an end. Law enforcement personnel must use all available tools to collect the intelligence needed to protect the country. They must see themselves as part of a larger effort. If they become too parochial, they will miss opportunities to protect national security. For example, I mentioned before<sup>74</sup> that where a problem looks like a nail we need to use a hammer and where it looks like a bolt we need to use a wrench. A related point is worth making here: To a person whose job is to use a hammer, *every* problem can begin to look like a nail. The Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, has spoken recently on the importance of seeing military power in the context of U.S. national interests as a whole,<sup>75</sup> and law enforcement power should be viewed in that way as well. If, as will often be the case under present conditions, law enforcement agents are the first to encounter terrorists in the United States, those agents must be careful to act in accord with our overall national interest. They should not lightly take actions that foreclose other methods consistent with our values that may be more effective for achieving our goals.

On the other side of the balance, certainly most of our friends in Europe, and indeed in many countries around the world (as well as many people in this country), accept only a law enforcement response and reject a military response to terrorism, at least outside of theaters of active armed conflict.<sup>76</sup> As a result, some of those countries will restrict their cooperation with us unless we are using law enforcement methods. Gaining cooperation from other countries can help us win the war – these countries can share intelligence, provide witnesses and evidence, and transfer terrorists to us. Where a foreign country will not give us a terrorist (or information needed to neutralize a terrorist) for anything but a criminal prosecution, we obviously should pursue the prosecution rather than letting the terrorist go free. This does not subordinate U.S. national interest to some global test of

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74. See *supra* Part II.

75. See Admiral Mike Mullen, Speech on Military Strategy at Kansas State University (Mar. 3, 2010), available at <http://www.jcs.mil/speech.aspx?id=1336>, and his Fort Leavenworth All Hands Call (Mar. 4, 2010), available at <http://www.jcs.mil/speech.aspx?ID=1341>.

76. As discussed in Part I, *supra*, the Obama administration has made clear that it will use military commissions and law of war detention. See *infra* Part IV.

legitimacy; it simply reflects a pragmatic approach to winning the war. If we want the help of our allies, we need to work with them.<sup>77</sup>

More generally, we need to recognize the practical impact of our treatment of the enemy and the perception of that treatment. This war is not a classic battle over land or resources, but is fundamentally a conflict of values and ways of life.<sup>78</sup> Demonstrating that we live up to our values, thus drawing stark contrasts with the adversary, is essential to ensuring victory. When our enemy is seen in its true colors – lawless, ruthless, merciless – it loses support worldwide. For example, in Iraq, al Qaeda’s random and widespread violence against civilians eventually helped mobilize the population against the insurgents.<sup>79</sup> On the other hand, when our actions or policies provoke questions about whether we are committed to the rule of law and our other values, we risk losing some of our moral authority. This makes it harder to gain cooperation from our allies and easier for the terrorists to find new recruits.

This is not simply abstract philosophy. It is an important reality in our military’s effort to defeat the enemy in places like Iraq and Afghanistan. As the U.S. military’s counterinsurgency field manual states, “to establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support.”<sup>80</sup> Adherence to the rule of law

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77. I will have more to say about international cooperation issues as part of the comparison between the criminal justice system, the system of reformed military commissions, and law of war detention.

78. The Department of Defense’s 2008 National Defense Strategy report provides: “This conflict is a prolonged irregular campaign, a violent struggle for legitimacy and influence over the population. The use of force plays a role, yet military efforts to capture or kill terrorists are likely to be subordinate to measures to promote local participation in government and economic programs to spur development, as well as efforts to understand and address the grievances that often lie at the heart of insurgencies. For these reasons, arguably the most important military component of the struggle against violent extremists is not the fighting we do ourselves, but how well we help prepare our partners to defend and govern themselves.” DEP’T OF DEF., NATIONAL DEFENSE STRATEGY (June 2008) at 8, available at <http://www.defense.gov/pubs/2008NationalDefenseStrategy.pdf>.

79. See, for example, General David Petraeus’s speech at the Marine Corps Association Dinner in July 2009, in which he described the complex of factors that led to the so-called “Anbar Awakening” – the effort there required both fierce fighting and building trust with local partners, including protecting allies and “also required living among, and sharing the risks with, those whose trust we sought; training, equipping, and funding security forces capable of protecting their own neighborhoods; and, once an area had been cleared of insurgents, doing the hard work of rebuilding not only local infrastructure, but also local governance and rule of law. . . . Eventually, we reached a tipping point. The Coalition demonstrated its ability to protect the population and its long-term commitment to the fight, and insurgent attacks started to drive more Anbaris to our side.” The speech is available at <http://www.centcom.mil/en/from-the-commander/commanders-speech-to-marine-corps-association-annual-dinner.html>.

80. U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY, at §1-131 (Dec.

is central to this approach: “The presence of the rule of law is a major factor in assuring voluntary acceptance of a government’s authority and therefore its legitimacy. A government’s respect for preexisting and impersonal legal rules can provide the key to gaining widespread enduring societal support. Such respect for rules – ideally ones recorded in a constitution and in laws adopted through a credible, democratic process – is the essence of the rule of law. As such, it is a powerful potential tool for counterinsurgents.”<sup>81</sup> Indeed, the U.S. military has been implementing such a transition to civilian law enforcement in Iraq, where detentions and prosecutions of insurgents are now principally processed through the domestic criminal justice system,<sup>82</sup> and we are moving in that direction in Afghanistan, where transfer of detention and prosecution responsibilities to Afghan civilian authorities is our goal.<sup>83</sup> I think these are principles that are well worth keeping in

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2006).

81. *Id.* at §1-119.

82. U.S. detention operations in Iraq are governed by the Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Nov. 17, 2008, (*available at* [http://www.usf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.usf-iraq.com/images/CGs_Messages/security_agreement.pdf)) [hereinafter Security Agreement]. The Agreement entered into force on January 1, 2009, and governs the U.S. military presence in Iraq. The Agreement addresses both disposition of legacy security detainees, who were detained pursuant to the United Nations mandate for the Multi-National Force-Iraq prior to January 1, 2009, and new captures. Security Agreement, at art. 22. Under the Agreement, legacy security detainees whom Iraqi authorities wish to prosecute are transferred to the Government of Iraq upon presentation of a valid criminal arrest warrant and detention order. *Id.* at art. 22(4). Detainees against whom a criminal case is not brought must be released by U.S. forces “in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement.” *Id.* A request by the Government of Iraq for another disposition might include repatriation to a third country. To mitigate security risks, U.S. forces release detainees whom Iraqi authorities have determined would not be prosecuted in order of least to greatest security threat. New captures are processed in line with the Iraqi judicial system. The Agreement precludes U.S. forces from arresting or detaining individuals “except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4” of the Agreement, which authorizes U.S. military operations and requires U.S. forces to respect Iraqi law. *Id.* at art. 22(1). The preference is to arrest an individual pursuant to an Iraqi-issued arrest warrant; if a warrant is not feasible, individuals taken into U.S. forces’ custody must be turned over to a competent Iraqi authority within 24 hours, at which point Iraqi authorities determine whether continued detention is warranted. *Id.* at art. 22(2). The Agreement also affirms that U.S. forces in Iraq retain the right to legitimate self-defense. *Id.* at art. 4(5).

83. *See, e.g.*, Gen. Stanley McChrystal, then Commander, Int’l Sec. Assistance Force (ISAF), Joint News Briefing with Ambassador Mark Sedwill, NATO Representative in Afghanistan (March 17, 2010) *available at* <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4589>, (“The most important thing is we’re in a major effort here to turn detainee operations over to Afghan control. Our JTF-435, under Vice Admiral Bob Harward, is working already in partnership. So through 2010, we will be in the lead, but they will be partnering with us at places like the detainee facility in Parwan, right outside of Bagram. And then we look to 1 January 2011, for it to be Afghan ownership. We think it’s an important step in their sovereignty and their control of this entire effort. And we would



mind as we think about the impact of employing different tools in the context of our conflict with al Qaeda. It would not only be ironic, but also operationally counterproductive, if our partners in Iraq and Afghanistan rely increasingly on law enforcement tools to detain terrorists, even in areas of active hostilities, while we abandon those tools here in the United States.<sup>84</sup>

#### IV. COMPARING THE CRIMINAL JUSTICE AND MILITARY DETENTION SYSTEMS

Ultimately, the value of the criminal justice system as a counterterrorism tool is relative. It must be compared to the value of other tools. Comparing the criminal justice system to the use of military force or diplomacy is difficult, because it has so little in common with them. But insofar as it permits us to disrupt and incapacitate terrorists, and to gather intelligence, the criminal justice system is readily comparable with two other systems – detention under the law of war, and prosecution in a military commission.<sup>85</sup> I will now turn to these comparisons.

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then partner with them, to assist. So any decision we make to make sure that our detainee operations are effective now to protect our forces and help the campaign should also be a step towards Afghan control, which we're already executing."'). Later at the same briefing, Ambassador Sedwill added the following: "I just urge you to remember the complexity of this campaign. We've tended to focus – I think it's quite natural in this audience – on the military elements of it, but the military elements of it are not going to deliver success here unless we get the political elements right and indeed the other part of it, the development of governance and so on." *Id.*

84. Of course, I am by no means suggesting that our military, when operating in Iraq or Afghanistan, or in any other military context, should employ law enforcement tools against our enemies – by, for example, providing *Miranda* warnings to captured individuals or adopting other practices that would be inconsistent with its primary mission. The primary mission of our nation's military is to capture or engage the enemy, not to collect evidence for criminal prosecutions. My point is that there is a very important role for domestic, civilian law enforcement even in places like Iraq and Afghanistan that are confronting large-scale insurgencies and where our military is actively engaged. I should add one additional and important note here. In most of the discussion, I have talked about values primarily as a threshold determination – we determine the tools that are consistent with our laws and values, and then we make them available to our operational personnel. As President Obama made clear in his speech at the National Archives, however, it can also be the case that our values tolerate the use of certain methods, but only as a last resort. *See supra* 42. The President made that point with respect to long-term law of war detention for detainees held at Guantánamo Bay. I do not mean to discount this more nuanced approach to the role of values in determining the tools we should use to defeat our enemies in the current conflict.

85. Executive Order No. 13,567, *Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, 76 Fed. Reg. 13,277 (March 10, 2011) (directing a system of periodic review for persons detained at Guantánamo Bay). The order provides that "[a]s to each detainee whom the interagency review established by Executive Order 13492 has designated for continued law of war detention, the Attorney General and the Secretary of Defense shall continue to assess whether prosecution of the detainee is feasible and in the national security interests of the

Before I focus on the differences between these systems, however, I want to acknowledge the similarities of the two prosecution systems. Prosecution in an Article III federal court and prosecution before a military commission have many requirements and elements in common. These include the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt;<sup>86</sup> the right to notice of the charges;<sup>87</sup> the right to counsel and choice of counsel;<sup>88</sup> the right to be present during proceedings;<sup>89</sup> the right against self-incrimination;<sup>90</sup> the right to present evidence, cross-examine the government's witnesses, and compel the attendance of witnesses in one's defense;<sup>91</sup> the right to exculpatory evidence that the prosecution may have as to guilt, sentencing and the credibility of

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United States, and shall refer detainees for prosecution, as appropriate." In an accompanying press release, which is available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>, the White House stated that "[t]he Secretary of Defense will issue an order rescinding his prior suspension on the swearing and referring of new charges in the military commissions."

86. *Coffin v. United States*, 156 U.S. 432, 453 (1895) (presumption of innocence); *In re Winship*, 397 U.S. at 364 (finding that due process requires prosecution to prove defendant guilty of each element beyond a reasonable doubt); 10 U.S.C. §949l(2)(c)(1) (2006) (requiring that members be instructed that accused is presumed innocent until guilt is established beyond a reasonable doubt).

87. U.S. CONST. amend. VI; *Cook v. United States*, 138 U.S. 157 (1891) (finding that the defendant is entitled to be informed of the nature of the charge with sufficiently reasonable certainty to allow for preparation of the defense); 10 U.S.C. §948s (2006) (requiring assigned trial counsel to serve defense counsel copy of the charges in English and, if appropriate, another language "sufficiently in advance of trial to prepare a defense").

88. U.S. CONST. amend. VI; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (finding that the Sixth Amendment right to counsel includes the right of a defendant who does not require appointed counsel to choose who will represent him); 10 U.S.C.A. §949a(b)(2)(C)(i) (West 2009) (right to be represented by civilian counsel at no expense to the government and by either defense counsel detailed or the military counsel of the accused's own selection, if reasonably available).

89. *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (finding that the Confrontation Clause of Sixth Amendment guarantees a defendant's right to be present at trial); *id.* at 343 ("a defendant can lose his right to be present at trial if, after he has been warned by the judge . . . he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."); 10 U.S.C.A. §949a(b)(2)(B) (West 2009) (right to be present at all sessions of the military commission other than for deliberation or voting except as set forth in §949d); 10 U.S.C.A. §949d(d)(1)-(2) (West 2009) (military judge may exclude the accused upon a determination that, after warning, accused persists in conduct that justifies exclusion to ensure physical safety or prevent disruption).

90. U.S. CONST. amend. V; *Bram v. United States*, 168 U.S. 532, 542 (1897); 10 U.S.C.A. §948r(b) (West 2009) ("No person shall be required to testify against himself or herself at a proceeding of a military commission. . .").

91. U.S. CONST. amend. VI; *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); 10 U.S.C.A. §949a(b)(2)(A) (West 2009) (right to present evidence); 10 U.S.C.A. §949j(a) (West 2009) ("opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant" in an Article III court).

adverse witnesses;<sup>92</sup> the right to an impartial decisionmaker,<sup>93</sup> and similar procedures for the selection of jurors and commission members;<sup>94</sup> the right to suppression of evidence that is not reliable or probative or that will result in unfair prejudice, confusion, or be misleading to the jury/commission;<sup>95</sup> the right to qualified self-representation;<sup>96</sup> protection against double

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92. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (finding that the suppression by prosecution of evidence favorable to accused violates due process where evidence is material either to guilt or punishment); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility [could justify a new trial.]”); 10 U.S.C.A. §949j(b) (West 2009) (right to exculpatory evidence as to guilt, sentencing, and the credibility of adverse witnesses).

93. In Article III criminal trials, the Sixth Amendment guarantees the criminal defendant the right to be tried by an impartial jury. *See Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (“The right to an impartial adjudicator, be it judge or jury” is “basic to a fair trial.”). In military commissions, attempting to influence the decision-making of military trial judges, commission members, and appellate judges is prohibited, except for narrow exceptions (which relate to the training of military judges and the provision of instructions to commission members by judges). *See* 10 U.S.C.A. §949b(a)(1) (West 2009) (“No authority convening a military commission . . . may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence . . . or with respect to any other exercises of its or their functions in the conduct of the proceedings.”); 10 U.S.C.A. §949b(a)(2) (West 2009) (“No person may attempt to coerce or, by any unauthorized means infringe” the actions of a military commission or commission members; convening, approving or reviewing authority “with respect to their judicial acts” or “the exercise of professional judgment by trial counsel or defense counsel.”); 10 U.S.C.A. §949b(a)(3) (West 2009) (similar provisions on appeal regarding the U.S. Court of Military Commission Review (CMCR)). Of course, unlike in an Article III criminal trial, all of the members of the commission, as well as the judges, must be military officers. 10 U.S.C.A. §§948i & 948j (West 2009).

94. *See* FED. R. CRIM. P. 24 (explaining voir dire process for selection of trial jurors); U.S. DEP’T OF DEF., *MANUAL FOR MILITARY COMMISSIONS* (2010), Rule 912 (explaining voir dire process for selection of military commission members including questionnaire and challenges for cause), *available at* <http://www.defense.gov/news/d2010manual.pdf>.

95. *See* FED. R. EVID. 402 (relevant evidence generally admissible; irrelevant evidence generally inadmissible), 403 (exclusion of evidence on grounds of unfair prejudice, confusion of the issues, or waste of time); 10 U.S.C.A. §§949a(b)(2)(E) (West 2009) (suppression of evidence that is not reliable or probative) and 949a(b)(2)(F) (West 2009) (suppression of evidence on grounds of unfair prejudice, confusion of the issues or misleading the members, or undue delay, waste of time, or cumulative nature of evidence).

96. *Faretta v. California*, 422 U.S. 806, 821, 835 (1975) (finding that the Sixth Amendment gives criminal defendant right to conduct own defense in a criminal case; to proceed *pro se*, defendant must knowingly and intelligently waive right to counsel); *McKaskle v. Wiggins*, 465 U.S. 168, 169 (1984) (holding that the Sixth Amendment is not violated when trial judge appoints stand-by counsel, even over defendant’s objection, in order to ensure that defendant understands and follows “basic rules of courtroom protocol”); 10 U.S.C.A. §949a(b)(2)(D) (West 2009) (right to self-representation if “accused knowingly and competently waives assistance of counsel” and “conform[s] the accused’s deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission”).

jeopardy;<sup>97</sup> a prohibition on ex post facto laws;<sup>98</sup> protections for incompetent defendants;<sup>99</sup> and the right to an appeal,<sup>100</sup> among others. The U.S. Constitution secures many of these rights in federal court, and may also secure these rights in the context of military commissions. The 2009 Military Commissions Act (2009 MCA or MCA)<sup>101</sup> provides most of these basic procedural protections as a statutory matter.

It is also important to note that while the criminal justice and military prosecution systems share certain essential characteristics and also a common punitive function, the legal basis and rationale for law of war detention is fundamentally different. As a plurality of the Supreme Court explained in *Hamdi*, during a war or armed conflict, a state that captures enemy forces can lawfully hold them for the duration of the conflict.<sup>102</sup> Unlike criminal prosecution, holding a detainee under the law of war is not penal in nature; a detainee is not convicted of a criminal act or subject to a criminal sentence. When hostilities end, international law requires prompt repatriation.<sup>103</sup> Because the legal basis and rationale of law of war detention

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97. U.S. CONST., amend. V; *Price v. Georgia*, 398 U.S. 323, 326 (1970); 10 U.S.C.A. §949h (West 2009) (“No person may, without the person’s consent, be tried by a military commission . . . a second time for the same offense.”).

98. U.S. CONST., art. I, §8; *Miller v. Florida*, 482 U.S. 423 (1987); *United States v. Hamdan*, 2 M.C. 1, 2 (2008) (“Congress is not authorized to pass *ex post facto* legislation.”).

99. *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (finding that a criminal defendant may not be tried unless he is mentally competent); 18 U.S.C. §4241 (2006) (procedures for determining mental competency of defendant). Although there is no analogous provision in the Military Commissions Act, the 2010 Military Commissions Manual contains similar rules. See U.S. Dep’t of Def., MANUAL FOR MILITARY COMMISSIONS (2010), Rule 909 (capacity of the accused to stand trial by military commission); Rule 909(e) (incompetence determination hearing). A military judge ordered competency hearings for two individuals, Ramzi Bin Al Shihb and Mustafa Ahmed al Hawsawi, based on motions from their counsel pursuant to the 2007 Military Commissions Manual. See, e.g., Petition for Writ of Mandamus or Writ of Prohibition at 3, *In re Al Shihb*, No. 09-1238 (D.C. Cir. 2010) (referencing military judge’s order of competency hearing), *dismissed as moot*, July 23, 2010 [hereinafter *Bin al Shihb* Petition]; Petition for Writ of Mandamus or Writ of Prohibition at 18-19, *In re Al Hawsawi*, No. 09-1244 (D.C. Cir. 2010) (referencing military judge’s order on Dec. 9, 2008 ordering competency inquiry), *dismissed as moot*, July 23, 2010 [hereinafter *Al Hawsawi* Petition].

100. 28 U.S.C. §§1291-92 (2006) (federal appellate courts may review final decisions of district courts); 10 U.S.C. §§950c, 950f, 950g (2006) (includes de novo review of fact and law by CMCR followed by review as to matters of law, including sufficiency of the evidence, by the U.S. Court of Appeals for the District of Columbia Circuit). Note that the military commissions provide broader appeal rights and an additional level of appellate review than do civilian courts. See note 187, *infra*.

101. 10 U.S.C.A. §§948a-1807, Pub. L. No. 111-84 (West 2009).

102. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-524 (2004).

103. *Hamdi*, 542 U.S. at 520 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”) (quoting Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 3406). With respect to some detainees, repatriation may pose challenges. See *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam).

is different from criminal prosecution, the legal process that applies is also different from that applicable in a criminal proceeding. In concluding that the detainees held at Guantánamo have a constitutional right to challenge the lawfulness of their detention by writ of habeas corpus, the Supreme Court in its *Boumediene* decision recognized that standards and procedures to be applied must account for the special circumstances of wartime detention, and left open the contours of the substantive and procedural law of detention for lower courts to shape in a common law fashion.<sup>104</sup> Many of these detainee cases have been litigated recently in the federal courts in the District of Columbia, and some critical issues regarding the standards and procedures applicable to this unique class of cases have been resolved. For example, the courts have upheld the government's standard as to who may be lawfully detained under the 2001 Authorization for Use of Military Force (AUMF);<sup>105</sup> agreed that requiring the government to prove the lawfulness of detention by a preponderance of the evidence is constitutionally sufficient;<sup>106</sup> and held that hearsay is admissible in these proceedings.<sup>107</sup> Since *Boumediene*, the courts are in the process of implementing a regime that provides for rigorous review of the government's evidence while properly accounting for the unique nature of the proceedings.

An exhaustive comparison of the differences among all three systems would require a longer discussion,<sup>108</sup> but I have identified five relative

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104. See *Boumediene v. Bush*, 553 U.S. 723, 796 (2008).

105. 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001); see *Al Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).

106. See *Awad v. Obama*, 608 F.3d 1, 10 (D.C. Cir. 2010).

107. See *id.* at 7.

108. Three additional caveats are in order. First, the extent and significance of the differences between the systems often turn on the facts of a particular case. There is no substitute for immersion in the details.

I am comparing civilian law enforcement and federal courts on the one hand, and use of our military detention authorities and military commissions on the other, but I want to emphasize that these are really three different tools, rather than two. For many of the reasons I mentioned, the two trial mechanisms – federal courts and military commissions – have more in common with each other than they do with law of war detention, which is not designed to hold individuals accountable for criminal conduct but instead to keep them away from the fight during a war. Both trial mechanisms also afford justice to the victims of terrorist attacks and significant community therapeutic value in a way that law of war detention cannot do. In federal criminal trials, the Crime Victims' Rights Act, 18 U.S.C. §3771 (2006), provides victims of crimes with certain rights, including the right to reasonable, accurate and timely notice of public court proceedings related to the crime, §3771(a)(2), the right not to be excluded from public proceedings, §3771(a)(3), the right to confer with the government, §3771(a)(5), and the right to be heard by the court, §3771(a)(4), among others. Similarly, regulations issued by the Department of Defense in 2007 to govern the day-to-day functions of military commissions include the Military Commissions Victim and Witness Assistance Program (VWAP), which sets forth certain policies and responsibilities designed for the benefit of victims. See REGULATION FOR TRIAL BY

advantages of our military system and five of our civilian system, viewed solely from the perspective of the government and solely as to the effectiveness of each system in combating terrorism.<sup>109</sup> Of course, in any particular case, all three of these systems – criminal justice, military, and law of war detention – may be lawful and appropriate, and determining which one to employ requires an assessment of the substantive and procedural features of each. I need to emphasize, however, that this comparison is not nearly as detailed a comparison as would be required in order to make informed policy or operational judgments. Those judgments generally would require comparisons that are far more granular and nuanced.

### *A. Advantages of Military Authorities*

With those important caveats, here are five general advantages that using military authorities rather than civilian prosecution may offer to the government, depending on the facts:

#### *1. Government's Burden*

In federal court, prosecutors must persuade all twelve jurors beyond a reasonable doubt that the defendant is guilty of a federal offense.<sup>110</sup> In

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MILITARY COMMISSIONS (RMC) (April 27, 2007 ed.), available at [http://www.defense.gov/news/Apr2007/Reg\\_for\\_Trial\\_by\\_mcm.pdf](http://www.defense.gov/news/Apr2007/Reg_for_Trial_by_mcm.pdf) (RMC). These include, for example, that each crime victim should be notified of commission proceedings, *see* RMC 16-4b(2), be provided information about the conviction, sentencing, imprisonment, and transfer of the offender, RMC 16-4b(4), and be allowed to provide information, in writing, to any authority considering the offender's potential release or transfer from custody, RMC 16-4b(5). While these regulations implement the Military Commissions Act of 2006, Pub. L. No. 109-366 (2006), these provisions should not be affected by the Military Commissions Act of 2009, Pub. L. No. 111-84 (2009).

