

## THE SPEEDY TRIAL RIGHTS OF MILITARY DETAINEES

Walter E. Kuhn<sup>†</sup>

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### INTRODUCTION

In Washington, debate roils on about whether terrorism suspects should be tried by military commission, Article III courts, some combination of the two, or not at all. The Obama administration's highest profile decision to hold a civilian terrorism trial on American soil—that of Khalid Sheikh Mohammed (KSM) and his September 11 co-conspirators—was met with popular<sup>1</sup> and congressional<sup>2</sup> resistance

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<sup>†</sup> Minority Chief Counsel, United States Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Human Rights. J.D. Duke University School of Law, 2006; B.A. University of North Carolina at Chapel Hill, 2003.

1. See Lydia Saad, *Americans at Odds With Recent Terror Trial Decisions*, GALLUP (Nov. 27, 2009), <http://www.gallup.com/poll/124493/Americans-Odds-Recent-Terror-Trial-Decisions.aspx?CSTS=tagrss> (discussing a poll showing that a majority of Americans believed that Khalid Sheikh Mohammed should be tried by military commission outside of New York City, and were “very concerned” or “somewhat concerned” that a trial would

and ultimately rescinded.<sup>3</sup> Another Guantanamo detainee, Ahmed Ghailani, was transferred to the Southern District of New York, convicted of a single count of conspiracy to destroy government buildings and property, and sentenced to life in prison.<sup>4</sup>

*United States v. Ghailani*<sup>5</sup> tested the government's ability under the Sixth Amendment Speedy Trial Clause and Fifth Amendment Due Process Clause to move military detainees to the civilian justice system after a delay of many years. While the near-acquittal in *Ghailani* may freeze criminal trials of long-term military detainees for the foreseeable future,<sup>6</sup> eventually there will be further attempts to bring such prosecutions,<sup>7</sup> whether by President Obama or one of his successors.<sup>8</sup>

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give KSM a forum to further his cause).

2. Eighteen senators introduced an amendment to deny the Department of Justice funding for the trials, but it failed to attract the sixty votes necessary in November 2009. See Kasie Hunt, *Senators try to block KSM trial*, POLITICO (Feb. 2, 2010), <http://www.politico.com/news/stories/0210/32382.html>. There was press speculation that if offered again, the legislation may receive enough votes for passage. Michael Isikoff, *No KSM in NYC?*, THE DAILY BEAST (Jan. 16, 2010), <http://www.thedailybeast.com/newsweek/blogs/declassified/2010/01/15/no-ksm-in-nyc.html>.

3. Anne E. Kornblut & Peter Finn, *Obama advisers set to recommend military tribunals for alleged 9/11 plotters*, WASH. POST, Mar. 5, 2010, at A01.

4. Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 25, 2011, at A18.

5. See generally 751 F. Supp. 2d 515 (S.D.N.Y. 2010).

6. See Jack Goldsmith, *The Ghailani Sentence*, LAWFARE (Jan. 25, 2011), <http://www.lawfareblog.com/2011/01/the-ghailani-sentence/> ("I doubt the Ghailani verdict points the way for more civilian trials of GTMO detainees in the near future. There don't seem to be that many cases that the administration thinks it can win in civilian court. But more importantly, this verdict won't change congressional resistance to such trials, and the President is unlikely to expend political capital in a presidential election cycle to reverse this resistance.").

7. Evidencing the administration's intention to try detainees criminally in the future, Attorney General Eric Holder reiterated his general support for Article III terrorism trials after reversing his decision to try KSM and his co-conspirators in New York. Attorney General Eric Holder, Address at the American Constitution Society Convention (June 16, 2011), available at <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-1106161.html>. Further, the administration transferred Ahmed Abdulakir Warsame to New York for criminal trial after a short period of military detention following his capture in the Gulf of Aden. Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES, July 7, 2011, at A10. Members of the Senate Judiciary Committee also sent Attorney General Holder a letter expressing concern about the potential criminal trial of Ali Mussa Daquq, a detainee held in United States custody for years in Iraq. Letter from Senators to AG Holder: Prosecute Senior Hezbollah Commander Before Military Tribunal (May 17, 2011) available at [http://hatch.senate.gov/public/index.cfm/releases?ContentRecord\\_id=ae4e97ed-80ba-4f22-9d8c-c3f381440208](http://hatch.senate.gov/public/index.cfm/releases?ContentRecord_id=ae4e97ed-80ba-4f22-9d8c-c3f381440208).

8. In the short-term, the 2011 National Defense Authorization Act prohibited the use of fiscal year 2011 Department of Defense funds to transfer Guantanamo detainees to the United States, despite protest from President Obama and Attorney General Eric Holder. Ike

As the politicization of terrorism law and policy continues and perhaps even intensifies, more terrorism suspects may be moved between the military and civilian justice systems. Just as the Bush administration focused its efforts on military commissions and the Obama administration on civilian trials, future Republican and Democratic presidents will be inclined to try terror suspects in their preferred venue. As a result, there may be more cases like *Ghailani* in the future, with a defendant who has been transferred to the civilian justice system after spending years in military custody.