Third, I want to acknowledge that while I have experience with civilian criminal procedure, I am not an expert on military justice or the law of war. I have tried to describe accurately the rules governing law of war detention and military commissions, and I have tried also to be detailed, rigorous, and objective in the comparisons I draw. But there is a lot of complexity here, the military commission system is evolving, and I welcome any insight and nuance from those with greater expertise or a different perspective. My primary goal here is to start a conversation about the relative advantages and disadvantages of military authorities and civilian law enforcement, not to finish that conversation.

109. I do not mean to suggest that the perspective of the prosecution is the only viable perspective in assessing "advantages" of one system or another. As explained in Parts I and II, *supra*, that perspective is critical to those who would exclude the use of law enforcement from U.S. counterterrorism options, and hence a focus of this discussion. Nor do I mean to suggest that there are only five advantages and disadvantages of each system.

110. *Andres v. United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues – character or degree of the crime, guilt and punishment – which are left to the jury."); FED. R. CRIM. P. 31(a) (unanimous jury

military commissions, the burden of proof is the same, but in non-capital cases only two-thirds of the members of the commission – in effect, the jurors – need to be persuaded for a guilty verdict, and the minimum number of jurors required is only five.<sup>111</sup> The potential for non-unanimous guilty verdicts, as well as working with a smaller number of jurors, is a significant advantage to the government in a military commission, although there are important nuances that qualify that advantage in certain cases.<sup>112</sup> For law of war detention where habeas corpus applies, the burden is different and often less demanding, which is to be expected given the different underlying basis for detention of enemy forces in war. Although the detainee has a right to an adversary proceeding before a federal judge,<sup>113</sup> as noted above,

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requirement); *Coffin v. United States*, 156 U.S. 432, 453 (1895) (presumption of innocence); *In re Winship*, 397 U.S. 358, 364 (1970) (due process requires prosecution to prove defendant guilty of each element beyond a reasonable doubt).

111. See 10 U.S.C. §949l(c) (requiring members be instructed that accused is presumed innocent until guilt is established beyond a reasonable doubt); 10 U.S.C. §949m(a) (requiring two-thirds of members present to convict). Sentences of ten years or less also require concurrence of two-thirds of the members present at the time the vote is taken. 10 U.S.C. §949m(b)(1). Sentences above ten years, including life imprisonment, require the concurrence of three-fourths of the members present at the time the vote is taken. 10 U.S.C. §949m(b)(3). And imposition of capital punishment, which is discussed in greater detail, *infra* Part IV.B.4, requires a unanimous vote. 10 U.S.C. §949m(b)(2)(D). Because in non-capital cases, a minimum of only five members is required on the commission, 10 U.S.C. §948m(a), only three members may actually be needed to find guilt in order to convict – which is less demanding than the concurrence of twelve jurors to convict required in federal court. (In capital cases before a military commission, a minimum of twelve members is generally required, unless “reasonably unavailable . . . because of physical conditions or military exigencies,” but there must be at least nine. 10 U.S.C. §949m(c).

112. If the vote of the members of a military commission results in any fewer than two-thirds in favor of conviction, the accused will be acquitted; the two-thirds requirement only applies to convictions in military commissions whereas the unanimity requirement in federal court applies to all verdicts. Thus, for example, where the jury votes 7-5 in favor of conviction, the result in a military commission is an acquittal (because 7/12 is less than 2/3), while the result in federal court is a mistrial and retrial (because the verdict is not unanimous). Compare 10 U.S.C. §949m(a) (“No person may be convicted by a military commission except . . . by concurrence of two-thirds of the members present at the time the vote is taken”) with FED. R. CRIM. P. 31(a) (“The verdict must be unanimous.”) and 31(b)(3) (“The government may retry any defendant on any count on which the jury could not agree.”). For a discussion of the requirements in capital cases, see text and notes 171-175, *infra*.

113. See *Boumediene v. Bush*, 553 U.S. 723, 770-777 (2008) (“We do consider it uncontroversial that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”); *id.* at 784 (“For the writ of habeas corpus, or its substitute to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the [prior] proceedings. This includes some authority to assess the sufficiency of the Government’s evidence against the detainee. It must also have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.”).

the government need only persuade the judge by a preponderance of the evidence that the petitioner is part of, or substantially supporting, al Qaeda, the Taliban, or associated forces.<sup>114</sup> This can be a significant advantage in many cases where the individual's affiliation with the enemy is clear but proof of a specific criminal offense would be difficult. That said, this burden is by no means a blank check; indeed, the review has been rigorous and it has been difficult for the government to carry this burden in a number of cases.<sup>115</sup>

## 2. Admissibility of Confessions

As a general matter, military commissions have different and more flexible standards than federal courts for admitting custodial statements of the accused – although the differences are not as stark as the public debate might suggest. As discussed above, if the government wants to use a defendant's responses to custodial interrogation in federal court, it generally must provide *Miranda* warnings,<sup>116</sup> and it must show that the statements were voluntary based on the totality of the circumstances (*Miranda* warnings are one important factor that helps establish voluntariness).<sup>117</sup>

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114. See *Al Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (authority to detain under 2001 AUMF, includes “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.”); see also *Barhoumi v. Obama*, 609 F.3d 416, 424 (D.C. Cir. 2010) (setting out same standard for government proof but noting that court “has yet to delineate the precise contours of the ‘part of’ inquiry”). This discussion does not address any independent Constitutional power that may exist with respect to detention.

115. As of December 20, 2010, district courts have granted writs of habeas corpus in 21 contested cases. Writs have been denied in 19 cases. In addition, writs were granted with respect to 17 Chinese Uighurs whose cases the government did not oppose. Of the seven resolutions on appeal to date, four denials of the writ have been upheld by the D.C. Circuit, one denial of the writ has been reversed and remanded, and two grants of the writ have been reversed and remanded. Eight government appeals and eleven detainee appeals are pending, as well as four petitions for certiorari. Approximately 150 cases are pending either in the district court or on appeal.

116. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *New York v. Quarles*, 467 U.S. 649 (1984). Under the public safety exception, an un-Mirandized statement made by a suspect immediately after a bombing or attempted bombing – concerning, for example, what the explosives were made of, or whether he had any accomplices – would likely be admissible in a criminal case against him. In one case, following the discovery of pipe bombs and related material in a raid on the defendant's apartment, officers asked the defendant a number of questions about the bombs without advising him of his rights, including whether he planned to kill himself in an explosion. The court upheld the admission of the defendant's un-Mirandized responses based on the public safety exception. *United States v. Khalil*, 214 F.3d 111, 121-122 (2d Cir. 2000).

117. *Haynes v. Washington*, 373 U.S. 503, 513-514 (1963); *United States v. Morris*, 247 F.3d 1080, 1090 (10th Cir. 2001) (confession voluntary despite 19 year-old's 10th grade education because he was given and understood his *Miranda* rights). The fruits of an involuntary confession may also be excluded from evidence in a criminal trial, *Nix v. Williams*, 467 U.S. 431, 442, n.3 (1984), unless they would “inevitably have been



Under the 2009 MCA, *Miranda* warnings are not required, but a voluntariness test applies,<sup>118</sup> subject to an exception for statements taken incident to military operations at the point of capture or during closely related active combat engagement.<sup>119</sup> While statements elicited by torture or cruel, inhuman, or degrading treatment (CID) are *per se* excluded,<sup>120</sup> evidence derived from those statements or other involuntary statements is

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discovered” even without the coercive conduct, *id.* at 446, or if discovered through a source independent of the coercive conduct, *id.* at 443, or if the causal connection between the coercive conduct and the acquisition of the evidence is sufficiently attenuated, *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). *Cf.* *United States v. Ghailani*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 4058043 at \*1 (S.D.N.Y. Oct. 6, 2010) (precluding witness testimony in federal criminal trial because government failed to show that testimony was sufficiently attenuated from coercive government conduct so as to be admissible). The fruits of a voluntary but un-Mirandized statement will not be excluded. *See United States v. Patane*, 542 U.S. 630, 644 (2004) (“Introduction of non-testimonial fruit of a voluntary statement. . . does not implicate the Self-Incrimination Clause.”).

118. 10 U.S.C. §948r(c). *See, e.g., Prosecuting Law of War Violations: Reforming the Military Commissions Act of 2006: Hearing Before the House Armed Servs. Comm.*, 111th Cong. (2009) (statement of Vice Admiral Bruce E. MacDonald, Judge Advocate General, U.S. Navy), available at <http://democrats.armedservices.house.gov/index.cfm/2009/7/prosecuting-law-of-war-violations-reforming-the-military-commissions-act-of-2006> (“And I think, at this point, we would assess it this way: The closer you are to the battlefield, the more that voluntariness would recede and you would look at the kind of indicia of reliability of the statement itself. At some point, though, as you take the detainee off the battlefield, and as you put them in a confinement facility, then the nature of the interrogation changes. So you go from this tactical interrogation . . . on the battlefield in Afghanistan. You move away from the intelligence interrogations that go on. And at some point, you’re starting to look at exploitation, getting statements for prosecution. At that point – I think we all agree that voluntariness should be the standard at that point.”).

119. 10 U.S.C. §948r(c) (“A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds – (1) that the totality of circumstances renders the statement reliable and possessing sufficient probative value; and (2) that – (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.”). In determining voluntariness, the statute directs the military judge to consider the “totality of the circumstances,” including, as appropriate: (1) the details of taking the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities; (2) 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. 10 U.S.C. §948r(d). Some of the relevant terms – such as “at the point of capture” or “closely related active combat engagement” – are not defined in the 2009 MCA and clarification of their scope will develop through judicial interpretation and application on a case-by-case basis. It is unclear, for example, the extent to which such an exception can apply off of the “traditional” battlefield, particularly in the United States. The precise contours of the due process analysis that courts will apply with regard to voluntariness of statements in military commissions are also unclear, and it is possible that in certain circumstances courts might find that these narrow statutory carve-outs for voluntariness may not meet due process requirements.

120. 10 U.S.C. §948r(a).

not explicitly barred in the 2009 MCA.<sup>121</sup> On the other hand, in a military commission, the judge must also find a statement “reliable” before it can be admitted (which is not specifically required in federal court) and military judges applying a similar reliability standard in a court martial sometimes require corroboration of statements in ways that federal judges may not.<sup>122</sup>

In a habeas corpus proceeding over law of war detention, there is likewise no *Miranda* requirement, and thus no statements are excluded based on the absence of a *Miranda* warning or failure to provide counsel. Judges typically evaluate a statement using standards that are similar to those that inform a voluntariness assessment, but perhaps weighted differently, and at times they also seem to assess the statement’s reliability. Although the government does not rely on statements that were the product

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121. While there is no explicit bar on the “fruits” of such impermissible statements in the 2009 MCA, the 2010 Military Commissions Manual does contain certain restrictions on the admissibility of the “fruits” of statements obtained through torture, and cruel, inhuman, or degrading treatment and other precluded statements, although admissibility of such evidence will nevertheless be broader than in federal courts, particularly as to the admissibility of evidence derived from statements that were not elicited by torture or CID but may nevertheless be deemed involuntary. Rule 304(a)(5) provides, for example, that evidence derived from statements obtained by torture or cruel, inhuman, or degrading treatment may not be received in evidence against the 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 . . . the evidence would have been obtained even if the statement had not been made; or . . . the use of such evidence would otherwise be consistent with the interests of justice.” U.S. DEP’T OF DEF., MANUAL FOR MIL. COMM’NS (2010), Rule 304(a)(5)(A). Evidence derived from other excludable statements of the accused (e.g., statements excluded because they were involuntary and did not meet any exceptions to the voluntariness requirement, but not obtained through torture or cruel, inhuman, or degrading treatment) may not be admitted against the accused who made the statement if the accused makes a timely objection “unless the military judge determines by a preponderance of the evidence that . . . the totality of the circumstances renders the evidence reliable and possessing sufficient probative value; and . . . use of such evidence would be consistent with the interests of justice.” *Id.* Rule 304(a)(5)(B). It remains unclear how judges will treat such evidence in practice, and the extent to which due process protections will apply to exclude such evidence. *See, e.g.*, United States v. Ghailani, 2010 WL 4058043 at \*19 n.182 (noting that it is “very far from clear” that evidence found to be derived from coercion and excluded from a federal criminal trial would be admissible in military commissions under Rule 304 or the Fifth Amendment).

122. *See, e.g.*, United States v. Cucuzzella, 64 M.J. 580, 585 (A.F. Ct. Crim. App. 2007) (“To be admitted, an accused’s confession must be corroborated by evidence sufficient to justify an inference that the essential facts of the confession are true [citing Military Rule of Evidence (Mil. R. Evid.) 304(g)]. Corroborating evidence need not establish all of the elements of the offense, nor establish the truth of the confession by even a preponderance of the evidence. Only a ‘slight’ or ‘very slight’ quantum of evidence is needed to fulfill the corroboration requirement of Mil. R. Evid. 304(g).”) (internal citations omitted). It is unclear what factors will be relevant to a finding that the statement is sufficiently “reliable” in the military commission context – in particular, whether any corroboration will be needed. If military judges do require some corroboration, even if only minimal, this could complicate the admissibility question, especially for statements made years after the events in question.

of torture, issues concerning allegedly coerced statements have often been litigated. Judges have discounted or rejected statements where there was evidence of coercion or a coercive environment,<sup>123</sup> but they have often evaluated similar evidence in different ways in determining when coercive circumstances will invalidate a confession. One judge, for example, has suggested that the fact that statements are made in a facility where abuse was taking place, regardless of whether the petitioner himself was subject to it, may be sufficient to taint the statement.<sup>124</sup> Other judges have differed in the extent to which they have credited claims of coercion, requiring more specific allegations.<sup>125</sup> The judges also appear to disagree as to when prior abuse will taint subsequent statements; some judges have admitted statements made well after credited allegations of abuse as long as they were made at administrative hearings, while others have excluded such statements.<sup>126</sup> The law continues to develop on these issues on a case-by-

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123. See *Al Warafi v. Obama*, 704 F. Supp. 2d 32, 40 (D.D.C. 2010) (not relying on certain statements because “[r]espondents have not provided any evidence demonstrating that these statements are accurate, reliable, and credible. In particular, respondents have not assured the Court that these statements were not coerced. In addition, respondents have determined that at least one of the detainees on whose statements they rely is unreliable.”); *Hatim v. Obama*, 677 F. Supp. 2d 1, 12 (D.D.C. 2009) (“[P]etitioner Hatim’s unrefuted allegations of torture undermine the reliability of the statements made subsequent to his detention at Kandahar.”); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 61 (D.D.C. 2009) (“The larger issue is that [unnamed witness’s] initial identification suffers from serious reliability problems. First and foremost, the detainee made the inculpatory statement at Bagram Prison in Afghanistan, about which there have been widespread, credible reports of torture and detainee abuse.”).

124. See *Ahmed*, *supra* note 123, 613 F. Supp. 2d at 61.

125. See, e.g., *Awad v. Obama*, 646 F. Supp. 2d 20, 24 n.2 (D.D.C. 2009) (dismissing petitioner’s claim that incriminating statements he made were the result of coercion and thus unreliable, noting only one specific allegation of coercion and Government’s response), *aff’d*, 608 F.3d 1 (D.C. Cir. 2010).

126. See, e.g., *Salahi v. Obama*, 710 F. Supp. 2d 1, 6 (D.D.C. April 9, 2010) (“[A]buse and coercive interrogation methods do not throw a blanket over every statement, no matter when given, or to whom, or under what circumstances. Allegations of mistreatment certainly taint petitioner’s statements, raising questions about their reliability . . . . But at some point – after the passage of time and intervening events, and considering the circumstances – the taint of abuse and coercion may be attenuated enough for a witness’s statements to be considered reliable – there must certainly be a ‘clean break’ between the mistreatment and any such statement.”), *vacated and remanded on other grounds*, *Salahi v. Obama*, 625 F.3d 745, 747 (D.C. Cir. 2010). Compare *Anam v. Obama*, 696 F. Supp. 2d 1, 9 (D.D.C. 2010) (finding the majority of petitioner’s past statements unreliable with exception of two made during Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) hearings because the circumstances were “fundamentally different” from those affecting previous interrogations, representing a “sufficient ‘break’ from past coercive conditions”) with *Hatim*, 677 F. Supp. 2d at 10-12 (unrefuted allegations of torture undermine reliability of subsequent statements, including those made to CSRT).

case basis, and there will be greater clarity over time on the circumstances under which the courts will consider a detainee's statements.

### 3. Closing the Courtroom

Closing the courtroom may be helpful in some terrorism proceedings to protect classified information from public disclosure. It may be somewhat easier to close the courtroom in a military commission than in a federal criminal prosecution, and it is clearly easier to do so in civil habeas corpus proceedings challenging law of war detention. Under the Constitution, a federal criminal trial is presumptively open, and may be closed only upon a specific finding by the trial judge "that closure is essential to preserve higher values and is narrowly tailored to serve that interest."<sup>127</sup> Consistent

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127. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984); *Waller v. Georgia*, 467 U.S. 39, 48 (1984) (finding closure of entire suppression hearing was unjustified, applying *Press-Enterprise* test); *id.* at 45 ("[T]he Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care."); 28 C.F.R. §50.9; U.S. ATT'YS MANUAL §9-5.150. At this point, it remains unclear the extent to which this same Constitutional standard would apply to military commission proceedings. If it were held to apply, the practice of closure in military commissions would likely be more comparable to the practice in federal courts – in which courtrooms can and have been closed during testimony in hearings and trial proceedings, but only on rare occasions, and typically to protect the identity and safety of witnesses. *See, e.g.,* *United States v. Marzook*, 412 F. Supp. 2d 913, 925-927 (N.D. Ill. 2006) (applying *Waller* and *Press-Enterprise* and permitting closure of courtroom during CIPA-governed testimony of foreign agents during suppression hearing); *United States v. Marrero*, 04 Cr. 48 (S.D.N.Y. 2007) (JSR) (oral order) (courtroom closed during trial testimony of undercover officer); *see also* *United States v. Holy Land Foundation*, 04 Cr. 240, Doc. # 628 (N.D. Tex. 2007) (unpublished opinion and order) (permitting foreign agents to testify under pseudonym and courtroom to be partially closed during testimony, with only defendants, counsel, and immediate families present in addition to court personnel and jury; video feed of live testimony provided to public with identities of witnesses protected; certain other measures adopted to protect classified information including presence of agents' legal advisor during testimony to permit consultation as to whether answer to questions would elicit classified information and question-by-question review by court about any classification issues); *United States v. Salah*, 03 Cr. 978, Doc. #652 (N.D. Ill. 2006) (unpublished opinion and order) (permitting foreign agents to testify under pseudonym and courtroom to be partially closed during testimony, with only defendants, counsel, and immediate families present in addition to court personnel and jury; video feed of live testimony provided to public; and transcript available to public upon request); *United States v. Leos-Hermosillo*, 213 F.3d 644, 2000 WL 300967, at \*1 (9th Cir. Mar. 22, 2000) (district court granted motion to exclude public from courtroom during trial testimony of a confidential informant, but provided simultaneous audio feed, which was affirmed by the 9th Circuit in a summary order); *see also* *United States v. Doe*, 63 F.3d 121, 128 (2d Cir. 1995) (applying *Waller* and *Press-Enterprise* in reviewing defendant's motion to close the courtroom for safety reasons and stating that "the same test applies whether a closure motion is made by the government over the defendant's Sixth Amendment objection or made by the defendant over the First Amendment objection of the government or press"). *Cf. Ayala v.*

with this standard, courts have also implemented special procedures – such as the “silent witness rule” – in some cases to shield classified information from disclosure to the public attending a trial, which is similar in many respects to closing the proceeding as to the evidence in question.<sup>128</sup> Under the 2009 MCA, a military judge may close all or part of a trial to the public in potentially broader circumstances, but must still make a determination that closure is necessary to protect information which, if disclosed, would be harmful to national security interests or to the physical safety of any participant.<sup>129</sup> Moreover, in contrast to federal judges, military judges have more practical references for the conduct of closed proceedings, as it is not uncommon for courts-martial to include closed sessions to admit classified evidence, an experience that will likely influence the practice in military commissions.<sup>130</sup> Since habeas corpus proceedings take place in federal

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Speckard, 131 F.3d 62, 72 (2d. Cir. 1997) (applying *Waller* and *Press-Enterprise* and upholding limited closure of courtrooms during trial testimony of undercover officers in three state court criminal cases).

128. The “silent witness rule” – which has also been used rarely – involves the employment of techniques, such as the use of numbers or code names for a person or location, the key to which only the trial participants and the jury have access, or documents containing classified information which is only available to the witness, court, counsel, and jury. As a consequence, only they can understand trial testimony or evidence employing the coded terms or related to the document, and the testimony is not comprehensible to members of the public. *See, e.g.*, *United States v. Rosen*, 520 F. Supp. 2d 786, 794, 798-799 (E.D. Va. 2007) (“silent witness” rule, by which “certain evidence designated by the government is made known to the judge, the jury, counsel, and witnesses, but is withheld from the public . . . results in closing a part of the trial to the public” and accordingly the practice is permitted, but only after applying *Press-Enterprise* criteria); *see also* *United States v. Zettl*, 835 F. 2d 1059, 1063 (4<sup>th</sup> Cir. 1987) (noting use of procedure whereby classified document referred to by witness in testimony was available only to court, counsel, jury, and witness but declining to reach question of the propriety of this approach); *United States v. Abu Ali*, 528 F.3d 210, 255, n.22 (4<sup>th</sup> Cir. 2008) (noting silent witness rule procedure “contemplates situations in which the jury is provided classified information that is withheld from the public, but not from the defendant” but declining to rule expressly on whether it would be proper).

129. 10 U.S.C. §949d(c). Military commission trials also have implemented a 45-second delay of the broadcast of statements to permit classified information to be blocked before it is aired in certain cases; this ensures, for example, that if the accused were to say something out loud that is classified, it can be blocked before the audience hears it. As far as I know, federal courts have not thus far adopted such a mechanism, which could raise both practical and legal concerns.

130. In fact, training for military judges includes specific instructions regarding the conduct of closed sessions of trials in accordance with case law. *Cf.* *United States v. Grunden*, 2 M.J. 116, 120-121 (C.M.A. 1977) (finding exclusion of public from virtually entire espionage trial violated Sixth Amendment right to public trial of accused in court-martial; however, in order to protect classified or security matters “within carefully limited guidelines, partial exclusion of the public . . . can be justified”). Military courts also permit the sealing of transcripts of trial testimony in limited circumstances, which is not practiced to the same extent in federal court. Additionally, because the jurors are military officers, they have security clearances that civilians may not, making the disclosure of classified information less of a problem. However, even in military trials, defendants are not excluded

courtrooms, they are also theoretically open to the public. However, as a practical matter, the vast majority of district court habeas proceedings involving Guantánamo Bay detainees have been closed in order to protect classified information. Although in the large majority of cases counsel see the same classified material the court sees, the habeas petitioner has no right to review classified material or even to be present at the hearing. Arrangements are made for petitioners to listen from Guantánamo to unclassified opening statements, and they often testify in their cases via video link. The classified portions of the district court proceedings are closed, however, and involve only the judge, counsel and other court personnel. Appellate proceedings have required the filing of public briefs (in which classified material is redacted) and oral arguments have generally been open to the public, with the court holding additional closed sessions when necessary.

#### 4. Admissibility of Hearsay

It is sometimes in the government's interest in a terrorism case to be able to introduce hearsay evidence – statements from an individual who is not present in the courtroom to testify and be cross-examined. For example, use of hearsay may be the only way (or the best way) to introduce evidence from a sensitive intelligence source. The Confrontation Clause of the Sixth Amendment presents barriers to the introduction of testimonial hearsay in federal criminal proceedings<sup>131</sup> in a way that may not apply in the military commissions, though the application of different constitutional provisions to the military commissions is as yet unclear. The 2009 MCA permits hearsay in broader circumstances than in the federal court system.<sup>132</sup> It expressly provides that hearsay evidence may be admitted if the military judge finds, among other things, that 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 requiring production of the witness.<sup>133</sup> (Of course, broader hearsay rules can also benefit the accused in a military commission prosecution.<sup>134</sup>) The standard for admission of hearsay is even more relaxed in habeas proceedings

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even if trial testimony warrants closure of the courtroom to the general public.

131. See *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (“[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.”).

132. Compare FED. R. EVID. 802-804 with 10 U.S.C. §949a(b)(3)(D).

133. See 10 U.S.C. §949a(b)(3)(D).

134. In fact, in Hamdan's military commission trial, Hamdan himself relied far more than the government on the more flexible military commission rule.

brought to challenge law of war detention, where hearsay is permissible and the hearsay evidence is assessed for reliability.<sup>135</sup> Even though hearsay evidence is admissible in such proceedings, the courts have assessed hearsay evidence based on its indicia of reliability and whether it is consistent with the evidence as a whole. Assessment of the weight given hearsay evidence can be very fact-dependent.<sup>136</sup>

### 5. *Classified Evidence*

In federal courts, the use of classified evidence is governed by the Classified Information Procedures Act (CIPA)<sup>137</sup> and interpretive case law. CIPA permits the government to provide the defense a substitute for classified information, such as a statement admitting the relevant facts or a summary, if the court finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information itself.<sup>138</sup> The new rules in the 2009 MCA on handling classified information are modeled on CIPA,

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135. See *Al Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010) (hearsay “is always admissible” in habeas proceedings); see also *Odah v. United States*, 611 F.3d 8, 14 (D.C. Cir. 2010) (district court’s reliance on hearsay “is of no consequence. To show error in the court’s reliance on hearsay evidence, the habeas petitioner must establish not that it is hearsay, but that it is unreliable hearsay.”) (quoting *Awad v. Obama*, 608 F.3d 1, 5). As a general matter, evidentiary and procedural rules in habeas proceedings are less rigid, and are at the discretion of individual judges. See *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (“We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees’ habeas corpus proceedings. We recognize, however, that the Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible. . . . These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.”) (internal citation and quotation omitted). See also *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-0442 (TFH), Case Management Order, 05-cv-00634-RWR, Doc. # 85 (D.D.C. Nov. 6, 2008) at n.1 (noting individual judges can depart from general framework set forth in case management order) (Guantanamo Litigation CMO); Order on Government’s Motion for Clarification, 05-cv-02444-RMC, Doc. #52 (D.D.C. Dec. 16, 2008) (Guantanamo Litigation Amended CMO).

136. Appellate decisions have set out a framework for district courts to use in approaching evidence in these habeas proceedings. See, e.g., *Adahi v. Obama*, 613 F. 3d 1102, 1105-1110 (D.C. Cir. 2010) (providing framework for assessing evidence as a whole); *Al Odah v. United States*, 609 F.3d at 427-432 (similar to *Adahi*, in viewing evidence as a whole); *Barhouni v. Obama*, 609 F.3d 416, 427-432 (examining reliability of diary based on its characteristics and details); *Awad*, 608 F.3d at 7-10 (upholding detention after carefully reviewing multiple different types of hearsay and discussing reliability); *Bensayah v. Obama*, 610 F.3d 718, 725-727 (D.C. Cir. 2010) (reversing and remanding where key document was not adequately corroborated but providing that multiple pieces of evidence, each independently unreliable, can be mutually corroborative).

137. 18 U.S.C. App. 3.

138. 18 U.S.C. App. 3 §6(c).

and are not dramatically different, but do have some modifications or improvements based on experience in terrorism cases in federal court. While the fundamental procedures are now very similar, the 2009 MCA makes explicit some rules that have been developed in federal court only through judicial interpretation and practice.<sup>139</sup> The 2009 MCA also clarifies other provisions that have sometimes resulted in more restrictive federal court precedent,<sup>140</sup> and provides additional avenues to protect intelligence

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139. For example, the 2009 MCA makes clear that courts can conduct an *ex parte* pre-trial conference with either party to address potential classified information issues; CIPA's language is silent on this issue but has been interpreted to allow such conferences. Compare 10 U.S.C. §949p-2(b) (court shall hold conference to consider classified information "*ex parte* to the extent necessary to protect classified information from disclosure, in accordance with the practice of the Federal courts under" CIPA), with 18 U.S.C. App. 3 §2 (no discussion of whether pre-trial conference can be *ex parte* or not), and *United States v. Campa*, 529 F.3d 980, 994-995 (11th Cir. 2008) (permitting *ex parte* conference); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (permitting *ex parte* conference). In addition, classified procedures in the 2009 MCA clearly apply not only to documentary material but also to testimony, which again is not clear from the language of CIPA. Compare 10 U.S.C. §949p-4(b) ("The military judge . . . may authorize the United States – (A) to delete or withhold specific items of classified information; (B) to substitute a summary for classified information; or (C) to substitute a statement admitting the relevant facts that the classified information or material would tend to prove."), with 18 U.S.C. App. 3 §4 ("The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents . . . to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove."). The CIPA provision has nevertheless been judicially applied by analogy to non-documentary material. See *United States v. Moussaoui*, 333 F.3d 509, 513-515 (4th Cir. 2003) (while concluding that CIPA did not specifically cover testimony, lower court applied procedures set forth in CIPA by analogy for deposition of witness). Also, the 2009 MCA mandates, rather than simply permits, the judge to consider the government's motion for relief *ex parte*. Compare 10 U.S.C. §949p-4(b)(2) ("military judge shall permit" *ex parte* presentation in lieu of declaration from government setting forth alleged damage to national security that discovery of or access to specified information may cause), with 18 U.S.C. App. 3 §4 ("court may permit the United States to make a request . . . to be inspected by the court alone"), and *United States v. Rezaq*, 156 F.R.D. 514, 526 (D.D.C. 1995) (precluding government from filing CIPA §4 pleading *ex parte*), reconsidered at 899 F. Supp. 697, 707 (government must litigate its right to proceed *ex parte* in an adversarial hearing) with *Klimavicius-Viloria*, 144 F.3d at 1261 (upholding use of *ex parte* submissions). For an additional comparison of the 2009 MCA and CIPA, see Response 28 in *Oversight of the U.S. Dep't of Justice: Hearing Before the S. Comm. on the Judiciary*, 111<sup>th</sup> Cong. (2009) (Responses to questions for the record by Att'y Gen. Eric Holder (Mar. 22, 2010).

140. For example, 10 U.S.C. §949p-3 expressly provides the court the ability to design measures or to issue an order to protect against the disclosure of classified information produced in discovery or "that has otherwise been provided to, or obtained by" the accused; in contrast, CIPA's language permits such protective orders for classified information "disclosed by the United States to any defendant in any criminal case in any district court of the United States," 18 U.S.C. App. 3 §3. The CIPA provision has been interpreted by one federal court as not authorizing courts to issue protective orders prohibiting the defendant from publicly disclosing, outside of court proceedings, information he may have obtained prior to the criminal case. See *United States v. Pappas*, 94 F.3d 795, 800-801 (2<sup>nd</sup> Cir. 1996) (under CIPA "information acquired by the defendant prior to the criminal prosecution may



sources, methods, and activities.<sup>141</sup> As a result, litigation risks for the government on classified information issues may be somewhat reduced in military commissions as compared to federal courts. That said, CIPA has generally worked well in protecting classified information in federal courts, which have much more experience handling classified information issues than the military commissions. The 2009 MCA specifically requires military judges to view federal court precedent as authoritative unless the text of the 2009 MCA specifically requires a different result.<sup>142</sup>

The rules regarding disclosure of classified evidence in habeas cases are both more flexible and less certain than in either civilian criminal courts or in military commissions. Generally the individual judges have greater discretion to set procedures and, as noted above, there is more flexibility to shield classified information from the detainee himself and, in exceptional cases, even from the detainee's counsel. However, the government is often required to provide declassified versions of documents to the detainees and their counsel. Because the evidence submitted in habeas cases typically includes hundreds of pages of intelligence reports, the declassification process poses serious logistical challenges to the government and risks the

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be prohibited from disclosure only 'in connection with the trial' and not outside the trial"). The 2009 MCA language clarifies that this is too restrictive a reading of the provision's scope.

Another example of where the 2009 MCA clarifies provisions of CIPA that have been restrictively applied by courts is with regard to the scope of interlocutory appeals. *Compare* 10 U.S.C. §950d(c) (permitting interlocutory appeal by United States "whenever the military judge enters an order or ruling that would require the disclosure of classified information, without regard to whether the order or ruling appealed from was entered under this chapter, another provision of law, a rule, or otherwise."), *with* 18 U.S.C. App. 3 §7(a) (permitting interlocutory appeal by United States "from a decision or order of district court authorizing the disclosure of classified information, imposing sanctions. . . , or refusing a protective order sought by the United States to prevent the disclosure of classified information."). The CIPA provision has been interpreted, for example, to preclude interlocutory appeal of an order authorizing a defendant in a criminal case to depose a witness who may have possessed classified information on the basis that, because the deposition order did not involve the discovery of classified *documentary* information under CIPA, 18 U.S.C. App. 3 §4, it was not an order "authorizing the disclosure of classified information" under CIPA and therefore not subject to interlocutory appeal. *See Moussaoui*, 333 F.3d at 280 (Wilkins, C.J., concurring); *see also Oversight of the U.S. Dep't of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 16 (2010) (statement of Att'y Gen. Eric Holder), *available at* [http://judiciary.senate.gov/hearings/testimony.cfm?id=4470&wit\\_id=](http://judiciary.senate.gov/hearings/testimony.cfm?id=4470&wit_id=) ("The military commissions, the modifications that have been made to the secrecy provisions, really codify, I think, what judges do as a matter of routine in civilian court – with one exception, and that has to do with the possibility of interlocutory appeals, which, frankly, I think is a good idea and perhaps ought to be incorporated into what we do on the civilian side. Much of the other enhancements that you see with regard to military commissions reflect what judges do on the civilian side.").

141. 10 U.S.C. §949p-6(c)(2) (protection of sources, methods, and activities by which evidence is acquired).

142. 10 U.S.C. §949p-1(d).

inadvertent release of information that should remain classified. Nonetheless, on the whole, habeas proceedings, where it is common to close the courtroom and which permit hearsay evidence, provide the government the greatest ability to protect classified information, although there are challenges associated with reliance on classified hearsay evidence.<sup>143</sup>

### *B. Advantages of Civilian Authorities*

Subject to the same caveats as described above, here are five general advantages (for the prosecution) of using federal courts rather than military commissions or law of war detention:

#### *1. Certainty and Finality*

The civilian criminal justice system enjoys an advantage over both military commissions and law of war detention with respect to the certainty of its rules and the finality of its results. The federal courts have years of experience trying and convicting dangerous criminals, including international terrorists, and the rules are well-established and understood. To be sure, there is substantial litigation in many federal terrorism prosecutions, and some of the more complex cases may present novel legal issues. But while military commissions have long roots in American history during times of armed conflict, the current commissions are essentially a new creation, and they do not have the body of established procedures and years of precedent and experience to guide the parties and the judges. This invites, if it does not guarantee, challenges to virtually every aspect of the commission proceedings – the legality of the system, the jurisdiction of the court, the lawfulness of certain offenses, the rules on the use of evidence derived from coerced statements, discovery obligations, and the nature of protective orders (among others). Indeed, legal challenges to the new commissions authorized by the 2009 MCA were initiated in the fall of 2009 and early 2010.<sup>144</sup> While most of these challenges have recently

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143. It is important to note the interrelationship between hearsay rules and classified evidence. As explained above, military commissions have relatively rigorous hearsay admissibility rules as compared to habeas proceedings; however, there is greater scope for admitting hearsay in military commissions than in federal criminal trials. This broader scope for hearsay evidence in military commissions relative to federal criminal trials, combined with the CIPA-based provisions in the 2009 MCA, can provide the government with some additional ways to use and protect classified information in certain military commission cases, particularly to protect sources and methods, that may not be available in federal criminal cases.

144. For example in 2009, detainees filed mandamus petitions in the D.C. Circuit requesting that the military commissions be halted. They alleged, among other claims, that the commissions exceeded Congressional authority and impermissibly discriminated against aliens. See *Bin Al Shihb* Petition, *supra* note 99, at 2-3, 35; *Al Hawsawi* Petition, *supra* note

been dismissed as moot, the underlying substantive issues have not been resolved yet, meaning that we may not have confidence in military commission convictions until each case works its way up to the Supreme Court – a process that could take years.

Similarly, habeas challenges to law of war detention for Guantánamo Bay detainees have raised claims about every aspect of that process, including the rules for the proceedings and even the basic scope of the government's detention authority. While trial judges have varied in their understanding of who can be detained and what evidentiary procedures and sources of law apply, some of the most significant substantive and procedural questions have recently been resolved by the court of appeals. Nevertheless, it will likely take a substantial period of time before the appellate review of Guantánamo cases has developed the degree of uniformity or predictability that we have after many years of trying terrorism and other criminal cases in federal court. Whether law of war detention is even legally available for individuals who are apprehended in

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99, at 3; *In re Abdal-Rahim Nashiri*, No. 09-1274 (D.C. Cir. Nov. 20, 2009) (raising issue of alienage/citizenship distinction) (hereinafter *Nashiri* Petition); *In re Mohammed Kamin*, No. 09-1294 (D.C. Cir. Nov. 30, 2009) (same), *dismissed as moot*, July 23, 2010 (hereinafter *Kamin* Petition). Since the military commissions had been suspended at the time these petitions were filed, the D.C. Circuit held them in abeyance. See Orders of D.C. Circuit Court of Appeals, *In re Hawsawi*, No. 09-1244 (Dec. 12, 2009); *In re Bin Al Shihb*, No. 09-1239 (Dec. 16, 2009); *In re Nashiri*, No. 09-1274 (Jan. 5, 2010); *In re Kamin*, No. 09-1294 (Jan. 22, 2010). On July 23, 2010, no military proceedings having been initiated by then, the D.C. Circuit issued orders dismissing three of the petitions on mootness grounds. See Orders of D.C. Circuit Court of Appeals, *In re Hawsawi*, No. 09-1244 (July 23, 2010); *In re Bin Al Shihb*, No. 09-1239 (July 23, 2010); *In re Kamin*, No. 09-1294 (July 23, 2010). As of October 20, 2010, the *Nashiri* Petition was still pending. In March 2010, a petition was filed by Omar Khadr that was also later dismissed by the D.C. Circuit, raising some of the same claims as well as an additional one. See *In re Mohammed Khadr*, No. 10-1067 (Mar. 23, 2010) (raising challenges to military commissions based on alienage distinction; claim that issuance of evidentiary rules violates the Ex Post Facto clause; and claim that defendant's status as "child soldier" forecloses prosecution by military commission), *dismissed*, August 4, 2010 (hereinafter *Khadr* Petition). Khadr pleaded guilty to the charges against him in October 2010. See News Release, U.S. Dep't of Defense, Detainee Pleads Guilty at Military Commission Hearing (October 25, 2010), available at <http://www.defense.gov/releases/release.aspx?releaseid=13999>. The one detainee who has been convicted after a military commission trial and remains in detention has filed an appeal, challenging the conviction on the grounds that, *inter alia*, none of the crimes of conviction – conspiracy and providing material support to terrorism – constitute war crimes properly triable by a military commission. See Brief of Appellant at 2, 24, *United States v. Ali Hamza Ahmad Suliman al Bahlul*, CMCR Case No. 09-001 (Sept. 1, 2009). In addition, a second detainee, who was convicted upon a plea of guilty and is no longer in custody, has also filed an appeal that raises a similar challenge to his material support conviction, among other issues. See Brief of Appellant, at 3, 22, *United States v. Salim Ahmed Hamdan*, CMCR Case No. 09-002 (Oct. 15, 2009). As of February 2011, these appeals remain pending.

the United States is another major area of uncertainty (and controversy), as litigation on that issue has yielded diverse opinions from our courts.<sup>145</sup>

For those who do not litigate extensively, it may be difficult to appreciate the significance of this legal uncertainty, but the history so far of the military commissions is instructive. From their inception in 2001 to President Obama's executive order suspending them in January 2009,<sup>146</sup> military commissions achieved a total of three convictions, one of which

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145. An *en banc* panel of the Fourth Circuit, reversing a prior panel opinion, held 5-4 that the President has the authority to detain as an enemy combatant a lawful resident alien initially apprehended in the United States by civilian authorities and subsequently transferred to military custody. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 253-262 (4th Cir. 2008) (Traxler, J., concurring), *judgment vacated and appeal dismissed as moot*; *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.). The judges took widely varying views of the question, resulting in eight different opinions. In contrast, the Second Circuit held that the President did not have the authority to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat. *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003), *reversed on other grounds*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). For a more detailed discussion of this issue, see *infra* note 147.

146. A brief review of the recent history of the military commissions illustrates how uncertainty about the basic foundation and rules of the forum has led to extensive legal wrangling which has, in turn, contributed to delayed progress in the cases. The initial military commissions were established by presidential order in November 2001. See Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,831 (Nov. 13, 2001). DoD announced the first military commission review panel in December 2003, see Jim Garamone, *DoD Announces Military Commission Review Panel*, AMERICAN FORCES PRESS SERVICE, Dec. 30, 2003, available at <http://www.defense.gov/news/newsarticle.aspx?id=27554>, and the first charges against detainees were announced in February 2004, see K.L. Vantran, *Guantanamo Detainees Charged With Conspiracy to Commit War Crimes*, AMERICAN FORCES PRESS SERVICE, Feb. 24, 2004, available at [http://osd.dtic.mil/news/Feb2004/n02242004\\_200402246.html](http://osd.dtic.mil/news/Feb2004/n02242004_200402246.html). This initial round of military commissions was declared illegal by the Supreme Court in 2006. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006). The commissions were then re-established by statute and substantially overhauled later that year, see Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (2006 MCA), and military commission prosecutors had to start over again, once rules implementing the 2006 MCA were issued in January 2007. See News Release, U.S. Dep't of Defense, DoD Press Briefing on New Military Commissions Rules (Jan. 18, 2007), available at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3868>. The first sets of charges under the 2006 MCA were filed in February 2007. See, e.g., Memorandum for Detainee Omar Ahmed Khadr, Re: Notification of the Swearing of Charges (Feb. 2, 2007), available at <http://www.defense.gov/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf>. Subsequent to the filing of these charges, numerous motions were filed challenging basic aspects of the proceedings. In January 2009, President Obama ordered a halt to all proceedings in the military commissions then under way pending a legal and factual review of the bases for detention of the individuals held at Guantánamo, including those who were charged in the military commissions. See §7, Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009). The trial of Omar Khadr, which was the first trial under the new commissions, began in August 2010; Khadr has since pleaded guilty and been sentenced. See News Release, U.S. Dep't of Defense, DoD Announces Sentence for Detainee Omar Khadr (Oct. 31, 2010), available at <http://www.defense.gov/releases/release.aspx?releaseid=14023>.

was a guilty plea.<sup>147</sup> Thereafter, in 2009, Congress overhauled the rules governing commissions (for the second time) in the 2009 MCA, and two more detainees have since pleaded guilty under the new system.<sup>148</sup>

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147. The three convictions prior to enactment of the 2009 MCA are as follows:

On February 2, 2007, David Hicks was charged with one count of providing material support for terrorism and one count of attempted murder in violation of the law of war. See Memorandum for Detainee David M. Hicks, Re: Notification of the Swearing of Charges (Feb. 2, 2007), available at <http://www.defense.gov/news/d2007hicks%20-%20notification%20of%20sworn%20charges.pdf>. On March 30, 2007, he pleaded guilty to the charge of providing material support to terrorism. See News Release, U.S. Dep't of Defense, Detainee Convicted of Terrorism Charge at Guantanamo Trial (Mar. 30, 2007), available at <http://www.defense.gov/releases/release.aspx?releaseid=10678>. As part of a pre-trial agreement, Hicks's sentence was limited to not more than nine months' confinement; a military commission panel sentenced him to seven years of confinement of which six years and three months were suspended per the pre-trial agreement. *Id.* Pursuant to a transfer agreement, Hicks was transferred to Australia to serve the remainder of his sentence after his conviction. *Id.*

On February 2, 2007, Salim Hamdan was charged with conspiracy and providing material support to terrorism. See Memorandum for Detainee Salim Ahmed Hamdan, Re: Notification of the Swearing of Charges (Feb. 2, 2007), available at <http://www.defense.gov/news/d2007Hamdan%20-%20Notification%20of%20Sworn%20Charges.pdf>. After trial, on August 6, 2008, he was found guilty on the material support charge and acquitted of the conspiracy charge. See Transcript of Proceedings of Military Commission at 3942 (Hamdan Transcript), United States v. Salim Ahmad Hamdan, available at <http://www.defense.gov/news/22-24-part%201-Ham-5-7%20Aug%2008-FINAL-pgs%203891-4014%20Redacted.pdf>. He was sentenced to 66 months of confinement on August 7, 2008 (61 months of which was time served). *Id.* at 4170, 4174. Based on a transfer agreement, he was transferred to Yemen on November 25, 2008 to serve the remainder of his sentence. See News Release, U.S. Dep't of Defense, Detainee Transfer Announced (Nov. 25, 2008), available at <http://www.defense.gov/releases/release.aspx?releaseid=12372>. Hamdan's conviction is currently on appeal. See United States v. Salim Ahmed Hamdan, CMCR Case No. 09-002 (Oct. 15, 2009).

On February 8, 2008, Ali Hamza al Bahlul was charged with one count of conspiracy alleging various objects, including murder of protected persons, attacking civilians and civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, terrorism, and providing material support for terrorism; one count of solicitation to commit the same; and one count of providing material support for terrorism. See Charge Sheet, Ali Hamza Ahmad Suliman al Bahlul, available at <http://www.defense.gov/news/AE%201-13.pdf>. After trial on November 3, 2008, he was found guilty of conspiracy to commit murder of protected persons, attack civilians, and other crimes; solicitation to commit murder of protected persons, to attack civilians and to commit acts of terrorism; and providing material support for terrorism, and was sentenced to life imprisonment. See News Release, U.S. Dep't of Defense, Detainee Convicted of Terrorism Charge at Military Commission Trial (Nov. 3, 2008), available at <http://www.defense.gov/releases/release.aspx?releaseid=12329>, and News Release, U.S. Dep't of Defense, Detainee Sentenced to Life In Prison (Nov. 3, 2008), available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=12331>. His case is currently on appeal. See United States v. Ali Hamza Ahmad Suliman Al Bahlul, CMCR Case No. 09-001 (Nov. 3, 2008).

148. As noted above, legal challenges to the newly-authorized commissions began in 2009; while most have been dismissed on procedural grounds the substantive issues have not

Commissions should in the end prove to be a powerful tool in the current war, but for now the uncertainty is a factor to be weighed. In that sense, military commissions are like a new weapons system – one that is based on venerable principles and has been in development for nearly a decade, but has been test-fired only a handful of times (and has had to be redesigned twice). The civilian criminal justice system, by contrast, has been used many times against terrorists both before and after 9/11, and untold hundreds of thousands of times in other cases. With two such weapons available – one new and promising but relatively untested, and the other proven and reliable even if subject to some limits – who would send troops into battle armed only with the first?<sup>149</sup>

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been resolved. As of February 1, 2011, there have been two convictions in the reformed commissions since they were restarted in the spring of 2010, both pursuant to guilty pleas – Ibrahim al Qosi and Omar Khadr. On July 7, 2010, al Qosi pleaded guilty to providing material support to al Qaeda and conspiring to commit terrorism and material support to terrorism. *See* News Release, U.S. Dep't of Defense, Military Commission Guilty Plea (July 7, 2010), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=13684>. Al Qosi was initially charged on February 8, 2008 with one count of conspiracy alleging various objects, including targeting civilians, attacking civilians, murdering civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, and providing material support to terrorism, and one count of providing material support to terrorism. *See* Charge Sheet, Ibrahim Ahmed Mahmoud al Qosi, *available at* <http://www.defense.gov/news/d20080305alqosicharges.pdf>. A military jury sentenced al Qosi to 14 years' imprisonment in August 2010. *See* News Release, Dep't of Defense, Al Qosi Sentence Announced (August 11, 2010), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=13792>. In February 2011, the military commission's convening authority directed that al Qosi's confinement beyond two years from July 7, 2010 be suspended conditionally (if he complied with certain requirements), based on the terms of his plea agreement (which was not made available to the sentencing jury, consistent with usual military commission procedures). *See* Military Commission Convening Authority, Final Action in U.S. v. Al Qosi (Feb. 3, 2011), *available at* <http://www.defense.gov/news/Convening%20Authority,%20Final%20Action%20in%20US%20v%20al%20Qosi,%203%20Feb%202011.pdf> and Memorandum for Convening Authority, Re: Legal Advisor's Recommendation, U.S. v. al Qosi (Oct. 13, 2010), *available at* [http://www.defense.gov/news/Legal%20Advisors%20Recommendation%20\[PORTIONS%20UNDER%20SEAL\],%20Oct%202013,%202010.pdf](http://www.defense.gov/news/Legal%20Advisors%20Recommendation%20[PORTIONS%20UNDER%20SEAL],%20Oct%202013,%202010.pdf).

On October 25, 2010, Khadr pleaded guilty to the charges against him, which included murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying. *See* News Release, U.S. Dep't of Defense, Detainee Pleads Guilty at Military Commission Hearing (Oct. 25, 2010), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=13999>. He was sentenced to 40 years' imprisonment by a military jury on October 31, 2010. Under the terms of his plea agreement, he will serve eight years (in addition to time served), and, pursuant to a diplomatic agreement with Canada, one year will be in U.S. custody followed by his return to Canada to serve the remainder of his sentence. *See* News Release, U.S. Dep't of Defense, DOD Announces Sentence for Detainee Omar Khadr (Oct. 31, 2010) *available at* <http://www.defense.gov/releases/release.aspx?releaseid=14023>.

149. I emphasize that I do not mean by this analogy to suggest that military commissions do not work, that they are not or will not be effective, or that they should be used only in a secondary role behind the criminal justice system. I mean only to say that we should recognize the challenges inherent in implementing a new system; we should be able

## 2. Scope

The criminal justice system is a tool with broader application in many instances than either military commissions or law of war detention. The criminal justice system can be used against any person who has violated our criminal laws, whether here or abroad, if our laws apply extraterritorially, as many of them do.<sup>150</sup> In contrast, the government interprets the 2001 AUMF,<sup>151</sup> as informed by law-of-war principles, as authorizing detention of those who are part of, or who substantially support, Taliban, al Qaeda, or associated forces that are engaged in hostilities against the United States or its coalition partners.<sup>152</sup> Individuals who are part of or supporting other

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to overcome those challenges in time, but we should not deny their existence now.

150. Such extraterritorial offenses include (but are not limited to) war crimes (including grave breaches of the 1949 Geneva Conventions, violations of certain provisions of the Hague Rules, and grave breaches of Common Article 3), 18 U.S.C. §2441; extraterritorial assault or murder of a U.S. national or conspiracy to do so for reasons related to terrorism, 18 U.S.C. §2332; use of a weapon of mass destruction against, *inter alia*, a U.S. national outside the United States, 18 U.S.C. §2332a; acts of terrorism transcending national boundaries, 18 U.S.C. §2332b; bombings of places of public use including offenses against another state or government facility, 18 U.S.C. §2332f; the deployment of missiles or missile systems to destroy aircraft, 18 U.S.C. §2332g; harboring or concealing terrorists, 18 U.S.C. §2339; providing material support to terrorists, 18 U.S.C. §2339A; providing material support to foreign terrorist organizations, 18 U.S.C. §2339B; providing financing to terrorism, 18 U.S.C. §2339C; receiving military training from a foreign terrorist organization, 18 U.S.C. §2339D; torture when the offender is present in the United States, 18 U.S.C. §2340A; offenses against a U.S. national (including murder, rape, assault, etc., on the premises of an overseas U.S. diplomatic, consular, military or other U.S. government mission or a residence related thereto), 18 U.S.C. §7(9); destruction of aircraft (including certain foreign aircraft), 18 U.S.C. §32; violence at international airports, 18 U.S.C. §37; assaults against U.S. government personnel in the performance of their official duties, 18 U.S.C. §111; assaults against internationally-protected persons (including such conduct overseas when the offender is afterwards found in the United States), 18 U.S.C. §112; knowing development, possession, etc., of a biological agent, 18 U.S.C. §175; knowing development, possession, etc., of a chemical weapon (including extraterritorial deployment against a U.S. person or facility), 18 U.S.C. §229; receipt, use, possession, etc., of nuclear materials, 18 U.S.C. §831; use of fire or explosive, *inter alia*, to destroy U.S. government property, or to commit any other federal offense, 18 U.S.C. §844(f); conspiracy to kill, maim or injure persons or damage property in a foreign country, 18 U.S.C. §956; travel to a foreign country for the purpose of taking part in a military enterprise against a friendly nation, 18 U.S.C. §960; using or carrying a firearm during and in relation to the commission of a federal crime of violence, or possession of a firearm to facilitate such an offense, 18 U.S.C. §924(c); killing or attempting to kill officers or employees of the United States on account of or in the performance of official duties, 18 U.S.C. §1114; murder or manslaughter of internationally protected persons, 18 U.S.C. §1116; hostage taking (extraterritorial jurisdiction if the victim is a U.S. national or if the hostage taker is “found in the United States”), 18 U.S.C. §1203; treason, 18 U.S.C. §2381; seditious conspiracy, 18 U.S.C. §2384; and aircraft piracy, 49 U.S.C. §46502.

151. This discussion does not address any independent constitutional detention authority that may exist.

152. The court of appeals has upheld that standard. *See* Al Bihani v. Obama, 590 F.3d

terrorist groups like Hamas, Hizbollah, or the FARC are not subject to the AUMF based solely on that membership;<sup>153</sup> nor are lone-wolf terrorists who may be inspired by al Qaeda but are not part of it.<sup>154</sup> There is also a question whether law of war detention extends to persons apprehended in the United States.<sup>155</sup> The application of military commissions is in some ways even

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866, 872 (D.C. Cir. 2010) (“We have no occasion here to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard. We merely recognize that both prongs are valid criteria that are independently sufficient to satisfy the standard.”). The court rejected the proposition that the international laws of war inform the scope of the AUMF, but in denying rehearing *en banc*, seven judges of the court determined that the panel’s statements regarding international law were unnecessary to the decision. *See Al Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010).

153. *See, e.g., Hamlily v. Obama*, 616 F. Supp.2d 63, 75, n. 17 (D.D.C. 2009) (agreeing with government that AUMF provides “authority to detain members of ‘associated forces’ as long as those forces would be considered co-belligerents under the law of war” but “[a]ssociated forces’ do not include terrorist organizations who merely share an abstract philosophy or even a common purpose with al Qaeda – there must be an actual association in the current conflict with al Qaeda or the Taliban”).

154. *See Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) (“[I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is ‘part of’ al Qaeda. That determination 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. That an individual operates within al Qaeda’s formal command structure is surely sufficient but is not necessary to show he is ‘part of’ the organization; there may be other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it . . . , but the purely independent conduct of a freelancer is not enough.”) (internal quotations and citations omitted); *Hamlily*, 616 F. Supp. 2d at 75 (“[M]ere sympathy for or association with an enemy organization does not render an individual a member’ of that enemy organization. The key inquiry, then, is not necessarily whether one self-identifies as a member of the organization (although this could be relevant in some cases), but whether the individual functions or participates within or under the command structure of the organization – *i.e.*, whether he receives and executes orders or directions.”) (quoting *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009)).

155. The statutory and constitutional questions raised by detention in the United States have divided our courts. Two (and only two) persons apprehended in this country in recent times have been held under the law of war. First, Jose Padilla was arrested on a federal material witness warrant on May 8, 2002, and was transferred to law of war custody approximately one month later, on June 9, 2002, after his court-appointed counsel moved to vacate the warrant. He was returned to the civilian criminal system in January 2006, and convicted in August 2007 after a three-month trial. He was sentenced to 17 years and 4 months’ imprisonment in January 2008. Ali Saleh Kahlal Al-Marri was initially approached by the FBI and interviewed in October and December 2001. He was arrested on December 12, 2001 on a material witness warrant, and he was indicted on federal criminal charges (non-terrorism related) on February 6, 2002 in the Southern District of New York. After those charges were dismissed for lack of venue, he was re-indicted on similar charges in the District of Illinois on May 22, 2003. On June 23, 2003 he was transferred to military detention. He was permitted access to counsel in October 2004. In February 2009, he was indicted again in Illinois. He pleaded guilty in April 2009 to providing material support to al Qaeda and was sentenced to 8 years in prison in October 2009.

In both of these cases, the transfer to law of war custody raised serious legal issues in the courts concerning the lawfulness of the government’s actions and spawned lengthy litigation. In Padilla’s case, the United States Court of Appeals for the Second Circuit found



that the President did not have the authority to detain him under the law of war. *Padilla v. Rumsfeld*, 352 F.3d 695, 723-724 (2d Cir. 2003) (finding that the detention was not authorized either by statute: “[t]he plain language of the [AUMF] contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization . . . and the ‘clear,’ ‘unmistakable’ language required. . . .”; or the Constitution: “in the domestic context, the president’s inherent constitutional powers do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat”; and thus ordering that the Secretary of Defense release Padilla from military custody within 30 days and the government transfer him to “appropriate civilian authorities who can bring criminal charges against him”) (internal citations omitted). The Supreme Court ultimately reversed and remanded that decision on the grounds that Padilla’s habeas petition had been filed in the wrong jurisdiction. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004). Padilla then re-filed his habeas petition in the District of South Carolina, the district where he was being held. The district court granted habeas relief, based on reasoning similar to that of the Second Circuit, and ordered that he be criminally charged or released. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 689, 692 n. 14 (D.S.C. 2005), *reversed*, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). A panel of the Fourth Circuit reversed, concluding that the AUMF conferred the requisite detention authority on the President. 423 F.3d at 389. While the petition for certiorari seeking review of the Fourth Circuit decision was pending before the Supreme Court, the government indicted Padilla, and the petition was accordingly denied by a divided Supreme Court. *Hanft v. Padilla*, 547 U.S. 1062 (2006). Three Justices would have granted certiorari. *Id.*

In *Al-Marri*’s case, a divided panel of the United States Court of Appeals for the Fourth Circuit initially held that *Al-Marri*’s detention was unlawful, rejecting the Government’s argument that the AUMF provided authority for military detention of enemy combatants in the United States, and that the President had inherent Constitutional authority to order *Al-Marri*’s detention. *Al-Marri v. Wright*, 487 F.3d 160, 184 (4th Cir. 2007) (“Thus the Government is mistaken in its representation that *Hamdi* and *Padilla* ‘recognized’ ‘[t]he President’s authority to detain ‘enemy combatants’ during the current conflict with al Qaeda.’ No precedent recognizes any such authority. *Hamdi* and *Padilla* evidence no sympathy for the view that the AUMF permits indefinite military detention beyond the ‘limited category’ of people covered by the ‘narrow circumstances’ of those cases.”) (internal citations omitted); *id.* at 193 (“We do not question the President’s war-time authority over enemy combatants; but absent suspension of the writ of habeas corpus or declaration of martial law, the Constitution simply does not provide the President the power to exercise military authority over civilians within the United States.”). On rehearing *en banc*, this decision was reversed on a 5-4 split vote, resulting in eight separate opinions, and the majority of judges found that *Al-Marri* had not been afforded adequate due process to challenge his detention as an enemy combatant. *Al Marri v. Pucciarelli*, 534 F.3d 213, 253-262 (4th Cir. 2008) (Traxler, J., concurring). No single opinion in *Al Marri* commanded a majority of the court. The Supreme Court vacated this decision as moot after *Al-Marri* was indicted and transferred back to the criminal justice system. *Al Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.).

Notably, because the authority to detain individuals for purposes of trial by military commission is similarly rooted in the law of war, *Hamdan v. Rumsfeld*, 548 U.S. 557, 596-597 (2006) (noting that “law-of-war commission” is the only model for military commission used outside the contexts of enemy-occupied territory or martial law); (“Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a fact-finding one – to determine, typically on the battlefield itself, whether the defendant has violated the law of war.”) (Stevens, J., plurality opinion), any military commission prosecution of aliens apprehended in the United States might also be challenged on the ground that detention authority is lacking.

narrower: Not only must a defendant be an unprivileged enemy belligerent with the requisite connection to al Qaeda or the Taliban, he must also be a foreign national. U.S. citizens like José Padilla, John Walker Lindh, and Anwar Awlaki cannot be prosecuted by military commission, even if they are part of al Qaeda or associated forces.<sup>156</sup>

In our criminal justice system, Congress has enacted a vast array of federal laws that criminalize most types of terrorist conduct, including terrorist acts abroad against U.S. nationals, material support to terrorism or a designated terrorist organization, harboring terrorists, terrorist financing, receiving military training from a terrorist organization, narco-terrorism, hostage taking, aircraft piracy, sea piracy, bombings of public places, WMD-related offenses, and many others, as well as conspiracies to commit these crimes. (To the extent that these statutes were recently enacted or amended, they may not be available to charge older crimes,<sup>157</sup> and criminal charges under Title 18 require some jurisdictional nexus to the United States or its interests, often specified in the elements of certain extraterritorial crimes.<sup>158</sup>) In addition to pure terrorism-related offenses, as I have explained,<sup>159</sup> prosecution of ordinary crimes can also neutralize terrorists – just as Al Capone was convicted of tax fraud rather than murder. In contrast, a military commission has limited jurisdiction only to prosecute violations of the laws of war and offenses traditionally triable by military commissions.<sup>160</sup>

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156. 10 U.S.C. §948c (“Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.”); 10 U.S.C. §948a(1) (“The term ‘alien’ means an individual who is not a citizen of the United States.”). An unprivileged enemy belligerent is an individual who has engaged in or purposefully and materially supported hostilities against the United States or its coalition partners, or was a part of al Qaeda at the time of the alleged offense. 10 U.S.C. §§948a(7) & (8).

157. For example, 18 U.S.C. §2339A, which prohibits the provision of material support to terrorism, was originally confined to offenses occurring within the United States. The requirement of territoriality was eliminated by the PATRIOT Act in 2001. Accordingly, extraterritorial offenses are subject to prosecution under this provision only if their commission (or a portion thereof) post-dates October 2001. Likewise, 18 U.S.C. §2339B, which prohibits providing material support to foreign terrorist organizations (FTOs), was amended in 2004 to generally reach extraterritorial offenses. *See* IRTPA §2001(c)(1). Its utility in reaching material support offenses involving FTOs is therefore similarly limited to offenses that post-date the 2004 amendment.

158. *See, e.g.*, 18 U.S.C. §2332a (use of weapons of mass destruction) (criminalizing offenses either against a national of the United States or within the United States, §2332a(a), or by a national of the United States outside the United States, §2332a(b)).

159. *See supra* Part III.A.

160. *See* 10 U.S.C. §948d (military commissions shall have jurisdiction over any offense set forth in the 2009 MCA or in articles 104 and 106 of the Uniform Code of Military Justice (UCMJ), or made punishable by the law of war). There are 32 enumerated offenses in the 2009 MCA. *See* 10 U.S.C. §950t. Moreover, several key offenses included in the 2009 MCA, such as conspiracy and material support to terrorism, 10 U.S.C. §§950t(25) & (29), will likely be challenged by defense counsel on the ground that they have no analog in the common law of war and cannot constitutionally be applied to conduct that

With respect to law of war detention, of course, no criminal charges need be established at all. It must be proved, however, that the individual is part of al Qaeda, the Taliban, or associated forces. In some cases, it can actually be harder to make this showing than to prove a criminal offense. For example, where someone in the United States travels to Afghanistan or Pakistan to obtain terrorist training in a camp, we may be able to prove the federal offense of receiving military training from a terrorist organization,<sup>161</sup> but unless the training camp is linked to al Qaeda, the Taliban, or an associated force, we may be unable to prove that the individual is detainable under the AUMF. Likewise, we may be able to prove that an individual was involved in a specific act of terrorism – such as the federal offenses of conspiring to kill persons in a foreign country,<sup>162</sup> or providing assistance in the development of chemical weapons<sup>163</sup> – but face similar obstacles to proving that he is subject to detention under the AUMF.

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predated Congress' enactment of the offenses in statute. For example, four justices of the Supreme Court have expressed some doubt about the viability of the conspiracy offense in a military commission, albeit before Congress expressly authorized this offense in law. *Hamdan*, 548 U.S. at 603-612 (Stevens, J., plurality opinion). It is unclear what impact Congressional authorization will have on this question. *Cf. id.* at 601 (noting that “[t]here is no suggestion that Congress has, in exercise of its Constitutional authority . . . positively identified ‘conspiracy’ as a war crime.”). Both *Bahlul* and *Hamdan* raised these issues in appeals of their military commission convictions, which are currently pending. *See supra* note 144. While we hope and expect to defeat any legal challenges to military commission charges, the outcome of such litigation is uncertain.

161. 18 U.S.C. §2339D. To establish a violation of this statute, the government must prove: (1) the defendant knowingly received military-type training; (2) the training was received from or on behalf of a designated foreign terrorist organization; (3) the defendant had knowledge at the time of the offense that the organization was a designated foreign terrorist organization or that the organization engaged in terrorism or terrorist activity; and (4) the existence of one of the following jurisdictional requirements: the defendant is a national of the United States, an alien with lawful permanent resident status, or a stateless person whose habitual residence is the United States; the prohibited conduct occurred in whole or in part within the United States; after the conduct the defendant was brought to or found in the United States; the offense occurred in or affected interstate or foreign commerce; or the defendant aided and abetted conduct which satisfied these elements. *See, e.g.*, Transcript of Guilty Plea, *United States v. Bryant Neal Vinas*, 08 Cr. 823, Doc. #23 (NGG) (E.D.N.Y. Jan. 28, 2009).

162. 18 U.S.C. §956(a)(1). The government must prove: (1) the defendant agreed with at least one person to commit murder; (2) the defendant willfully joined the agreement with the intent to further its purpose; (3) during the existence of the conspiracy, one of the conspirators committed at least one overt act in furtherance of the conspiracy; and (4) at least one of the conspirators was within the jurisdiction of the United States when the agreement was made. *See United States v. Wharton*, 320 F.3d 526, 537-538 (5th Cir. 2003).

163. 18 U.S.C. §229(a). The government must prove: (1) the defendant assisted or induced others to develop, produce, acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, use, or threaten to use, a chemical weapon; (2) the defendant provided this assistance or inducement knowingly; and (3) the existence of one of the following jurisdictional requirements: the prohibited conduct took place in the United States, took place outside of the United States and was committed by a national of the United States, was

### 3. *Incentives for Cooperation*

The criminal justice system has mechanisms to encourage cooperation by detainees that do not exist in law of war detention or are not as well-established or extensive in military commissions. As I have explained,<sup>164</sup> the criminal justice system has long-standing experience with proffer agreements, plea agreements, pre-sentencing incentives available under the U.S. Sentencing Guidelines, and post-sentencing incentives available under the Federal Rules of Criminal Procedure.<sup>165</sup> These tools can be used to encourage cooperation and obtain intelligence. The government's promises to the defendant are judicially enforceable, and the defendant's failure to follow through on his promises can be sanctioned, which increases the likelihood that cooperation agreements will be made and honored.<sup>166</sup> In the military commission system, Rule 705 provides a mechanism similar to a plea agreement which is based on an analogous procedure used in the courts-martial system.<sup>167</sup> Through it, the parties may negotiate a pre-trial agreement, including an agreement to cooperate and an applicable sentencing range.<sup>168</sup> However, this system and its effectiveness in obtaining

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committed against a citizen of the United States while the citizen was outside the United States, or was committed against any property that was owned, leased, or used by the United States or any department or agency of the United States, whether the property is within or outside the United States. *See* Charge Given in United States v. Kassir, S2 04 Cr. 356 (JGK) (S.D.N.Y.).

164. *See supra* Part III.A.

165. U.S.S.G. §5K1.1; FED. R. CRIM. P. 35.

166. *See* Brady v. United States, 397 U.S. 742, 755 (1970) ("A plea of guilt entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes)") (internal quotation and citation omitted).

167. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES 705 (2008), available at <http://www.jag.navy.mil/documents/mcm2008.pdf>. There is also a practice in courts-martial whereby the accused can provide information and be granted limited immunity, akin to a proffer agreement. This may also be available in military commissions, although the practice is not as established as it is in federal criminal cases.

168. *See* U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS 705 (2010). The rule provides that the accused and the convening authority may enter in a pretrial agreement consistent with the rule. The agreement must be in writing and contain all of the terms of the agreement. *Id.* 705(a). The agreement may include, *inter alia*, a promise by the accused to plead guilty to or stipulate to certain charges; and a promise by the convening authority to refer charges to a certain type of military commission; refer a capital offense as noncapital; or withdraw one or more of the charges or specifications; have trial counsel present no evidence of one or more of the specifications; take specified action on the sentence adjudged by the commission; and fulfill any additional terms or conditions requested by the accused that are within the convening authority's power and not otherwise barred by the Manual or the MCA. *Id.* 705(b). In order for a term or condition to be enforceable, the accused must freely and voluntarily agree to it; and no agreement is enforceable if it deprives the accused

cooperation in a military commission case – where the equivalent of the jury does the sentencing, the cases can take years to resolve, and there has been no significant experience with cooperation to date – is not yet well tested. Moreover, there are no sentencing guidelines, no mandatory minimums, and no track record that can be used to set the parameters for any negotiations, which may make it more difficult to come to an agreement. Nor is there an extensive practice of post-conviction, pre-sentencing cooperation, particularly for a substantial period of time (as may be required in complex terrorism cases), or an established post-sentencing cooperation mechanism in military commissions. The federal courts, in contrast, have all of these tools readily available for use.

In law of war detention, although interrogators can offer detainees improvements in their conditions of confinement (e.g., better recreational opportunities) in return for cooperation, there are currently no established and enforceable mechanisms for encouraging cooperation analogous to those available in the criminal justice system. There is no “sentence” over which to negotiate, nor is there any neutral third party like a judge who could enforce any agreement to release an individual at a date certain in return for cooperation. Detainees may have little incentive to provide information when that information may be used against them only to prolong their detention, with no end in sight. On the other hand, in law of war detention, if the individual is held in an area where habeas corpus does not apply and the detainee has no right to counsel, interrogators can control the conditions of detention and interrogation in lawful ways, including separating the detainee from others, that many believe can be helpful to the effective interrogation of a hardened terrorist in particular cases.<sup>169</sup> In some cases, this may be an effective approach to intelligence collection. However, this approach may not be as effective, at least not for any extended period of time (which may be necessary to yield results), in any area where habeas corpus and right to counsel applies.

In sum, in law of war detention, the absence of enforceable mechanisms for balancing conditions and duration of confinement against cooperation

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of the right to counsel or to “other indispensable judicial guarantees.” *Id.* 705(c)(1). Permissible conditions include a promise to enter into a stipulation of fact; a promise to testify as a witness in the trial of another; and a promise to waive certain procedural rights, including appellate review, among others. *Id.* 705(c)(2). No member of the military commission shall be informed of the existence of the agreement. *Id.* 705(e).

169. See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL FM 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, APPENDIX M (RESTRICTED INTERROGATION TECHNIQUE – SEPARATION) ¶¶M-1, M-5 (Sept. 2006) (“The purpose of separation is to deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story; [and] decreasing the detainee’s resistance to interrogation. . . . Separation will be applied on a case-by-case basis when there is a good basis to believe that the detainee is likely to possess important intelligence and [other] intelligence approach techniques . . . are insufficient.”).

may in some cases reduce the incentive for cooperation-based intelligence collection. Similarly, in military commissions, the absence of specific mechanisms to facilitate cooperation that are as well-established or extensive as in federal courts, contributes to making bargaining more unpredictable, and thus potentially less effective, in that forum. Plea bargaining is essentially a market transaction, and markets work best where there are clear, enforceable rules of contract and associated traditions.<sup>170</sup> These rules and traditions do not spring up overnight; as in all systems, they take time to develop. Moreover, they develop best when the alternatives are clear, such as when the government's authority to detain for a long, fixed period is unquestioned. A terrorist detained in the criminal justice system knows that the system itself is impregnable, and if the government has a strong case he will go to prison for a long time. A terrorist detained under the law of war, particularly if he is initially apprehended in the United States, faces an entirely different situation, in which the validity of the system is subject to challenge, the extent of his rights and the government's power is less certain, and the duration of his confinement is indefinite.<sup>171</sup> Likewise, in the military commission system, in addition to prevailing uncertainty about the system as a whole, the practical operation and usefulness of specific cooperation mechanisms imported from the courts-martial system remains unclear. The incentives created by uncertainty in both of the military systems may not lead to quick and effective cooperation.

#### 4. Sentencing

Sentencing is more predictable, and potentially better for the government, in federal court than in a military commission. In the criminal justice system, as I mentioned, federal courts have for many years meted out lengthy prison sentences in the most serious terrorism cases, including a number of life sentences. While not every case results in a long sentence, and indeed many small fishes receive much shorter terms, sentencing is more or less predictable. Federal judges impose sentences based in part on the U.S. Sentencing Guidelines, which include provisions such as a

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170. See *Puckett v. United States*, 129 S. Ct. 1423, 1430 (2009) (analyzing plea agreement as contract) (“When a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, *i.e.*, to withdraw his plea. But rescission is not the only possible remedy; in [*Santobello v. New York*, 404 U.S. 257, 263 (1971)] we allowed for a resentencing at which the Government would fully comply with the agreement – in effect, specific performance of the contract. . . . It is precisely because the plea was knowing and voluntary (and hence valid) that the Government is obligated to uphold its side of the bargain.”) (internal citations omitted) (emphasis in original).

171. See *supra* notes 145, 155.

terrorism enhancement for certain offenders.<sup>172</sup> In some cases, statutory minimum sentences apply, and maximum sentences may be up to life, and include death, for certain offenses. In the military commissions, by contrast, the sentence is imposed by the military members – essentially the jury – rather than the judge, and without the benefit of any guidelines or minimums enacted by Congress.<sup>173</sup> While we have little experience so far with sentencing by the juries in the military commissions, as noted above, two of the five commission defendants sentenced thus far (including Osama bin Laden’s driver) received sentences of five to six years, with credit for time served at Guantánamo. They were therefore released within a few months. A third defendant received a life sentence that is now on appeal.<sup>174</sup>

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172. U.S. SENTENCING GUIDELINES §3A1.4 (terrorism enhancement) (“[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism,” the offense level should be increased by 12 levels (and be no lower than level 32) and defendant’s criminal history category should be Category VI). The Guidelines are advisory, not mandatory. *United States v. Booker*, 543 U.S. 220 (2005). However, they provide a starting point and a framework for guidance on the appropriate sentence in a given case. *See United States v. Gall*, 552 U.S. 38, 49-50 (2007) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the [statutorily prescribed sentencing] factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.”) (citations omitted). Between October 1, 2008 and September 30, 2009, the most recent period for which annual statistics are available, approximately 57% of cases nationally were sentenced within the given Guidelines range. *See U.S. SENTENCING COMM’N, SOURCEBOOK OF FED. SENTENCING STATISTICS* (2009), Table N – National Comparison of Sentence Imposed and Position Relative to the Guideline Range: Fiscal Year 2009, available at <http://ftp.ussc.gov/ANNRPT/2009/TableN.pdf>. Of the remainder, approximately 2% were above the Guideline range; 25% were “Government Sponsored Below Range” (that is, either through a §5K1.1 motion, or other government supported sentencing reduction); and 16 % were “Non-Government Sponsored Below Range.” *Id.*

173. Sentences of ten years or less require concurrence of two-thirds of the members present at the time the vote is taken. 10 U.S.C. §949m(b)(1). Sentences above ten years, including life imprisonment, require the concurrence of three-fourths of the members present at the time the vote is taken. 10 U.S.C. §949m(b)(3). The only statutory limits are a prohibition on cruel or unusual punishments, 10 U.S.C. §949s, and a requirement that the punishment “not exceed such limits” as are imposed by the President or Secretary of Defense for a particular offense. 10 U.S.C. §949t. Capital punishment is discussed in text and notes 182 and 183, *infra*.

174. *See United States v. Ali Hamza Ahmad Suliman Al Bahlul*, CMCR Case No. 09-001 (Nov. 3, 2008).

More recently, a fourth was sentenced to two years and a fifth to eight years, both pursuant to guilty pleas.<sup>175</sup> Sentencing in the commissions is much harder to predict at this stage.

With respect to law of war detention, there is of course no “sentence” since it is not a criminal punishment at all, and the legally permissible duration of confinement is not clear. Under traditional principles, terrorists may be held under the authority afforded by the 2001 AUMF and the law of war until the end of hostilities. However, the Supreme Court has warned that if the circumstances of the current conflict “are entirely unlike those of the conflicts that informed the development of the law of war,” that authority to detain “may unravel.”<sup>176</sup> In the *Hamdi* decision, which upheld the detention of a U.S. citizen apprehended on the battlefield in Afghanistan, a plurality of the Court expressly relied on the fact that “active combat operations against Taliban fighters apparently are ongoing in Afghanistan” in concluding that the 2001 AUMF continued to authorize detention of enemy belligerents.<sup>177</sup> As circumstances change, or if active combat operations are concluded, it is not clear how long the detention authority will endure.<sup>178</sup> Right now, of course, with combat operations ongoing in Afghanistan and elsewhere, our authority to detain under the law of war remains solid.

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175. See discussion about the guilty pleas and sentences of Ibrahim Al Qosi and Omar Khadr, *supra* note 148.

176. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

177. *Id.*

178. In *Hamdi*, for example, a plurality of the Court acknowledged Hamdi’s concern that if the Court accepted the government’s view of its detention authority, he could potentially be detained for the rest of his life given the nature of the conflict. Although not directly resolving whether the AUMF authorized such indefinite detention, the Court narrowly described the detention authority it was upholding:

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. . . . Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date . . . . The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’ If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of ‘necessary and appropriate force,’ and therefore authorized by the AUMF.

*Id.* at 520-521 (citations omitted). In other contexts, the Supreme Court has indicated that the question of when an armed conflict ends is properly a question for the political branches, rather than the judiciary, to determine. See *Ludecke v. Williams*, 335 U.S. 160, 168-169 (1948).



There are also significant advantages in how capital cases are handled in federal court as compared to a military commission. The federal criminal system has well-established procedures for how the government decides to seek the death penalty,<sup>179</sup> and there is an experienced defense bar capable of handling the complex litigation required during the sentencing phase of the trial. The death penalty is imposed by a unanimous jury of twelve, and can be imposed after a trial or after a guilty plea. In military commissions, there is greater uncertainty about death penalty procedures than in the federal criminal system, as there is no recent experience in the commissions on this issue.<sup>180</sup> While a capital sentence must be imposed unanimously, the number of military commission “jurors” who must vote need not be limited to twelve. Rather, the required number is however many have not been struck during the voir dire process – in other words, if twenty-one jurors are called for the panel, and none are struck, all twenty-one must vote for the death penalty for it to be imposed, making it potentially much harder for the prosecution to obtain the death penalty.<sup>181</sup> Also, it is not clear at present that the death penalty can be imposed by a military commission after a guilty plea,<sup>182</sup> and questions also remain about

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179. See 18 U.S.C. §§3591 *et seq.*; U.S. ATT’YS MANUAL §§9-10.010-10.190 (1997).

180. As of January 2011, there were defendants who had been sentenced to the death penalty in the federal system. The last federal execution was in 2003; there have been three federal executions since the federal death penalty was reinstated in 1988. See Death Penalty Info. Ctr., Federal Death Penalty, available at <http://www.deathpenaltyinfo.org/federal-death-row-prisoners#list>; Death Penalty Info. Ctr., Federal Executions, 1927-2003, available at <http://www.deathpenaltyinfo.org/federal-executions-1927-2003>. In the court-martial system, as of September 2010, there were seven individuals sentenced to the death penalty. See Death Penalty Info. Ctr., The U.S. Military Death Penalty, available at <http://www.deathpenaltyinfo.org/us-military-death-penalty>. The last military execution was in 1961. *Id.*

181. 10 U.S.C. §949m(b)(2)(D). In such a case, 14 votes (two-thirds of 21) would be needed to convict, while the full 21 would be needed to impose the death sentence.

182. 10 U.S.C. §949m(b)(1)(C) provides that the death penalty cannot be imposed in a military commission unless the “accused was convicted of the offense by the concurrence of all the members present at the time the vote is taken.” When an accused pleads guilty, no vote is taken for conviction. Therefore, there is a question about whether the death penalty can be imposed after a guilty plea consistent with this provision. Based on the same language in the 2006 MCA, a military judge raised the issue and ordered briefing in December 2008; the question was not resolved before military commission proceedings were suspended by President Obama in January 2009. See Government Response to Military Judge’s Directed Brief (Capital Punishment Issues), *United States v. Khaled Sheikh Mohammed*, No. MJ-010 (Dec. 22, 2008). The 2010 Military Commissions Manual contains the following on this issue, in non-binding commentary accompanying the rule governing guilty pleas: “In the discussion under this rule in the 2007 Manual for Military Commissions, the following sentence appeared: ‘The M.C.A. permits an accused to plead guilty to a capital offense referred to a capital military commission, at which trial death remains an authorized sentence, notwithstanding the accused’s plea of guilty.’ That sentence has been omitted in the 2010 Manual. The omission of that sentence, however, does not suggest that an accused cannot accept responsibility for guilt in a capital case. In the event an accused desires to accept responsibility and avoid a lengthy proceeding on the question of

the availability of sufficiently trained defense counsel and adequate resources – all of which could further complicate post-conviction litigation.<sup>183</sup> Of course, for detainees held in law of war detention without trial, capital punishment is not available at all.

### 5. *International Cooperation*

Finally, the criminal justice system may help us obtain important cooperation from other countries. That cooperation may be necessary if we want to detain suspected terrorists or otherwise accomplish our national security objectives. Our federal courts are well-respected internationally. There are well-established, formal legal mechanisms that allow the transfer of terrorism suspects to the United States for trial in federal court, and for the provision of information to assist in law enforcement investigations – i.e., extradition and mutual legal assistance treaties (MLATs). Our allies around the world are comfortable with these mechanisms, as well as with more informal procedures that are often used to provide assistance to the United States in law enforcement matters, whether relating to terrorism or other types of cases. Such cooperation can be critical to the success of a prosecution, and in some cases can be the only way in which we will gain custody of a suspected terrorist who has broken our laws.<sup>184</sup>

In contrast, many of our key allies around the world are not willing to cooperate with or support our efforts to hold suspected terrorists in law of war detention or to prosecute them in military commissions. While we

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guilt or innocence, an accused may choose, for example, not to contest the admission of evidence by the prosecution or may choose not to enter evidence on his behalf. An accused may also enter into stipulations of fact or expected testimony, including confessional stipulations. *See* R.M.C. 811(c).” U.S. DEP’T OF DEF., MANUAL FOR MIL. COMM’NS 910(a) (2010),(discussion). Legislation is currently pending in Congress that would clarify that the death penalty can be imposed after a guilty plea in a military commission. *See* National Defense Authorization Act for FY 2011, S. 3454, 111th Cong. §1045 (2010) (proposing amendment to 2009 MCA).

183. As Defense Department General Counsel Jeh Johnson stated in Congressional testimony, the question of training and resources for capital defense counsel is a critical issue for the military commissions: “In terms of resources, the ability to prosecute and defend these cases, one of my special concerns is to ensure, for example, that our defense counsel are adequately trained and experienced in handling potentially capital cases. There are [American Bar Association] standards for our representation of a defendant in a [civilian] capital case, and I’ve met with [the Chief Defense Counsel at Guantánamo Bay] to ask him what he needs to provide his JAGs with the adequate training and resources to deal with very, very significant defenses of these cases and I’m open and willing and ready and able to help him in that task.” *Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond: Hearing Before the Subcomm. on Terrorism and Homeland Sec. of the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Jeh Johnson, Gen. Counsel, U.S. Dep’t of Def.), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit\\_id=8157](http://judiciary.senate.gov/hearings/testimony.cfm?id=4002&wit_id=8157).

184. Some countries will not extradite for, or otherwise support, federal court prosecutions if the death penalty is sought.

hope that over time they will grow more supportive of these legal mechanisms, at present many countries would not extradite individuals to the United States for military commission proceedings or law of war detention. Indeed, some of our extradition treaties explicitly forbid extradition to the United States where the person will be tried in a forum other than a criminal court. For example, our treaties with Germany (Article 13)<sup>185</sup> and with Sweden (Article V(3))<sup>186</sup> expressly forbid extradition when the defendant will be tried in an “extraordinary” court, and the understanding of the Indian government pursuant to its treaty with the United States is that extradition is available only for proceedings under the ordinary criminal laws of the requesting state.<sup>187</sup> More generally, the doctrine of dual criminality – under which extradition is available only for offenses made criminal in both countries – and the relatively common exclusion of extradition for military offenses not also punishable in civilian court may also limit extradition outside the criminal justice system.<sup>188</sup> Apart from extradition, even where we already have the terrorist in custody, many countries will not provide testimony, other information, or assistance in support of law of war detention or a military prosecution, either as a matter of national public policy or under other provisions of some of our MLATs.<sup>189</sup>

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185. Treaty Between the United States of America and the Federal Republic of Germany Concerning Extradition, U.S.-Ger., art. 3, June 20, 1978, T.I.A.S. No. 9785.

186. Convention on Extradition Between the United States of America and Sweden, U.S.-Swed., art. V(3), Oct. 24, 1961, 14 U.S.T. 1845.

187. *See Exchange of Letters Between Strobe Talbott, Acting Secretary of State, United States of America, and Saleem I. Shervani, Minister of State for External Affairs, India, of June 25, 1997, attached to Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, U.S.-India, June 25, 1997, T.I.A.S. 12873* (confirming understanding of both countries that “as a general matter, upon extradition, a person shall be proceeded against or punished under the ordinary criminal laws of the Requesting State, and shall be subject to prosecution or punishment in accordance with the Requesting State’s ordinary rules of criminal procedure. If either party is considering prosecution or punishment upon extradition under other laws or other rules of criminal procedure, the Requesting State shall request consultations and shall make such a request only upon the agreement of the Requested State.”).

188. Under the “dual criminality” doctrine, “an offense is extraditable only if the acts charged are criminal by the laws of both countries.” *Collins v. Loisel*, 259 U.S. 309, 311 (1922); *United States v. Saccoccia*, 58 F.3d 754, 766 (1st Cir. 1995) (dual criminality does not require laws be “carbon copies of one another” or have identical elements, rather it “is deemed to be satisfied when the two countries’ laws are substantially analogous.”).

189. The Agreement on Mutual Legal Assistance between the United States and the European Union, for example, includes a provision that “[a] request may be denied if it relates to a military offense that would not be an offense under the ordinary criminal law.” *See Instrument as contemplated by Article 3(2) of the Agreement on Mutual Legal Assistance Between the United States of America and the European Union, U.S.-E.U., June 25, 2003, S. TREATY DOC. NO. 109-13 (2006)*. This provision has been incorporated into the United States’ treaties with individual member nations. *See, e.g., id.* (as to the

These concerns are not hypothetical. During the last Administration, the United States was obliged to give assurances against the use of military commissions in order to obtain extradition of several terrorism suspects to the United States.<sup>190</sup> There are a number of terror suspects currently in foreign custody who likely would not be extradited to the United States by foreign nations if they faced military tribunals.<sup>191</sup> In some of these cases, it might be necessary for the foreign nation to release these suspects if they

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Application of the Treaty Between the Government of the United States of America and the Government of the Republic of Estonia on Mutual Legal Assistance in Criminal Matters), U.S.-Est., art. 3(a), Apr. 2, 1998- Feb. 8, 2006, S. TREATY DOC. NO. 109-13 (2006). Our MLAT with South Africa specifically provides in its preamble the law enforcement basis for the treaty: “Desiring to improve the *effectiveness of the law enforcement authorities* of both countries in the investigation, prosecution, and prevention of crime through cooperation and mutual legal assistance in *criminal matters*.” See Treaty Between the Government of the United States of American and the Government of the Republic of South Africa on Mutual Legal Assistance in Criminal Matters, U.S.-S.Afr., Sept. 16, 1999, S. TREATY DOC. NO. 106-36 (2000) (emphasis added).

190. The following are two examples of cases in which the United States provided assurances that individuals would not be tried in military commissions in order to obtain their extradition to the United States:

- Oussama Kassir. In 2007, the Czech Republic extradited Kassir to the United States based on assurances that he would not be prosecuted in military tribunals. In 2009, Kassir was found guilty in federal court of providing material support to al Qaeda in connection with his participation in a plot to establish a jihad training camp in Oregon and was sentenced to life in prison.
- Syed Hashmi. In 2007, the United Kingdom extradited Hashmi to the United States based on assurances that he would not be prosecuted in military tribunals. He pleaded guilty in April 2010 to conspiring to provide material support to al Qaeda.

191. The following are some examples of cases in which the United States has had to provide assurances that individuals would not be tried in military commissions in support of pending extradition requests:

- Mahamud Said Omar: Sought for trial in the District of Minnesota in connection with an ongoing investigation into the recruitment of young men in Minneapolis to train with or fight for al Shabaab in Somalia. Omar is pending extradition from the Netherlands.
- Khalid Al Fawwaz and Adel Mohammed Almagid Abdul Bary: Sought for trial in the Southern District of New York in connection with the bombing of the U.S. embassies in East Africa in 1998. They are pending extradition from the United Kingdom.
- Nizar Trabelsi: Sought for trial in the District of Columbia in connection with plotting with other al Qaeda operatives to commit terrorist attacks against U.S. targets in Europe. He is pending extradition from Belgium.
- Babar Ahmad: Sought for trial in the District of Connecticut in connection with providing material support for terrorists and money laundering; he also allegedly possessed a document accurately describing plans of a U.S. naval battle group operating in the Straits of Hormuz in April 2001. Ahmad is pending extradition from the United Kingdom.
- Haroon Rashid Aswat: Sought for trial in the Southern District of New York in connection with a plot to create a jihad training camp in the United States. Aswat is pending extradition from the United Kingdom.

cannot be extradited because they do not face charges pending in the foreign nation.

On the other hand, in certain circumstances, some foreign partners have indicated they are only willing to provide assistance in court proceedings if their involvement can be kept secret. As noted above, the various fora have different rules and procedures regarding protection of classified information and closure of proceedings. None are foolproof and, in the individual case, it may not be possible to protect such information regardless of the proceeding, depending on its nature and importance. However, as a general rule, habeas proceedings will provide the most flexibility to protect information from public disclosure and, in particular cases, military commissions may provide more such protections, through the interplay of less restrictive hearsay rules and the classified information procedures, than are available in federal courts.

The comparison set forth above is somewhat artificial, and it omits several areas of difference, including differences in the right to counsel,<sup>192</sup>

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192. In the criminal justice system, once the Department of Justice commences prosecution by presenting a terrorism suspect to a judge or indicting him, the suspect has a right to the assistance of counsel, including during any interrogation (concerning the offense for which he is charged). *See* *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (citations omitted); *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *Texas v. Cobb*, 532 U.S. 162, 168 (2001); *Maine v. Moulton*, 474 U.S. 159, 177, 180 n.16 (1985). Similarly, once an individual is charged in a military commission, the MCA requires that military counsel be provided to the defendant “as soon as practicable.” 10 U.S.C. §948k(a)(3). In practice, this would be no later than when charges are referred, but the accused may be provided counsel at the point that charges are sworn (if not before). In addition, even before charges have been brought within the military commission system (or if they are never brought), there are serious questions about the government’s authority to deny a suspected terrorist inside the United States access to a lawyer to challenge his detention under the law of war. As noted above (*supra* note 62) then-Judge Michael Mukasey ruled that Jose Padilla was entitled to a lawyer to pursue a habeas petition when he was held in law of war detention but not charged in a military commission. *See* *Padilla v. Bush* 233 F. Supp.2d 564, 605 (S.D.N.Y. 2002). In addition, the Supreme Court in 2004 indicated that Yasser Hamdi, a U.S. citizen captured in Afghanistan, should have access to counsel to challenge his detention, a point the government conceded in that case. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (“Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand.”). Of course, if detainees are held overseas under the law of war in an area where habeas corpus does not apply, affording them access to counsel may not be required. In any event, as discussed above (*see supra* text and notes 58-59, 62), involvement of counsel, or advising a detainee of his right to counsel, does not invariably impede intelligence collection. Indeed, there are numerous examples of cases in which terrorism defendants in the criminal justice system, represented by counsel, have provided important intelligence to the government (*see supra* text and notes 62, 66). Nor does the absence of counsel guarantee successful intelligence collection.

speedy trial rights,<sup>193</sup> venue,<sup>194</sup> appeals,<sup>195</sup> and other issues.<sup>196</sup> But the

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193. While military commission rules impose certain timeframes designed to ensure a speedy trial, they are more flexible than the rules set forth in the federal Speedy Trial Act. Compare 18 U.S.C. §3161 *et seq.* with U.S. DEP'T OF DEF., MANUAL FOR MIL. COMM'NS 707 (2010); it is not clear that the Sixth Amendment right to a speedy trial applies to military commissions. See generally *Barker v. Wingo*, 407 U.S. 514 (1972). In habeas proceedings, there are no rules mandating timeframes for the resolution of the case similar to the Speedy Trial Act; any court proceedings are governed by rules adopted by individual judges. Where habeas does not apply, evidentiary issues and procedural rules are governed by administrative procedures. See Detainee Review Board Procedures at Bagram Theater Internment Facility, Afghanistan, *attached as an appendix to* Brief of Respondent-Appellants, *Maqaleh v. Gates*, Nos. 09-5265, 09-5266, 09-5277 (D.C. Cir. Sept. 14, 2009).

194. Federal criminal prosecutions operate under relatively strict rules regarding the location (or venue) in which the prosecution and trial can take place as compared to military commission prosecutions. Where any portion of a criminal offense occurs within the United States, venue is governed by Constitutional and statutory provisions, which require the trial to take place in the federal district where the offense, an element of the offense, or any overt act comprising the conspiracy has occurred. See U.S. CONST. art. III, §2, cl. 3; 18 U.S.C. §3237; FED. R. CRIM. P. 18. For extraterritorial offenses, venue lies by statute in the district where the defendant is first brought or arrested or, if an indictment is to be returned prior to the subject's arrest and return to the United States, in the district of his last known residence (or, if none, in the District of Columbia). U.S. CONST. art. III, §2; 18 U.S.C. §3238. Military commissions, on the other hand, do not operate under such restrictions, and so the proceedings can be conducted in geographically convenient locations, domestically or abroad. Habeas proceedings need to be conducted before a federal judge, generally in the district where the detainee is held, but there is greater flexibility with respect to detainees held overseas. Cf. *Boumediene v. Bush*, 553 U.S. 723, 795-796 (2008) (suggesting that all Guantánamo detainee habeas litigation be transferred to federal district court in D.C. in order to "reduce the administrative burdens on the Government.").

195. Appellate rights are generally broader in the military commissions system than in the federal courts. In particular, the CMCR has greater flexibility to review factual issues and to set aside convictions based on factual insufficiency than does a federal court of appeals. Under 10 U.S.C. §950f(d), "the CMCR may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses." By contrast, a federal court of appeals will generally review a jury verdict of guilt by "viewing the evidence in the light most favorable to the prosecution" to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard requires "a healthy respect for the trier of fact's 'responsibility ... to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Schlup v. Delo*, 513 U.S. 298, 340 (1995) (quoting *Jackson*, 443 U.S. at 319). The expanded scope of appellate review in the military commissions in essence creates the possibility for an appellate-level acquittal that is not available to the defendant in federal court (the government cannot appeal an acquittal in the trial court, so the expanded scope of appellate review in this area solely benefits the accused). In addition, the accused in a military commission enjoys a second layer of appeal as of right, to the D.C. Circuit Court of Appeals. 10 U.S.C. §950g(d). In law of war detention, where habeas applies, both sides have the right to appeal an adverse ruling to a federal court of appeals. 28 U.S.C. §2253(a).

196. The chart in Appendix 2 compares the three systems in 14 categories.

comparison highlights some of the most important similarities and differences among our civilian law enforcement, military commissions, and law of war detention authorities. Each of these tools is valuable in its own right. Each has strengths and weaknesses, and whether it is legally appropriate and strategically wise to use any tool in a particular case depends on the circumstances of that case. The choice about which tool to use can be complex and fact-intensive, and should be informed by the judgment of national security professionals who understand the tools and their application in particular contexts.

V. USING OUR AUTHORITIES MORE EFFECTIVELY:  
THE *MIRANDA* DEBATE

Whatever their relative strengths and weaknesses today, our civilian and military counterterrorism authorities are evolving and improving, and our experience with them in different contexts will inevitably affect how we choose among them in the future. As I have noted, the military commissions have been substantially reformed twice – from relatively ad hoc tribunals established by presidential order in 2001 to more robust trial mechanisms with extensive rules and procedures as established in the 2006 and 2009 MCAs. I think their credibility and viability have been enhanced as a result, and they will better protect national security, consistent with our laws and our values. As the commissions go forward, we will no doubt be generating more case law and obtaining practical experience that will shape how they operate and how both the government and the public perceives them. Likewise, our use of military detention authority has evolved over time. The executive branch now has much more rigorous policies and procedures for assessing who should be detained as an initial matter than it did in 2001. With respect to Guantánamo detainees, federal courts are also reviewing the lawfulness of detention. We will continue to develop case law in our courts that will inform how we use this authority in the future. This may or may not make detention more difficult, but I think it will make detention more sustainable over time and demonstrate our commitment to the rule of law as we work to protect national security.

The same is true of our use of law enforcement authority. I have explained how our government, after the 9/11 attacks, made major changes to permit closer coordination between, and integration of, our law enforcement and intelligence activities. The DOJ and the FBI were both reorganized and reoriented to reflect these changes and are now more effective in addressing terrorism and other national security threats.<sup>197</sup>

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197. See *supra* Part I.

While there have been substantial changes since 9/11 in how all of these tools operate, there remains room for improvement. We must be vigilant and creative in assessing how these tools work and how they can be strengthened. For example, there has been recent discussion about *Miranda* warnings in terrorism cases. Addressing the costs and benefits of *Miranda*, as well as the public-safety exception to *Miranda* and the importance of maximizing its use in terrorism cases, will illustrate generally some of the ways in which we can assess our counterterrorism tools and improve how we use them.

To understand *Miranda* as an operational matter (rather than a legal one), we have to consider the tension between two of the national security values I have discussed: (1) neutralizing the current terrorist threat and (2) gathering intelligence in order to neutralize future terrorist threats.<sup>198</sup> No

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198. As the Supreme Court explained in *Dickerson v. United States*, 530 U.S. 428 (2000), the *Miranda* rule is a constitutional one, not amenable to change by statute, and has a long historical pedigree in the Court's decisions.

Prior to *Miranda*, we evaluated the admissibility of a suspect's confession under a voluntariness test. The roots of this test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy. Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.

While [an 1897 decision relying on the self-incrimination aspect of the Fifth Amendment] was decided before [a 1936 decision relying on the Due Process Clause] and its progeny, for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the due process voluntariness test in "some 30 different cases decided during the era that intervened between [the 1936 decision] and [a 1964 decision]." Those cases refined the test into an inquiry that examines "whether a defendant's will was overborne" by the circumstances surrounding the giving of a confession. The due process test takes into consideration "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." The determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."

We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in *Malloy v. Hogan* [1964] and *Miranda* changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In *Malloy*, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. We decided *Miranda* on the heels of *Malloy*.

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." We concluded that the coercion inherent in custodial interrogation blurs the line



matter what tool you use – military, intelligence, diplomatic, or law enforcement – you will likely encounter a tension between these two values, and there will come a time when you have to strike a balance.

For example, consider the military context. When our armed forces locate a high-value terrorist abroad on the battlefield, they must make a basic decision about whether to try to kill him or capture him. Relatively speaking, it may be easier to kill than to capture – it often requires less precision and less risk to the forces engaged in the operation. Compared to a capture operation, a kill operation may have a higher chance of success in neutralizing the terrorist. On the other hand, a capture operation, if successful, offers a significantly greater benefit than the kill operation. Both will neutralize the terrorist, but only the capture operation offers the opportunity to interrogate the terrorist and gather intelligence from him. This is something an economist, as well as a soldier, can understand: one approach involves lower risk and lower benefits, while the other approach involves higher risk and potentially higher benefits.<sup>199</sup>

The risk/benefit framework is also applicable to the *Miranda* issue. As I have discussed, the general rule is that statements made in response to custodial interrogation in the United States cannot be used by the government to convict a defendant unless he first received a *Miranda* warning.<sup>200</sup> This is simply a fact of life in the criminal justice system. Facing that fact, officials confronting a terrorist in the United States must decide whether to advise him of his rights. Relatively speaking,

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between voluntary and involuntary statements, and thus heightens the risk that an individual will not be “accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.” Accordingly, we laid down “concrete constitutional guidelines for law enforcement agencies and courts to follow.” Those guidelines established that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police provided the suspect with four warnings. These warnings (which have come to be known colloquially as “*Miranda* rights”) are: a suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

*Id.* at 432-435 (citations and footnote omitted). The Court in *Dickerson* also cited its prior decision in *Quarles*, see 530 U.S. at 441, and observed: “If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.” *Id.* at 443-444. The Court also noted one important advantage of *Miranda*: “experience suggests that the totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner,” and where *Miranda* is satisfied, it will be “rare” for any defendant to be able to persuade a court that his statements were involuntary. *Id.* at 444.

199. I emphasize that this discussion addresses the question of battlefield strikes solely as an operational matter to illustrate the concept of operational risks and benefits. The legal underpinnings of such strikes are beyond the scope of this article.

200. See *supra* note 57.

interrogation without *Miranda* warnings might result in a higher chance of obtaining intelligence (though, as explained above, *Miranda* warnings do not typically seem to be the key factor in whether we secure the cooperation of the target).<sup>201</sup> Compared to Mirandized interrogation, therefore, un-Mirandized interrogation may have a somewhat higher chance of success in gathering intelligence. On the other hand, Mirandized interrogation, if it succeeds and the terrorist talks, offers a greater benefit than its un-Mirandized counterpart. Both gather intelligence, but only Mirandized interrogation offers an enhanced ability to neutralize the terrorist by using his statements to support his long-term detention through the criminal justice system.<sup>202</sup>

In some cases, *Miranda* warnings may be the difference between detaining a suspected terrorist and being compelled to release him. For example, consider a case in which the government learns through sensitive intelligence sources and methods that a U.S. citizen in the United States is plotting with al Qaeda to engage in terrorist activity here. Because we do not wish to expose these sources and methods, we might not be able to prove in a habeas corpus proceeding that this individual is part of al Qaeda, as we must in order to detain him under the law of war.<sup>203</sup> He cannot be prosecuted in a military commission because he is a U.S. citizen.<sup>204</sup> We also currently lack the useable evidence to prove that the individual is guilty of a crime (including a war crime). However, if we interrogate him with *Miranda* warnings, we may be able to elicit statements from him that will help us prove, for example, that he has received terrorist training overseas,

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201. See discussion *supra* Part III.A and notes 58-59, 62.

202. A *Miranda* warning is also useful (though not required) in helping the government meet the separate requirement that the accused's statement be voluntary (which also applies in a military commission, with some limited exceptions discussed in greater detail in Part IV, *supra*, 10 U.S.C. §§948r(c) & (d)), or is reliable (which applies even in the context of a habeas corpus petition adjudicating the validity of law of war detention, see, e.g., *Anam v. Obama*, 696 F. Supp. 2d 1, 8-9 (D.D.C. 2010) (finding that the government "failed to establish that the twenty-three interrogation reports [of interrogations of petitioner] bear sufficient indicia of reliability"); *Hatim v. Obama*, 677 F. Supp. 2d 1, 10 (D.D.C. 2009) (unrefuted allegations of torture "undermine the reliability of the statements made subsequent" to alleged torture); *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 40 (D.D.C. 2009) (concluding that detainee's confessions were "not reliable and credible"))).

203. As discussed, federal habeas courts have used their discretion to protect classified information from unauthorized disclosure; federal criminal courts achieve such protection using CIPA; and the 2009 MCA, contains provisions analogous to CIPA, 10 U.S.C. §§949p-1-949p-7. While these mechanisms have proven generally effective in protecting classified information, there will remain some cases in which classified information that is essential to the government's case cannot be relied upon due to security concerns, because, for example, the substance of key information, or its source, cannot be shared in any form with the petitioner/defendant/accused. In such circumstances, where the government has no alternative way to prove what the classified evidence would show, the government may not be able to make its case. This concern is potentially applicable to all three systems – Article III courts, military commissions, and law of war detention.

204. See *supra* note 156.

so that we can convict him and ensure he does not pose a threat. In that situation, Mirandized interrogation may be needed to ensure his detention.<sup>205</sup>

Seen in this way, the costs and benefits of *Miranda* warnings should be clear. Indulging the worst assumptions, they may inhibit short-term intelligence collection, but they also may expand detention options. Putting aside any legal and ethical restrictions that may apply,<sup>206</sup> one approach – eschewing *Miranda* warnings – involves lower risk and lower benefits, while the other approach involves somewhat higher risk and potentially higher benefits. The choice between them, of course, needs to be made by professionals who understand the details of the tactical situation and their own capabilities, as well as the alternatives. There may be exceptional terrorism cases in which we know in advance we do not need the individual's statements to ensure his detention, and we have an immediate need to collect intelligence. In such a case, a *Miranda* warning may be an unnecessary risk to take, even after public-safety questioning has been exhausted (assuming it is legally and ethically permissible to dispense with the warning in those circumstances). On the other hand, and more often in our experience, there are terrorism investigations in which we do not know that we can secure detention through a conviction without the defendant's statements, and no other assured avenues to detain the individual are presently available.<sup>207</sup>

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205. An un-Mirandized interrogation might yield evidence that the terrorist was part of al Qaeda if he was prepared to admit that fact, which could be used to support detention under the law of war, but only a Mirandized statement of terrorist conduct would support detention under federal criminal law where there is no link to al Qaeda or associated forces.

206. Note, however, that the Fifth Amendment is not violated at the time a statement is taken even if without a *Miranda* warning. A violation occurs only if and when the government attempts to introduce an unwarned custodial statement in a criminal proceeding. *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) (“[V]iolations [of the Fifth Amendment] occur, if at all, only upon the admission of unwarned statements into evidence at trial.”). Because a Fifth Amendment violation would only occur at the point at which such an unwarned statement is introduced in a criminal case, agents do not expose themselves to liability merely by taking an unwarned statement. *Id.* at 641 (“[P]olice do not violate a suspect’s constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*.”).

207. Determining that someone is eligible for detention under the law of war, particularly in the United States or if the person is a U.S. citizen, can take time. The government’s protocol for such determinations, made public in 2004, requires several agencies to prepare factual summaries and memoranda and an individual determination made by the President. *See* Declaration of Mr. Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism, ¶7 (describing process by which Ali Saleh Al-Marri was designated as an enemy combatant), redacted unclassified version attached to Respondents’ Supplemental Response to the Court’s Order During the February 27, 2006 Telephone Conference, *Al-Marri v. Bush*, 04 Civ. 2257 (Mar. 29, 2006); 150 CONG. REC. S2701-S2704 (daily ed. Mar. 11, 2004) (reprinting February 24, 2004 statement of Alberto R. Gonzalez, White House Counsel, before the American Bar Association’s Standing Committee on Law and National Security) (explaining process by which U.S. citizens Jose

The question, then, is how to maximize the benefits and minimize the costs of *Miranda* in keeping with our values and the rule of law. Obviously, *Miranda* is a constitutional rule,<sup>208</sup> and it cannot be overruled or changed by statute. But the Supreme Court has recognized an exception to the *Miranda* rule. In 1984, in the *Quarles* case, it held that questioning prompted by concerns about public safety need not be preceded by *Miranda* warnings.<sup>209</sup> In other words, you can use a person's unwarned answers to public-safety questions to support his conviction and resulting incarceration.

In *Quarles*, the Supreme Court found admissible the defendant's custodial statement to police officers who asked him about the location of a gun in a supermarket where he was apprehended after a chase – even though he had not yet been *Mirandized* – because of the imminent threat to public safety posed by the gun.<sup>210</sup> The Court explained its reasoning for adopting a public-safety exception:

In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in *Quarles*' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred *Quarles* from responding to [the police officer's]

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Padilla and Yaser Hamdi were designated enemy combatants); Letter from Richard A. Hertling, Principal Deputy Assistant Att'y Gen., Dep't of Justice, Office of Legis. Affairs, to Sen. Patrick Leahy (July 6, 2007) (providing information as required by Section 1176 of the Violence Against Women and Department of Justice Reauthorization Act of 2005; explaining process for "enemy combatant" determinations regarding U.S. persons or residents). Such a determination cannot be made in real time, as an arrest is taking place, which makes it difficult to know whether law of war detention is available at the time a decision about whether to administer *Miranda* warnings must be made.

208. *Dickerson v. United States*, 530 U.S. 428 (2000).

209. *New York v. Quarles*, 467 U.S. 645, 655-656 (1984).

210. *Quarles* involved a man who was suspected of rape and who had run into a supermarket to escape the police. When arrested, he had an empty shoulder holster, and without administering *Miranda* warnings the police asked him "Where's the gun?" In response, he nodded in the direction of some empty cartons and said, "The gun is over there," which indeed it was. The trial court found a *Miranda* violation and suppressed the statement, but the Supreme Court disagreed. It determined that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence." *Quarles*, 467 U.S. at 655. Applying that exception to the facts before it, the Court concluded, "[s]o long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it." *Id.* at 657.

question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. [The police officer] needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.<sup>211</sup>

The Court went on to state that the “exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.”<sup>212</sup>

The question today is how the public-safety exception recognized in *Quarles* should apply in the context of modern terrorism. The threat posed by terrorism today is far more complex, sophisticated, and serious than the threat posed by ordinary violent crime. Al Qaeda and other international terrorist organizations often engage in sophisticated planning for their attacks, design simultaneous or coordinated terrorist attacks in multiple locations with multiple participants, and employ tradecraft that makes such attacks difficult to disrupt or prevent. The harm inflicted on the public by successful attacks can be catastrophic. As a result, there are corresponding arguments that the public safety exception to *Miranda* permits more questioning when it is designed to mitigate the new threat of terrorism.<sup>213</sup> As the Court noted in *Quarles*, the public-safety exception is justified by an exigent need to protect the public and avoid a greater “social cost” than the loss of a criminal conviction, and its scope is therefore “circumscribed by the exigency which justifies it.”<sup>214</sup> Where the exigency in question is the danger of bombs on commercial aircraft or other coordinated mass-casualty attacks – as opposed to a loose gun in a supermarket – the public-safety exception should permit broader questioning, as necessary, to protect against the threat. We therefore need to ensure that guidance to and training of our law enforcement professionals appropriately address the public safety exception to *Miranda* and the potential for broader use of the public safety exception in questioning in the counterterrorism context.

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211. *Id.*

212. *Id.* at 658-659.

213. *See, e.g.,* United States v. Khalil, 214 F.3d 111 (2d Cir. 2000).

214. *Quarles*, *supra* note 209.

## CONCLUSION

Let me summarize the main points of this discussion. First, following 9/11, the United States developed a much more aggressive and effective national counterterrorism strategy, which includes law enforcement along with enhanced intelligence and military operations. Legal, policy, and organizational changes made after 2001 reflect the recognized value of law enforcement as one of several tools for combating terrorism. We should remember that history today.

Second, precisely because we are at war with a lethal enemy, we must remain focused on how best to win. I believe that winning requires a pragmatic, empirical approach – we must do what actually works as long as it is lawful and consistent with our values. This is not the time to abandon counterterrorism tools that have a proven track record out of deference to abstract notions of correctness or suitability. We must go where the empirical data leads. As an empirical matter, the criminal justice system has advanced three important national security goals: disrupting terrorist plots through detection and arrest, incapacitating terrorists through prosecution and incarceration, and gathering intelligence from and about terrorists through interrogation and recruitment of them as cooperating assets.

There is no inherent tension between national security and the criminal justice system. While our criminal justice system has limits, and is not always the right tool for the job, when it is the right tool it has an exceptional success rate. There are indeed rules – such as the requirement for *Miranda* warnings – that may at times constrain what we can do within the criminal justice system, but I believe the severity of these constraints has often been overstated. We are a nation of laws, and there are legal rules governing all of our counterterrorism options; there are similar tensions whether we are using the criminal justice system, military authorities, or other means.

Acknowledging the costs and benefits of using any of our options does not, however, demonstrate the value of law enforcement to counterterrorism, or how to choose between law enforcement and another approach in particular circumstances. That, as I noted, requires a dispassionate, rigorous and detailed analysis of how different systems actually operate. For the purpose of evaluating the utility of law enforcement for incapacitating terrorists and gathering intelligence, I have tried to offer a systematic comparison of the criminal justice system with comparable tools in the military system – namely, law of war detention and military commissions. I think this comparison shows the advantages and disadvantages of each of these tools.

Third, in part because of the complexity of these choices, we should not enact laws that protect suspected terrorists from our criminal justice system. These national security decisions are far too complex to be made in the

abstract. Rather, Congress needs to ensure that we have the broad authority required to protect the country (subject to appropriate limits and conditions); the Executive needs to provide sound policy guidance to the field; and the national security professionals who are charged with protecting the country – whether military, intelligence, or law enforcement – should be allowed to do their jobs and exercise some discretion based on the authority and policy guidance given to them.

These decisions can be difficult, and the fast-paced operational environment in which our national security professionals work will not always afford time for lengthy deliberation before action must be taken. Therefore, we have to understand that people on the front lines will, at least at the initial stages, use the tools that they have been trained to use. This means that our troops on the battlefield in Afghanistan will be treating individuals they apprehend there as enemy belligerents or otherwise under a law of war framework, subject to any understandings with the Afghan government. Conversely, our FBI agents and other federal and state law enforcement professionals on the front lines here at home have long treated suspected terrorists they apprehend in the United States under a law enforcement framework, albeit one that recognizes the imperative of collecting intelligence from the suspects, and that remains open to law of war options to the extent legally permitted. In areas overseas, outside of theaters of active armed conflict, it is likely that foreign governments will most often continue to apprehend and detain suspected terrorists in the first instance; if it is in the U.S. interest to seek transfer of such individuals to U.S. custody, we may have more time to determine at the outset what tool best serves our national security objectives. Diplomatic and legal constraints will also restrict our choices in this context.

At the operational level, the array of complex choices seems to require some mechanism for interagency notice. In appropriate cases, when a terrorist comes into the sights or hands of one agency, that agency should notify other national security agencies and provide them an opportunity to propose alternative approaches. This could apply, for example, if law enforcement authorities intend to arrest or take custody of certain terrorism suspects, or if an intelligence agency is told that a terrorism suspect is in liaison custody. Each agency will follow its own procedures and best judgment in the meantime, but notice provides an opportunity to identify viable alternatives where they exist without requiring the government to delay while the matter is debated. We have in recent years greatly expanded our interagency coordination, and the existing processes have proven effective, but that does not mean they cannot be improved. One of the keys to such improvement, I believe, is greater understanding of the relative advantages and disadvantages of the available tools and options. I have tried in this article to move towards that goal.

## Appendix 1

### Examples of Intelligence on Terrorist Activities Obtained Through the Criminal Justice System

The following summaries provide some examples of the wide range of intelligence that the United States government obtained from terrorism targets in law enforcement custody between approximately 1998 and 2010.

These examples are not intended provide an exhaustive account of the extensive intelligence that has been gained from and about terrorism targets by the FBI or other federal law enforcement authorities. The United States government is cautious about making public the results of its intelligence collection efforts for a variety of reasons, including, most importantly, the need to protect the safety of the cooperating sources and their families; the need to protect ongoing operations; and the need to protect classified information from disclosure. Based on a similar rationale, the Department of Justice does not typically disclose or publicly confirm when a defendant has pled guilty based on a cooperation agreement in an ongoing investigation. In addition, due to the mechanics of cooperation and sentencing, law enforcement officials are reluctant to characterize the nature of particular cooperation efforts before the cooperation has run its course and can be properly evaluated. Accordingly, this summary is intended only to illustrate the kinds of intelligence that can be obtained through the criminal justice system, albeit using examples of actual case histories.

This information was compiled during the time that David S. Kris served as Assistant Attorney General for the National Security Division, and he obtained permission to use it from the Department of Justice and the FBI.

The information contained in these case summaries includes some or all of the following, depending on the availability and sensitivity of the information: a brief description of the investigation or circumstances leading to the arrest; the nature and value of the information provided; and the details of conviction, including charges, and the sentence imposed, where applicable. The examples are categorized based on the terrorist organization to which the information provided pertains; within each subject category, the examples are organized roughly chronologically. Some of the names of particular individuals have been withheld for operational reasons.

#### **Al Qaeda**

##### ***Subject A:***

Subject A, an al Qaeda associate, was detained as a material witness in



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connection with the 1998 East African Embassy bombings. He lied to a grand jury, refused to testify in the face of an immunity order, and was detained on contempt and perjury charges. However, he subsequently agreed to debriefings with his attorney present and provided information regarding al Qaeda and Usama bin Laden (UBL). After 9/11, he provided information about the location of several al Qaeda camps in the area of Khost, Afghanistan.

***Jamal al Fadl:***

Al Fadl was one of the first individuals to join al Qaeda and a key al Qaeda member during the 1990s. In 1996, he walked into a U.S. embassy overseas and offered to cooperate against al Qaeda. Al Fadl agreed to be debriefed by the FBI. During those debriefings, he was not provided with *Miranda* warnings nor was he represented by counsel. At that time, law enforcement and the intelligence community knew little about the structure of al Qaeda. Al Fadl provided valuable intelligence regarding the structure of the organization, including the fact that al Qaeda had a Shura Council and sub-committees; in addition, he identified many high ranking members, and explained al Qaeda's history and philosophy. At the time and for the next several years, Al Fadl was a premier source of intelligence regarding al Qaeda. The following details some of the specific information provided by al Fadl to the FBI:

- From 1987 through 1995, UBL ran the Islamic Army. UBL created numerous divisions in the army in order to confuse governments in the event that a soldier was captured so that the soldier's participation in the war could not be traced back to UBL. Each division or cell within the Islamic Army had its own goals and objectives such as reconnaissance, operations, and recruiting and it would not go beyond its own specialty.
- Al Fadl identified Mustafa Shalabi from the Al Farooq Mosque in Brooklyn as an associate who worked with UBL and who was potentially involved in recruiting within the United States. According to al Fadl, as early as 1992, UBL became very interested in recruiting those with American citizenship.
- He reported that UBL and Abdullah Azzam established a "Mektab al Khidmat" or "Service Office" which handled the documents, distribution and logistics for all mujahideen who joined the war in Afghanistan. Although the initial reason for keeping the documents was to notify their families in the event of their death, over time the records of dead soldiers were used to falsify travel documents. In addition to forging travel documents, the office collected background documents such as

high school diplomas and birth certificates that would be used to back up the forged travel documents.

- Al Fadl identified two key individuals responsible for manufacturing false documents.
- He also identified three other UBL or Azzam associates who traveled to New York to meet with Shalabi.
- He explained that he raised funds for UBL in New York and that a substantial amount of money was raised by targeting individuals and stores in Brooklyn. The funds were sent to Pakistan or were used to make travel arrangements for individuals going to Afghanistan to fight.
- Al Fadl detailed the establishment of a camp outside Mogadishu; he reported that Abu Hafs el Masri”) (a future military commander of al Qaeda) and Abu Talha al Sudani went there to provoke various Somali factions against the U.S. presence in Somalia.
- Al Fadl also explained UBL’s interest in Islamic jurisprudence that supported his goal that the Americans must be removed from Saudi Arabia.
- According to al Fadl, UBL sent Wali Khan Amin Shah (a/k/a “Osama Asmurai”) to the Philippines to set up new camps and Shah worked very closely with UBL. Al Fadl identified Shah as missing fingers on one of his hands; and he said that in 1996, he had been living at a guest house near Peshawar. Al Fadl explained that he knew Shah had recently attempted to carry out an operation that had failed and that some of his associates had been arrested. Al Fadl also identified other associates of Shah. (As explained below in connection with Shah’s intelligence, Shah was arrested for his role in the failed 1995 “Bojinka” plot to bomb multiple U.S. commercial airliners over the Pacific.)
- Al Fadl identified a photograph of Sheik Omar Abdel Rahman as well as of another member of his group, who was previously unknown to the FBI. Rahman (a/k/a “The Blind Sheikh”) was later arrested in connection with a separate plot to conduct terrorist attacks in New York. He was convicted in 1995 and sentenced to life in prison.)
- He also identified photographs of a Sudanese member of the Islamic Army, and Mutawakil, a Saudi member of the Islamic Army who was an Emir in Jalalabad (Afghanistan).

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- Al Fadl provided physical descriptions and names of individuals who had established a UBL front company. He provided information on a Saudi who owned a relief organization and worked on other projects with UBL, including a UBL front company, “Premium,” which was involved in exporting sunflower seeds.
- He explained that UBL wanted an Islamic state in Bosnia but believed that it would never happen in Europe. He also identified an associate that UBL sent to Bosnia.
- He identified a palm oil business in Malaysia run by Mamdouh Salim (a/k/a “Abu Hajer al Iraqi”), who was a member of al Qaeda’s Shura Council.

Al Fadl was eventually flown to the United States and charged with various terrorism-related offenses in the Southern District of New York. He pled guilty to conspiracy to attack the national defense facilities of the United States (18 U.S.C. § 2155(b)), and conspiracy to transport explosives in connection with attacking the national defense of the United States (18 U.S.C. §§ 371, 844(h)). He continued to provide high quality intelligence on al Qaeda and testified for the government in the 2001 trial regarding the 1998 East African Embassy bombings.

***L’Houssaine Kherchtou:***

Kherchtou was an early member of al Qaeda in the 1990s and a member of one of the al Qaeda cells responsible for the 1998 East African Embassy bombings. In August 2000, the FBI approached Kherchtou in Morocco. He agreed to waive his *Miranda* rights and be interviewed by the FBI. Like al Fadl, Kherchtou was an invaluable source of intelligence regarding the structure and membership of al Qaeda at a time when the United States did not have access to other human source intelligence. For example, Kherchtou explained how al Qaeda recruited people; and how they used non-governmental organizations and false passports. He also explained how al Qaeda developed targets, and conducted surveillance and training; provided information on its finances and membership; and identified the weapons used and the vehicles driven. In addition, he identified al Qaeda’s principal liaison with a foreign government, and explained the relationship between al Qaeda and Hezbollah.

After approximately one month of debriefing, he was flown to the United States. He was continually debriefed in the United States by the FBI, with his counsel present. Kherchtou pled guilty in the Southern District of New York to conspiracy to kill U.S. nationals (18 U.S.C. § 2332(b)). He continued to provide significant information on al Qaeda, and he testified for the government in the 2001 and 2010 trials regarding the 1998 East African Embassy bombings.

***Ahmed Ressam:***

Ressam, the so-called “Millennium Bomber,” was arrested in December 1999 as he attempted to enter the United States from British Columbia through Port Angeles, Washington. At the port he provided a fraudulently obtained Canadian passport and a Costco membership card to the customs inspector. He fled on foot after being asked follow-up questions. The inspector located explosives and bomb-making materials in the trunk of the vehicle. Ressam was apprehended after a four-block foot chase. He was provided with written *Miranda* warnings in French and was read his *Miranda* rights in French over the telephone by an FBI agent. He immediately invoked his *Miranda* rights. The FBI agent alerted the customs inspectors that Ressam’s French accent was not that of a French-Canadian as he claimed, but rather of someone from North Africa.

Ressam was convicted in 2000, after a trial in the Western District of Washington, of carrying explosives during the commission of a felony (18 U.S.C. §§ 844(h)(2)); committing an act of terrorism that transcended national boundaries (18 U.S.C. § 2332b(c)); transporting explosives (18 U.S.C. §§ 842(a)(3)(A), 844(a) and (2)); and using a fictitious name for entry into the United States (18 U.S.C. § 1546). He was initially sentenced to 22 years’ imprisonment. After multiple appeals, the Ninth Circuit held, in February 2010, that the 22-year sentence was well below the applicable guidelines range, and remanded the case for re-sentencing to a different district court judge. The Ninth Circuit issued an amended opinion in December 10, 2010. Ressam’s petition for rehearing and petition for rehearing en banc is pending before the Ninth Circuit.

Ressam began cooperating with law enforcement after his trial, providing significant information on al Qaeda’s Khalden terrorist training camp located in Afghanistan and other terrorist subjects. He also testified in the trial in the Southern District of New York in July 2001 of his co-conspirator Mokhtar Haouri. However, Ressam ultimately stopped cooperating, which led to the dismissal of indictments against two subjects and the termination of successful investigative efforts against a number of other targets.

***Subject B:***

The Northern Alliance captured Subject B in Afghanistan in 2001. He refused to cooperate with U.S. interrogators immediately after his surrender; however, approximately 2 weeks later, he waived his *Miranda* rights, and the FBI and the Naval Criminal Investigative Service conducted several interviews. In those interviews, he provided detailed intelligence on his actions with the Taliban and his interactions with al Qaeda and Usama Bin Laden, including describing meeting personally with UBL at an al Qaeda poisons training facility near Kandahar, Afghanistan. In addition, he informed the FBI that after the September 11 attacks, UBL and his cadre of bodyguards moved every four hours to avoid capture, and he described the

vehicles that were used in UBL's convoy. He provided the FBI with information that UBL had plans for additional attacks following 9/11, and might have already dispatched sleeper operatives to attack the United States. He also described in detail the training he had received from al Qaeda as well as the facilitators who aided his entry into training camps and the camp instructors.

***Subject C:***

Subject C was arrested in early 2002 in the Middle East and ultimately turned over to the United States. He provided substantial intelligence on al-Qa'ida and Jemaah Islamiyah in several months of debriefings with the FBI, including the following:

- He provided detailed information about his meetings with Khalid Sheikh Mohammed (KSM) and Riduan Isomuddin (a/k/a, "Hambali"), who were directing a joint al-Qa'ida/Jemaah Islamiyah plot to bomb U.S. military targets and the U.S. and Israeli embassies in Singapore and the Philippines. Although the plot itself had already been disrupted by the time of his debriefings (several Jemaah Islamiyah members in Singapore were arrested in December 2001), his reporting was the most complete information provided at that time regarding KSM's role in directing multiple plots against the United States both before and after 9/11.
- Subject C also identified multiple lower level operatives with whom he had been working prior to his arrest; and he provided dates and meeting locations, the names and descriptions of other operatives, and a detailed chronology of the plot in which he was involved.
- He explained to the FBI how he became involved with al-Qa'ida as a teenager, thereby providing important insight into how al-Qa'ida identifies and recruits valuable Western operatives. He described traveling to Afghanistan and attending his first round of al-Qa'ida training in the summer of 2000, telling his family that he was studying in another country. He described in detail the route he traveled to Afghanistan, the guest houses in which he stayed and the names of people with whom he traveled or stayed en route. He also detailed the training he underwent at al Farooq, a training camp near Kandahar, and described the trainers and other attendees.
- He also identified several people whom he considered "important" in al-Qa'ida, including "Mukhtar" (KSM). He later met and swore bay'at to him.

- UBL told Subject C that he had been selected for an outside mission because he had a “clean” western passport and spoke English well. At UBL’s instruction, Subject C traveled to Karachi, Pakistan in the summer of 2001, where he stayed with KSM. KSM taught him how to travel on trains and buses, how to book travel tickets, and how to conform to local customs. After a few weeks, KSM directed him to travel to Malaysia to meet with individuals planning operations against the U.S. and Israeli embassies in the Philippines, and to provide them with funding.
- Once in Kuala Lumpur, he met an individual who described being in Karachi with KSM on 9/11, who said that the video equipment in KSM’s apartment was set to record on the morning of 9/11. Based on this information indicating KSM’s apparent foreknowledge, Subject C concluded that KSM had arranged and coordinated the 9/11 attacks. This was one of the earliest pieces of source reporting, prior to KSM’s capture, confirming that KSM was the architect of 9/11.
- Subject C provided the FBI with the phone numbers and e-mail addresses that he used to contact KSM.

***Ernest James Ujaama:***

Ujaama was involved in a plot to set up a jihad training camp at a farm in Bly, Oregon, and also operated websites for Mustafa Kamel Mustafa (a/k/a, “Abu Hamza” or “Hamza al-Masri”) the former imam of the Finsbury Park Mosque in London, England. In July 2002, Ujaama was arrested in Denver and brought to Seattle. He was *Mirandized* upon arrest and immediately invoked his *Miranda* rights. However, he eventually agreed to be debriefed with his attorney present and provided valuable information to law enforcement regarding Mustafa.

Ujaama pled guilty in the Western District of Washington in April 2003, pursuant to a plea agreement, to conspiracy to violate the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1705(b). He admitted to conspiring with others to provide support, including money, computer software, technology and services, to the Taliban and to persons in the territory of Afghanistan controlled by the Taliban.

As part of the plea agreement, Ujaama agreed to cooperate with the government in ongoing terrorism investigations for up to 10 years from the date of the agreement. He was sentenced to 24 months’ imprisonment. He absconded from supervised release in December 2006 prior to providing testimony. He was arrested in Belize and returned to the United States and is now in custody. He has resumed cooperation and now faces resentencing with a maximum 30 year sentence. In April 2009, Ujaama testified in the

trial of Oussama Kassir, who was charged with a conspiracy in connection with the Bly jihad training camp and with operating numerous terrorist websites in the same indictment as Mustafa. Kassir was found guilty of all 11 counts against him in May 2009, and he received a life sentence, plus 115 years, in September 2009. Ujaama's testimony was considered instrumental in helping to secure Kassir's conviction.

***Lyman Faris:***

The FBI learned about Faris after KSM's arrest in Rawalpindi (Pakistan) in March 2003. Agents contacted Faris, who was living in Columbus, Ohio, and he agreed to be interviewed. After he initially only provided scant information, the FBI asked him to take a polygraph. Faris then provided additional information that was of interest.

Over the course of FBI interviews conducted between March and May 2003, Faris, who had trained and fought in both Kashmir and Afghanistan in the late 1980s, provided extensive information about al-Qa'ida operations, leaders and its plans for attacks in the United States, including the following:

- He provided detailed information about his close friend and high-ranking al-Qa'ida affiliate Subject G. He identified photographs of Subject G and his son, both of whom, at the time of Faris's interviews, were at large in Pakistan and being sought by the United States. Faris gave the FBI a lengthy description of Subject G's personality and habits, including his daily routine, descriptions of vehicles Subject G used to travel around Pakistan, his communication habits and the security measures he employed. For instance, Faris advised that Subject G would communicate by using multiple cell phones. Faris also described several "errands" he had completed for Subject G (and the al-Qa'ida security tradecraft involved), including entering a travel agency in Karachi shortly after 9/11 dressed as a Tabligh Jamaat member to extend the departure date of approximately five airline tickets to Yemen for one month in order to keep five al-Qa'ida members in Pakistan. Significantly, Faris also described his travel with Subject G in the summer of 2000 to an al-Qa'ida safehouse in Kandahar, Afghanistan and then to an al-Qa'ida training camp "between two mountains," about an hour's drive from Kandahar. Faris described having lunch with UBL at the camp, and he identified the locations of the safehouse and camp on a map of Kandahar at the request of FBI agents.
- Faris also identified a photo of KSM, who had been captured just weeks before Faris's interviews, as an al-Qa'ida official

whom Faris met during his lunch with UBL and who was introduced to Faris as “Botci.” Faris told the FBI that during this initial meeting, KSM asked Faris about “ultralight” and other “kit” airplanes, and advised Faris that he was interested in using them as some type of “escaping airplane.” KSM tasked Faris with researching and providing him with additional information on ultralights. Faris admitted that approximately two or three months after this meeting, he printed material regarding ultralights off of the Internet and gave it to Subject G. Faris also informed the FBI about meeting KSM again in February 2002, in Karachi. After traveling with Subject G to a “money exchange” location in Karachi, where Subject G picked up approximately \$250,000 in cash (U.S.D.) and divided it into five bags, Faris accompanied Subject G’s son to a house in Karachi where they delivered the money to KSM. Faris told the FBI that during this meeting, KSM asked Faris for information about his job as a commercial truck driver in the United States and was particularly interested in Faris’s shipment of airplane cargo containers and his access to airports.

- Faris also provided the FBI with a description of counter-surveillance methods employed by KSM.
- KSM also pressed Faris for information about bringing al-Qa’ida operatives into the United States. KSM asked about the possibility of forging documents such as driver’s licenses and social security cards and about bribing officials in the United States.
- According to Faris, KSM believed that al-Qa’ida could accomplish attacks within the United States through bribing police officers.
- During this meeting, KSM tasked Faris with obtaining gas cutters to cut tension wires in order to attack and destroy the Brooklyn Bridge (when Faris returned to the United States).
- Faris advised the FBI that KSM instructed him to communicate in code about this project (*e.g.*, to refer to the gas cutters as “gas stations”).
- After a polygraph examination, Faris admitted to the FBI that he had conducted internet research about gas cutters and admitted to taking photos of the bridge and other structures around Manhattan.
- Faris also provided the FBI with critical information about links between KSM, Subject G, and Subject G’s relatives in the United States as well as about Faris’s own contacts with other



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potential al-Qa'ida sympathizers in the United States, allowing the FBI to investigate other possible domestic threats.

- Faris provided information about his contacts with Majid Khan, a detainee held at Guantanamo Bay, who was arrested in Karachi (Pakistan) in March 2003. That information assisted the FBI in fully identifying the domestic threat posed by Majid Khan, who had resided in Baltimore, Maryland from 1996 to 2002, and ensuring that all domestic links to Majid were exhausted.
- Faris informed the FBI that he believed that al-Qa'ida was attempting to develop a chemical weapon, because in early 2001, Faris was present when Subject G's son brought a man who was suffering from gas poisoning from testing that "they" had been conducting at Subject G's house in Karachi.

Faris pled guilty in the Eastern District of Virginia to one count of providing material support to al-Qaeda (18 U.S.C. § 2339B) and one count of conspiracy to provide material support to al-Qaeda (18 U.S.C. §§ 2339B & 371). Later, Faris stopped cooperating with the FBI and sought without success to withdraw his guilty plea. He repudiated all of his prior statements to the FBI and alleged that he had been threatened with "enemy combatant" status. Faris was eventually sentenced to 20 years' imprisonment (the statutory maximum).

***Nuradin Abdi:***

In November 2003, Abdi was arrested by Immigration and Customs Enforcement (ICE) after the Joint Terrorism Task Force (JTTF) learned that he was involved in a plot to blow up or shoot up a shopping mall. Upon his arrest he was *Mirandized* and immediately waived his rights. Abdi was offered a lawyer provided by his family, which he initially declined. Eventually, he agreed to speak to a lawyer who encouraged him to continue cooperating. Through a number of interviews, Abdi provided a tremendous amount of information regarding his travel to Africa to attend a training camp to fight jihad in Kosovo and Chechnya. He also told law enforcement that upon his return to the United States, he conspired with Iyman Faris and another individual, Christopher Paul, to send equipment overseas to al Qaeda and to plot violent acts in the United States.

In June 2004, Abdi was charged with conspiracy to provide material support to a terrorist act, namely, to murder individuals and destroy property overseas (18 U.S.C. §§ 371, 2339A, 956); conspiracy to provide material support to al-Qaeda (18 U.S.C. § 2339B); knowingly and willfully making a false representation to obtain a travel document (18 U.S.C. § 1546); and using a fraudulently obtained travel document to re-enter the

United States from Africa (18 U.S.C. § 1546). He ceased his cooperation after being charged and underwent a court-ordered competency evaluation. He fired his attorney and hired another attorney who disallowed law enforcement access.

Abdi pled guilty in the Southern District of Ohio to one count of material support to terrorism (18 U.S.C. § 2339A). He was sentenced to ten years' imprisonment in November 2007.

***Lackawanna Six:***

Prior to 9/11, these defendants, U.S. citizens from Lackawanna, New York, traveled to and received training in an al-Qaeda training camp in Afghanistan. At the camp, they met UBL, who spoke about attacking the United States. Bin Laden told the defendants that 50 men were on a mission related to such an attack and claimed responsibility for attacking the U.S. embassies in East Africa.

In September 2002, the defendants were arrested. One defendant initially waived his *Miranda* rights and provided a signed sworn statement, while in Bahrain. Another also provided a signed sworn statement to the FBI prior to his arrest. Three of the defendants had been interviewed by the FBI prior to their arrests and provided false statements. One was interviewed several times before his arrest and was not completely truthful. Approximately six weeks after their arrests, the defendants agreed to proffer, with their attorneys present, which led to numerous debriefings over the next year. In 2003, all of the defendants entered into plea agreements and agreed to continue to cooperate.

The defendants pled guilty in 2003 in the Western District of New York to various offenses: Faysal Galab pled guilty to providing funds and services to al-Qaeda in violation of IEEPA (50 U.S.C. § 1705); and Yahya Goba, Shafal Mosed, Sahim Alwan, Yaseinn Taher and Mukhtar al-Bakri pled guilty to providing material support to al-Qaeda (18 U.S.C. § 2339B), based on their pre-9/11 travel to Afghanistan to train in an al-Qaeda-affiliated camp. They received sentences ranging from 84 months to 120 months' imprisonment. The defendants also provided assistance through testimony in other terrorism prosecutions in the United States, Australia and in military commissions regarding terrorist training camps and al-Qaeda.

***Mohammed Abdullah Warsame:***

Warsame is a Somali national who obtained refugee status in Canada in 1989 and obtained landed immigrant status thereafter. After attending various training camps in Afghanistan from March 2000 through that summer, including one that he called the "camp of Usama bin Laden," Warsame traveled from Pakistan, via London, to Canada. He thereafter entered the United States (he had married a U.S. citizen in 1995). In December 2003, Warsame was approached by the FBI in Minneapolis and

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voluntarily submitted to an interview which took place over two days. Warsame agreed to speak to agents after they asked him to “help the United States.”

In these interviews, Warsame, under questioning, eventually admitted that he had traveled to Afghanistan in March 2002 and trained at a camp he referred to as “Abu Massab’s camp.” After several months, he had traveled to “the camp of Usama Bin Laden.” Warsame advised the FBI that in addition to basic training, specialized training was carried out at the camp, including training in the use of anti-aircraft guns, explosives, suicide missions and poisons. He had heard from others that the trainees in the poisons camp were learning how to attack locations by poisoning the air or atmosphere. Warsame also described for the FBI his time at an al Qaeda guest house in Kandahar and work at the al Qaeda clinic there. He told interviewing agents that he had been tasked to teach English to others working at the clinic, and that, while he was there, a goat was shot so that trainees could practice removing bullets. He initially claimed that he decided to leave Afghanistan to see his family, but under questioning, admitted that he had been given permission to leave Kandahar and was provided funds to travel by Abu Hafis al Masri, al Qaeda’s military commander (later killed in a U.S. airstrike). According to Warsame, Abu Hafis wanted him to leave Afghanistan before his Canadian passport expired and did not want him to apply for a new one in Pakistan in order to avoid suspicion. When asked if Abu Hafis expected Warsame to return to Afghanistan once he obtained a new passport, Warsame answered that Abu Hafis told him that if he wanted to come back, it would be good.

During the initial interviews, Warsame reluctantly admitted that he had made contact with individuals whom he had known in Afghanistan when he arrived in London. He also identified another Canadian citizen attempting to return to Canada from Afghanistan. In a subsequent interview, conducted in August 2004, Warsame provided the FBI additional information about his time and associates in London, including his Canadian associate. Based on information Warsame provided about his contacts in London, the FBI was able to conduct additional investigation to identify those associates. FBI agents believe that Warsame had likely been dispatched for operational purposes to the United States. However, any operational activity that he planned to undertake was disrupted by his arrest and statements he made to the FBI.

Warsame eventually terminated the interviews. Sometime after that, he was arrested and indicted for providing material support to al Qaeda (18 U.S.C. § 2339B). Warsame pled guilty in the District of Minnesota to one count of providing material support to al Qaeda (18 U.S.C. § 2339B). In July 2009, he was sentenced to 92 months’ imprisonment with credit for time served. He was removed from the United States to Canada upon his release in October 2010.

***Mohammed Junaid Babar:***

Babar was involved with Omar Khyam, Momin Khawaja and others who were arrested and charged in the U.K. and Canada in connection with a 2004 plot to bomb soft targets in the U.K. Babar was placed under surveillance upon his return to the United States in March 2004. He was approached by JTTF agents in April 2004 and participated in five days of voluntary debriefings. Agents advised Babar of his *Miranda* rights shortly after approaching him. Babar waived his *Miranda* rights and agreed to be debriefed.

Babar was arrested pursuant to a material witness warrant in April 2004. He pled guilty in the Southern District of New York in June 2004, to a five-count information based on his provision of material support to al Qaeda and to a British group.

Over the years, agents have developed a close working relationship with Babar, who is considered one of the most valuable sources of intelligence on al Qaeda. He also provided information on Lashkar-e-Taiba (LET) and Al-Muhajiroun. Babar arranged jihadi training for the U.K. plotters (and others) in July 2003 where they all received training in basic military skills and light weapons training. He also met with Hadi al-Iraqi, then al Qaeda's head of military activities in Afghanistan, on four occasions in January and February 2004.

He has testified in numerous terrorism trials in the U.K. and Canada and was expected to testify against co-conspirator Syed Hashmi in a 2010 trial in the Southern District of New York; however Hashmi pled guilty on the eve of trial. Babar was sentenced to time served on January 4, 2011.

***Subject D:***

Subject D waived his *Miranda* rights during overseas interrogations by the FBI in November 2008. He described attending a terrorist training camp and offering himself as a suicide bomber. He participated in rocket attacks on a U.S. military base in Afghanistan in late 2008, and he provided specific information about a possible terrorist target inside the United States.

***Subject E:***

Subject E waived his *Miranda* rights and provided information on at least three camps, where fighters received physical education, and firearms and explosives instruction. According to Subject E, he was told by other fighters in the camp that the instructors at one of the camps were al Qaeda members.

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**Hizbollah*****Khalil El Reda:***

El Reda provided information on Hizbollah fundraising activities in Los Angeles and Boston. He described money laundering transactions, as well as how funds were collected and forwarded to a charitable organization that was designated by the Department of Treasury's Office of Foreign Assets Control as a Hizbollah front organization in 2007.

***Subject F:***

Subject F was a member, former fighter, recruiter and fundraiser for Hizbollah in the United States, and a relative was a Hizbollah chief for a region of Lebanon. Subject F provided information to the FBI regarding the organization. His information was particularly valuable because it addressed the internal workings of the organization, including, for example, information about its structure, the identity of its members, its intent regarding the United States, and its future potential to commit terrorist attacks against the United States or U.S. interests. Subject F confirmed that he was an actual Hizbollah member and provided details on the recruitment, application and vetting process that Hizbollah undertakes. He explained how he was able to illegally enter the United States through a specific country, thereby alerting the FBI to the potential for other Hizbollah members to do the same.

Subject F was charged with conspiracy to provide material support to Hizbollah in U.S. court. He pled guilty and was sentenced to a term of years in prison. Subject F was deported to Lebanon upon completion of his sentence.

**Other Groups*****Mohammed Rashed:***

Rashed was a member of the "15 May" organization, a terrorist organization active in the 1970s and early 1980s whose goals included promoting the Palestinian cause by causing personal injury and economic damage to U.S. and Israeli interests around the world. Rashed was involved in arranging and carrying out bombing missions to further the organization's goals and he participated in the planning of some of the bombing missions. In August 1982, Rashed, his wife and young child flew from Baghdad to Tokyo. Before leaving the aircraft in Tokyo, Rashed placed an improvised explosive device (IED) made of PETN under the seat cushion of the seat in which he was sitting and pulled the pin to activate the IED. The aircraft continued on from Tokyo to Honolulu, as Pan Am flight 830. When the aircraft was approximately 20 minutes from Honolulu, the

bomb exploded, killing Toru Ozawa, the 16-year old passenger in the seat previously occupied by Rashed, and injuring 15 others.

Investigation into this incident revealed numerous other bombing missions conducted by Rashed and other 15 May organization members in 1980 and 1982. In July 1987, a nine-count indictment was returned against Rashed and two co-defendants in the District of D.C., charging conspiracy to commit assault and damage to property; conspiracy to commit murder; murder; aircraft sabotage; damaging aircraft used in foreign commerce; placing bombs on aircraft; assault; attempted aircraft sabotage and aiding and abetting, in connection with the bombing of Pan Am flight 830, the bombing of the Mount Royal Hotel in London, England, the attempted bombing of an aircraft in Rio de Janeiro, Brazil, and the attempted bombing of a hotel in Switzerland.

Rashed was captured in Greece in 1988. After Greece denied the U.S. extradition request in 1990, Greek authorities initiated a prosecution of him. Rashed was convicted in Greece in 1992 and ultimately sentenced to 15 years' imprisonment. In December 1996, after serving 8 ½ years of his sentence, he was released and began a trip to Africa. At the request of the United States, he was detained in a third country. The United States obtained custody of Rashed in June 1998, and he was brought here to stand trial on the pending indictment.

Rashed has been debriefed extensively by U.S. investigators and has provided useful information in the investigation into a 1986 bombing of a U.S. aircraft in Europe that killed four American citizens. He has cooperated with German prosecutors investigating the 1982 bombing of a restaurant in Berlin that killed a two-year-old girl, allowing the German authorities to issue an arrest warrant in that case. He has also cooperated with a French request for an interview relating to the bombing of a synagogue in 1980.

Rashed pled guilty in the District of D.C. in December 2002, to the first three counts of the indictment, conspiracy to commit murder (18 U.S.C. § 1117); conspiracy to commit offenses against the United States, including the bombing of Pan Am flight 830 and the attempted bombing of a flight in Rio de Janeiro (18 U.S.C. § 371); and premeditated murder of Toru Ozawa by means of an explosive device (18 U.S.C. § 1111). The plea included an agreement to cooperate. In exchange for the plea, the prosecutors agreed to recommend a release date of March 2013. In March 2006, Rashed was sentenced to an additional seven years.

***Virginia Jihad:***

The Virginia Jihad case involved a number of individuals who attended the Dar al-Arqam Islamic Center in Falls Church, Virginia, and who participated in paintball and paramilitary training with the encouragement of Ali Al-Timimi, a speaker and spiritual leader at the Center. Soon after 9/11, Al-Timimi encouraged the defendants to go to Pakistan to receive

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military training from LET in order to be able to fight against American troops soon expected to arrive in Afghanistan. Four of the defendants traveled a week later and attended an LET camp in Pakistan. Another defendant assisted an LET operative, Mohammed Ajmal Khan, in obtaining high-tech equipment for LET. This conduct occurred after LET had been designated a foreign terrorist organization.

In early 2003, one of the defendants agreed to six weeks of voluntary debriefings with the FBI. This defendant was later arrested and read *Miranda* warnings which he waived, and he continued to cooperate. The other defendants were arrested in the months that followed.

In June 2003, 11 defendants were indicted in a 41-count indictment. Four defendants agreed to cooperate and have provided valuable information against their co-defendants who trained at LET camps, including providing testimony in several trials.

Subsequent indictments of two additional defendants, as well as one indictment of a previously-acquitted defendant for perjury, providing false statements, and obstruction of justice, led to three additional convictions. In total, the Virginia Jihad investigation has resulted in the conviction of 12 defendants in the United States, the most in any single terrorism case since 9/11. Those found guilty of charges brought by this investigation have received sentences ranging from approximately four years to life imprisonment.

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	<b>FEDERAL COURTS</b>	<b>MILITARY COMMISSIONS</b>	<b>LAW OF WAR DETENTION</b>
<p><b>GENERAL PROCEDURAL RIGHTS FOR DEFENDANT/ ACCUSED/ PETITIONER</b></p>	<ul style="list-style-type: none"> <li>○ Greatest procedural protections.</li> <li>○ Full panoply of constitutional rights, including, <i>inter alia</i>, 4th Amendment (search and seizure; probable cause; speedy presentment); 5th Amendment (due process; double jeopardy; exculpatory evidence); 6th Amendment (speedy and public trial; petit jury; confrontation, including right to be present, confront witnesses, compel witnesses; qualified self-representation);</li> <li>○ Presumption of innocence; notice of charges; guilt must be proven beyond a reasonable doubt; impartial decision-maker; procedures for selection of jurors;</li> <li>○ Federal Rules of Evidence apply (including limitations on admissibility of prior acts, prejudicial evidence, and hearsay);</li> <li>○ Unanimous jury of 12 required for verdict;</li> <li>○ Appeal as of right to federal appeals court; deferential appellate review on facts and de novo review on legal issues;</li> <li>○ Constitutional and statutory venue requirements apply to limit location of trials.</li> </ul>	<ul style="list-style-type: none"> <li>○ Most of the rights mandated in federal courts are also required here.</li> </ul> <p><i>Some notable differences [in addition to those listed in greater detail below]:</i></p> <ul style="list-style-type: none"> <li>○ Rules on admissibility of hearsay are broader than in federal court but still limited (note this is of potential benefit to both government and accused);</li> <li>○ Speedy trial rules are not as rigid as those codified in federal Speedy Trial Act (although there may still be constitutional issues);</li> <li>○ No unanimous jury requirement (2/3 of jury) for conviction; in non-capital cases, minimum of 5 members required on jury;</li> <li>○ Jury consists of military officers;</li> <li>○ Two layers of appeal: (1) Court of Military Commission Review, which has greater flexibility to review factual issues (in addition to legal review), and to conduct a rehearing; and then (2) D.C. Circuit, which conducts deferential review of facts and de novo review of legal issues;</li> <li>○ No venue restrictions as in federal criminal trials so trials can take place in geographically convenient locations, domestic or abroad.</li> </ul>	<ul style="list-style-type: none"> <li>○ Fewest procedural protections.</li> </ul> <p><i>Where habeas applies:</i></p> <ul style="list-style-type: none"> <li>○ Supreme Court has recognized that standards and procedures to be applied must account for the special circumstances of wartime detention, and left open the contours of the substantive and procedural law for lower courts to shape in a common law fashion;</li> <li>○ Detainee has a right to an adversarial proceeding before a federal judge although it is possible there can be some delay before this right attaches;</li> <li>○ Generally, at a minimum, detainee has right to unclassified evidence upon which detention is based, to respond to that evidence, and to “exculpatory” evidence;</li> <li>○ Procedural rules are based on the discretion of the judges and broadly favor admission; hearsay is admissible; assessment of weight given hearsay is very fact dependent;</li> <li>○ Appeal as of right to federal appeals court, with deferential review of facts and de novo review of legal issues;</li> <li>○ Proceedings need to be conducted before a federal judge, generally in district where detainee is held, though different rules apply with respect to detainees held overseas (for example, all of the Guantanamo habeas litigation is conducted in federal court in D.C.).</li> </ul> <p><i>Where habeas does not apply:</i></p> <ul style="list-style-type: none"> <li>○ Procedural protections are based solely</li> </ul>



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	<b>FEDERAL COURTS</b>	<b>MILITARY COMMISSIONS</b>	<b>LAW OF WAR DETENTION</b>
			on administrative rules; no right to judicial review.
<b>SCOPE &amp; WHO MAY BE DETAINED</b>	<ul style="list-style-type: none"> <li>○ Unlimited (<i>e.g.</i>, by citizenship/alienage; affiliation; etc.).</li> </ul>	<ul style="list-style-type: none"> <li>○ Cannot charge a U.S. citizen;</li> <li>○ Must be an “alien” and an “unprivileged enemy belligerent” – that is, an individual who has engaged in or has purposefully and materially supported hostilities against the U.S. or its coalition partners; or was part of al Qaeda, Taliban or associated forces at the time of commission of offense;</li> <li>○ Does not currently include individuals who are part of or supporting terrorist groups not affiliated with al Qaeda, Taliban, or associated forces (<i>e.g.</i>, Hamas or Hizbollah).</li> </ul>	<ul style="list-style-type: none"> <li>○ Citizenship and alienage not generally relevant (although location/circumstances of capture may be relevant – see below);</li> <li>○ Must be within ambit of AUMF – which the government interprets as informed by law-of-war principles to authorize detention of those who are part of, or who substantially supported, Taliban, al Qaeda, or associated forces that are engaged in hostilities against the United States or its coalition partners;<sup>2</sup></li> <li>○ Does not include individuals who are part of or supporting terrorist groups not affiliated with al Qaeda, Taliban, or associated forces (<i>e.g.</i>, Hamas or Hizbollah).</li> </ul>
<b>REQUIRED PROOF</b>	<ul style="list-style-type: none"> <li>○ Broad array of terrorism offenses in Title 18 (from murder/WMD to material support/financing);</li> <li>○ Also can use non-terrorism-related offenses if needed, such as immigration fraud or false statements;</li> <li>○ Clear authority to charge if codified in Title 18.</li> </ul>	<ul style="list-style-type: none"> <li>○ Offense must be punishable by MCA or law of war (or two UCMJ offenses);</li> <li>○ 32 MCA offenses (covering many but not all terrorism-related offenses including hijacking, murder, terrorism, material support);</li> <li>○ There is some risk that courts may reject material support and conspiracy charges (at least to the extent they are as broadly construed as in the federal criminal code) based on ex post facto or other concerns;</li> <li>○ Does not cover other federal criminal code-type offenses (<i>e.g.</i>, immigration</li> </ul>	<ul style="list-style-type: none"> <li>○ No offense needs to be charged;</li> <li>○ However, must be within AUMF (and, where habeas applies, will have to show evidence of this to an Article III court).</li> </ul>

1. This discussion does not address any independent constitutional power that may exist with respect to detention.

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	<b>FEDERAL COURTS</b>	<b>MILITARY COMMISSIONS</b>	<b>LAW OF WAR DETENTION</b>
<b>EVIDENTIARY BURDEN</b>	<ul style="list-style-type: none"> <li>○ Government must prove accused is guilty of the crimes charged beyond a reasonable doubt;</li> <li>○ Presumption of innocence;</li> <li>○ Evidence is admissible consistent with Federal Rules of Evidence.</li> </ul>	<p>fraud, etc.).</p> <ul style="list-style-type: none"> <li>○ Government must prove accused is guilty of the crimes charged beyond a reasonable doubt;</li> <li>○ Presumption of innocence;</li> <li>○ Evidence is admissible consistent with 2009 MCA and 2010 Manual on Military Commissions.</li> </ul>	<p><i>Where habeas applies:</i></p> <ul style="list-style-type: none"> <li>○ Government must prove detention is authorized under AUMF; district courts have generally required proof by a preponderance of the evidence, a standard which the D.C. Circuit has upheld as constitutionally sufficient;</li> <li>○ Rebuttable presumption in favor of the government as to authenticity of the evidence (at least based upon District Court Case Management Order governing habeas cases);</li> <li>○ Evidentiary rules are generally within individual judge’s discretion (guidance from D.C. Circuit suggests rules should be broadly applied in favor of admissibility);</li> <li>○ District judges have thus far reviewed evidence rigorously (although different judges have evaluated similar evidence differently in some contexts).</li> </ul> <p><i>Where habeas does not apply:</i></p> <ul style="list-style-type: none"> <li>○ Governed solely by administrative procedures.</li> </ul>
<b>DURATION OF CONFINEMENT</b>	<ul style="list-style-type: none"> <li>○ Temporal limitation is length of sentence, regardless of whether conflict exists or the nature of the conflict.</li> </ul>	<ul style="list-style-type: none"> <li>○ Temporal limitation is length of sentence, regardless of whether conflict exists or the nature of the conflict.</li> </ul>	<ul style="list-style-type: none"> <li>○ Temporal scope is indeterminate: authority to detain will end when conflict ends; when hostilities end, international law requires prompt repatriation;</li> <li>○ May be difficult to determine when that is, but should endure at least while U.S. troops are engaged in combat;</li> <li>○ Even if conflict is still ongoing in some</li> </ul>

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	<b>FEDERAL COURTS</b>	<b>MILITARY COMMISSIONS</b>	<b>LAW OF WAR DETENTION</b>
			form, it is possible that law of war authority will eventually “unravel,” per Supreme Court plurality in <i>Hamdi</i> , depending on the nature of the existing conflict.
<b>SENTENCES (NON-CAPITAL)</b>	<ul style="list-style-type: none"> <li>○ Based on statutorily-established maximums and, in some cases, mandatory minimums;</li> <li>○ Determined by judge;</li> <li>○ Judge’s discretion is further guided by Sentencing Guidelines;</li> <li>○ Can have lengthy sentence, so defendant could be detained even if conflict is deemed to have ended.</li> </ul>	<ul style="list-style-type: none"> <li>○ Imposed by members of the panel, not judge;</li> <li>○ No Sentencing Guidelines or mandatory minimum sentences;</li> <li>○ Panel can impose any sentence as long as it does not exceed statutory maximum or any limitation imposed by Secretary of Defense;</li> <li>○ Can have lengthy sentence, so accused could be detained even if conflict is deemed to have ended.</li> </ul>	<ul style="list-style-type: none"> <li>○ No sentence is imposed, and detainee is not convicted of a criminal act;</li> <li>○ Where habeas applies, judge determines whether detention is lawful; otherwise, legality of detention is determined solely through administrative procedures;</li> <li>○ If lawful, detention is until the end of the conflict;</li> <li>○ Once conflict is deemed to have ended, no further authority to detain.</li> </ul>
<b>DEATH PENALTY</b>	<ul style="list-style-type: none"> <li>○ Imposed by unanimous jury of 12;</li> <li>○ Can clearly be imposed after a guilty plea;</li> <li>○ Established procedures exist for deciding to seek death penalty, for assigning “learned” counsel, and for conducting sentencing phase of capital trial.</li> </ul>	<ul style="list-style-type: none"> <li>○ Imposed by unanimous jury of indeterminate number (minimum of 12 unless “reasonably unavailable . . . because of physical conditions or military exigencies,” but there must be at least nine.);</li> <li>○ Currently, it is unclear whether commission judges would permit death penalty to be imposed after a guilty plea under applicable law, though legislation has been proposed on that issue;</li> <li>○ Questions still need to be resolved about availability, resources, and standards for defense counsel in death penalty cases (possibly adding to litigation issues).</li> </ul>	<ul style="list-style-type: none"> <li>○ Unavailable.</li> </ul>
<b>IMPACT OF LOCATION OF CAPTURE (e.g., APPLICATION IN THE</b>	<ul style="list-style-type: none"> <li>○ No impact – captures within or outside U.S. can be charged.</li> </ul>	<ul style="list-style-type: none"> <li>○ Does not present a bar to triability of offense per se; however, detention authority could be impacted if capture is</li> </ul>	<ul style="list-style-type: none"> <li>○ Courts have been divided on whether an individual – particularly a U.S. citizen or legally present alien – who is captured</li> </ul>

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	<b>FEDERAL COURTS</b>	<b>MILITARY COMMISSIONS</b>	<b>LAW OF WAR DETENTION</b>
<b>UNITED STATES)</b>		within U.S. (see LOW detention box).	within the U.S. can be held under the AUMF; ○ Detention authority may also face legal challenges if exercised in areas outside of the U.S. and outside of a theater of active armed conflict, depending on the facts.
<b>ADMISSIBILITY OF CONFESSIONS</b>	<ul style="list-style-type: none"> <li>○ In order to use defendant’s statements against him, statements must have been preceded by <i>Miranda</i> warning, unless certain exceptions apply (<i>e.g.</i>, public safety);</li> <li>○ Statements must also be voluntary (including no torture/CID elicited confessions);</li> <li>○ “Fruits” of involuntary statements are generally barred (fruits of a voluntary but un-<i>Mirandized</i> statement are not barred).</li> </ul>	<ul style="list-style-type: none"> <li>○ No need for <i>Miranda</i> warning;</li> <li>○ Statements must be reliable and voluntary, with a limited exception to voluntariness requirement for statements made at point of capture during a military operation;</li> <li>○ Torture/CID elicited confessions are barred;</li> <li>○ While “fruits” of torture/CID elicited confessions are generally barred under the 2010 Military Commissions Manual, there are exceptions that may permit such evidence to be introduced under broader circumstances than is permitted in federal courts;</li> <li>○ Unclear how rules will operate in practice, and there is a risk that courts may find that due process requires exclusion of “fruits” of unlawfully-obtained statements beyond that contemplated by the rules.</li> </ul>	<ul style="list-style-type: none"> <li>○ No need for <i>Miranda</i> warning;</li> <li>○ Where habeas applies, judges generally apply standards that are similar to those that inform a voluntariness assessment, but perhaps weighted differently, and at times they also seem to assess the statement’s reliability;</li> <li>○ USG does not use torture/CID elicited confessions to support detentions;</li> <li>○ Judges differ on extent to which (or whether) “fruits” of unlawful statements are barred.</li> </ul>

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	<b>FEDERAL COURTS</b>	<b>MILITARY COMMISSIONS</b>	<b>LAW OF WAR DETENTION</b>
<b>RIGHT TO COUNSEL</b>	<ul style="list-style-type: none"> <li>○ Sixth Amendment right to counsel attaches when adversary judicial process begins – usually when individual first appears in court on charges or at indictment, whichever occurs first – and includes right to presence of counsel at any interrogation (concerning offenses for which he is charged);</li> <li>○ “Offense-specific” right, so statements not concerning charged conduct would be admissible regardless of presence of counsel;</li> <li>○ Right to counsel includes right of defendant who does not require appointed counsel to choose counsel;</li> <li>○ Government must present defendant in court without unnecessary delay after arrest; at that appearance individual will have right to counsel;</li> <li>○ Government may not delay presentment solely for purpose of law enforcement questioning;</li> <li>○ Denial of individual’s access to counsel for an extended period may raise independent due process questions, even before the right to counsel attaches at presentment.</li> </ul>	<ul style="list-style-type: none"> <li>○ No right to counsel upon being taken into custody (timing of right to counsel depends on applicability of habeas and when right attaches if habeas applies – see LOW box);</li> <li>○ 2009 MCA requires that qualified military defense counsel be assigned “as soon as practicable”;</li> <li>○ Right to civilian counsel of own choosing at no expense to government;</li> <li>○ Latest such a right could attach is at the time that charges are referred, although accused may be provided counsel when charges are sworn, if not before.</li> </ul>	<ul style="list-style-type: none"> <li>○ Right to counsel is based on right to habeas.</li> </ul> <p><i>Where habeas applies:</i></p> <ul style="list-style-type: none"> <li>○ Individual detained must be afforded access to counsel at some point, at least for the purpose of contesting the facts the government asserts to justify detention;</li> <li>○ It is not clear when this right attaches. It may be different within the United States as compared to areas outside the United States.</li> </ul> <p><i>Where habeas does not apply:</i></p> <ul style="list-style-type: none"> <li>○ There is no right to counsel; however, administrative procedures require a personal representative be appointed within a specific time period to assist detainee with administrative hearing.</li> </ul>
<b>INCENTIVES TO PROVIDE INFORMATION</b>	<ul style="list-style-type: none"> <li>○ Established procedures that are well-known and understood by all parties provide incentives to cooperate through proffer agreements, cooperation plea agreements, pre-sentencing motions under the Sentencing Guidelines or post-sentencing motions permitting judge to reduce sentence based on</li> </ul>	<ul style="list-style-type: none"> <li>○ Mechanism analogous to a plea/cooperation agreement under which party may negotiate pre-trial agreement including applicable sentencing range;</li> <li>○ Use of cooperation plea agreements is not as well-tested as in federal court;</li> <li>○ No sentencing guidelines, mandatory minimums, or track record that can be</li> </ul>	<ul style="list-style-type: none"> <li>○ No regular, well-understood and enforceable mechanism for balancing conditions and duration of confinement against cooperation;</li> <li>○ At least for a certain amount of time, it may be possible to alter conditions of confinement; preclude involvement of attorney; and segregate detainee to</li> </ul>

**APPENDIX 2 TO ARTICLE BY DAVID S. KRIS**

	<b>FEDERAL COURTS</b>	<b>MILITARY COMMISSIONS</b>	<b>LAW OF WAR DETENTION</b>
	<p>“substantial assistance” that defendant provided to the government;</p> <ul style="list-style-type: none"> <li>○ Generally not possible for interrogator to alter conditions of confinement; preclude involvement of attorney; or segregate detainee to facilitate intelligence collection to same extent as in law of war detention.</li> </ul>	<p>used as parameters for any negotiations;</p> <ul style="list-style-type: none"> <li>○ No extensive practice of post-conviction, pre-sentencing cooperation or an established post-sentencing cooperation mechanism;</li> <li>○ Sentencing is not done by an individual judge but by the commission, so impact of cooperation may not be as predictable;</li> <li>○ Prior to the initiation of military commission charges, it may be possible to alter conditions of confinement; preclude involvement of attorney; and segregate detainee to facilitate intelligence collection;</li> <li>○ Once military commission prosecution starts it is unclear to what extent conditions of confinement can be altered; however, the timing of when the prosecution is initiated after the initial custody is in the government’s control.</li> </ul>	<p>facilitate intelligence collection;</p> <ul style="list-style-type: none"> <li>○ Where habeas applies, at some point an attorney would likely become involved, and a court hearing take place, reducing the availability/impact of segregation.</li> </ul>
<b>INTERNATIONAL COOPERATION</b>	<ul style="list-style-type: none"> <li>○ Well-respected internationally;</li> <li>○ Established formal legal mechanisms allow transfer of suspects to the U.S. for trial and for provision of information to assist law enforcement investigations (<i>i.e.</i>, extradition treaties and MLATs);</li> <li>○ Other countries are comfortable with these procedures as well as other informal mechanisms;</li> <li>○ Some key allies will not provide assistance for cases in which death penalty is sought;</li> <li>○ Some countries might prefer alternate forum if it would permit their assistance to be kept secret.</li> </ul>	<ul style="list-style-type: none"> <li>○ Many allies not willing to extradite to or provide assistance in connection with military commission proceedings;</li> <li>○ Some extradition treaties explicitly forbid extradition for proceedings in “extraordinary” courts;</li> <li>○ Some key allies will not provide assistance for cases in which death penalty is sought;</li> <li>○ Some countries might prefer to assist military commissions rather than federal courts if it is more likely that assistance can be kept secret in the former.</li> </ul>	<ul style="list-style-type: none"> <li>○ Many allies not willing to extradite to or provide assistance in connection with habeas proceedings to support law of war detention;</li> <li>○ Some extradition treaties explicitly forbid extradition for proceedings in “extraordinary” courts;</li> <li>○ Some countries might prefer to assist law of war detention rather than federal courts if it is more likely that assistance can be kept secret in the former.</li> </ul>

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<p><b>PROTECTION OF CLASSIFIED INFORMATION AND PUBLIC PROCEEDINGS</b></p>	<ul style="list-style-type: none"> <li>○ CIPA, and interpretive case law, governs use of classified information;</li> <li>○ CIPA permits government to provide defense a substitute for the actual classified information, such as statement of relevant facts or summary if the court finds that the substitute will provide the defendant substantially the same ability to make his defense as would disclosure of the specific classified information;</li> <li>○ Federal court trials are presumptively open to the public (constitutionally required as a general matter);</li> <li>○ Can only be closed in limited circumstances;</li> <li>○ Proceedings are accessible to all who want to watch in person and/or report about them, subject to logistical constraints (but not televised).</li> </ul>	<ul style="list-style-type: none"> <li>○ Procedures for handling classified information are modeled on CIPA; fundamental procedures are very similar although 2009 MCA makes some rules explicit that have developed in federal court through judicial interpretation and practice and clarifies others;</li> <li>○ Military commission judges are required to view federal court precedent as authoritative unless the text of the MCA specifically requires a different result;</li> <li>○ Military commissions are presumptively open to the public;</li> <li>○ However, can be closed in potentially broader circumstances than a federal court trial (judge must still make a determination that closure is necessary to protect national security/physical safety of a participant; accused may argue constitutional standard applies);</li> <li>○ Accused is not excluded even if testimony warrants closure of the courtroom to the general public;</li> <li>○ There is a 45-second delay of the broadcast of statements to permit the airing of classified information to be blocked in certain cases (and public is not in same room as trial);</li> <li>○ Jury consists of military officers, who may have more familiarity in dealing with classified information than many civilians.</li> </ul>	<p><i>Where habeas applies:</i></p> <ul style="list-style-type: none"> <li>○ Individual judges set procedures and have more flexibility to shield classified information from the detainee;</li> <li>○ Courts have, however, typically required that the government provide at least petitioner’s cleared counsel the classified information it is relying upon to justify detention or that is “exculpatory,” even if only in summary. In rare cases the government has sought exceptions to disclosure, particularly for marginally “exculpatory” information;</li> <li>○ Judges have not considered evidence on the merits that the detainee’s counsel has not been shown in some form;</li> <li>○ Although theoretically open to the public, as a practical matter vast majority of district court proceedings are closed to protect classified information;</li> <li>○ Petitioner does not have right to be present at hearing and usually is not, so closed proceedings involve only judge, counsel, and other court personnel;</li> <li>○ Arrangements are made for petitioners to listen from Guantanamo to unclassified opening statements, and they often testify in their cases via video link;</li> <li>○ Appellate proceedings have required the filing of public briefs (in which classified material is redacted) and oral arguments have generally been open to the public, with the court holding additional closed sessions when necessary</li> </ul> <p><i>Where habeas does not apply:</i></p> <ul style="list-style-type: none"> <li>○ Subject only to administrative rules.</li> </ul>

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	<b>FEDERAL COURTS</b>	<b>MILITARY COMMISSIONS</b>	<b>LAW OF WAR DETENTION</b>
<p><b>CERTAINTY/ FINALITY OF SYSTEM</b></p>	<ul style="list-style-type: none"> <li>○ Clear/established rules and extensive experience/precedents and practice;</li> <li>○ Most predictable and well-established system, providing the greatest certainty that a successful proceeding will lead to long-term detention that will be sustained upon appeal;</li> <li>○ Well accepted and respected internationally.</li> </ul>	<ul style="list-style-type: none"> <li>○ Statutory basis for authority and rules (2009 MCA);</li> <li>○ Lacks established precedents and practice on many issues;</li> <li>○ Subject to constitutional challenges to the system as a whole as well as extensive litigation as to how statute/rules will apply (given uncertainty and novelty of procedures) in a given case;</li> <li>○ There is some risk that courts may find that new procedural safeguards and rules in the 2009 MCA and 2010 Military Commissions Manual do not satisfy all due process concerns or that other constitutional safeguards apply;</li> <li>○ There is also some risk that courts may reject certain substantive offenses;</li> <li>○ Not yet as well-accepted internationally.</li> </ul>	<ul style="list-style-type: none"> <li>○ Statute (AUMF) and case law provide basis for authority;</li> <li>○ While the government’s authority to detain under the AUMF is established and is widely accepted (at least by U.S. courts), questions exist about the contours of that authority (especially for individuals apprehended in the United States);</li> <li>○ Where habeas applies, substantial questions have been litigated about the procedural/evidentiary rules that are applicable to habeas proceedings;</li> <li>○ Some of the most significant substantive and procedural questions have recently been resolved by the court of appeals. Nevertheless, it will likely take a substantial period of time before there is the degree of uniformity or predictability that we have in federal criminal trials;</li> <li>○ Success rate for the government has been significantly lower in habeas cases than is traditionally achieved in criminal prosecutions;</li> <li>○ Courts have not definitively resolved where habeas applies, beyond the U.S. and locations within the effective control of the U.S. such as Guantanamo;</li> <li>○ Not yet as well-accepted internationally.</li> </ul>