This Article examines the Sixth Amendment speedy trial rights<sup>9</sup> and related Fifth Amendment due process rights<sup>10</sup> of criminal defendants who were detained by the military as part of the War on Terror. I argue that the government should prosecute detainees by either military commission or criminal trial where possible, with the venue depending on the nature of the case. In criminal cases, the Speedy Trial Clause does not apply to periods of military detention absent unusual circumstances, and judicial scrutiny should occur primarily through the Due Process Clause of the Fifth Amendment. While defendants carry a higher burden under the Due Process Clause, the determinative factors under both Fifth and Sixth Amendment analysis are the reason for the delay and the resulting prejudice to the defendant.

Part I of this Article examines the arguments for and against trying military detainees as a threshold question. Part II discusses the nature of the Sixth Amendment Speedy Trial Clause and its interaction with the Fifth Amendment Due Process Clause. Part III inspects the *Barker v. Wingo*<sup>11</sup> test for determining whether there has been a violation of Speedy Trial Clause and its application in *Ghailani*, *United States v. Padilla*,<sup>12</sup> and potential future detainee cases. Finally, Part IV more

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Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2010); Press Release, President Barack Obama, Office of the Press Secretary, Statement by the President on H.R. 6523 (Jan. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523>

(“Section 1032 [barring the use of funds to transfer detainees into the United States] represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees.”); *see also* Peter Landers, *Congress Bars Gitmo Transfers*, WALL STREET J., Dec. 23, 2010, at A2.

9. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”).

10. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

11. 407 U.S. 514, 530-33 (1972).

12. No. 04-60001-CR-COOKE (S.D. Fla. Apr. 3, 2007) (denying motion to dismiss indictment for speedy trial violations in derogation of Sixth Amendment rights).

broadly discusses the benefits and dangers of transferring terrorism suspects between the military and civilian justice systems and adjusting existing criminal law to meet the particular needs of terrorism.

### I. WHY TRY LAW OF WAR DETAINEES?

Every year, the anniversary of the September 11 terrorist attacks reminds Americans of the terrible loss that day in 2001. Recently, it has also been a stark reminder of the lack of progress in both formulating a military detention policy and trying the perpetrators of the 9/11 attacks. Since President Obama took office, his administration has announced a deadline for closing the detention center at Guantanamo Bay<sup>13</sup> and plans to try KSM and his co-conspirators in civilian courts in New York.<sup>14</sup> Later, the administration backed off both those plans and reversed course by deciding to prosecute the 9/11 conspirators by military commission.<sup>15</sup> In addition, the first criminal prosecution of a Guantanamo detainee, Ghailani, suffered procedural obstacles and garnered a conviction on only one count,<sup>16</sup> and the planned military commission trial of another detainee, Abd Al Rahim al-Nashiri, was shelved<sup>17</sup> and restarted.<sup>18</sup>

In the context of these setbacks, including the *Ghailani* verdict, at least one prominent commentator is wondering why the United States is planning to try Guantanamo detainees in any forum.<sup>19</sup> After all, the

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13. Exec. Order No. 13492, 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009).

14. Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

15. Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

16. Benjamin Weiser, *U.S. Jury Acquits Former Detainee Of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1 (describing the verdict and the barring of an important prosecution witness).

17. Peter Finn, *Prosecution of alleged Cole bomber halted*, WASH. POST, Aug. 27, 2010, at A2.

18. *New Charges Filed Against Suspect in U.S.S. Cole Bombing*, N.Y. TIMES, Apr. 21, 2011, at A8.

19. E.g., Jack Goldsmith, *The Inevitability of Military Detention*, LAWFARE (Oct. 7, 2010, 8:02 AM), <http://www.lawfareblog.com/2010/10/the-inevitability-of-military-detention/> (hereinafter Goldsmith, *Inevitability*) (“[The idea that Ghailani will be detained even if found not guilty] makes me wonder why the government is bothering to try Ghailani. The trial will be legally and politically difficult, not only because of the problem of coercive interrogations, but also because of the problem of revealing sources and methods more generally. It can hardly bring the hoped-for legitimacy benefits if the government and the judge publicly agree that the defendant if acquitted will remain behind bars indefinitely. And the trial is unnecessary to keep Ghailani off the streets, since he can be held in military detention.”). Jack Goldsmith, *Don't Try Terrorists, Lock Them Up*, N.Y. TIMES, Oct. 9, 2010, at A21 (hereinafter Goldsmith, *Don't Try Terrorists*) (“The administration would save money and time, avoid political headaches and better preserve intelligence sources and

detention of those individuals is not contingent upon their conviction in either criminal trials or military commissions.<sup>20</sup> They could be detained indefinitely under the Authorization for Use of Military Force (AUMF) and the law of war regardless of the outcome of any trial.<sup>21</sup> Further, now that detainees at Guantanamo are eligible for habeas corpus review,<sup>22</sup> concern that detainees will be cut off from any judicial review should be assuaged.

The added legitimacy of detention based on conviction is a common argument for trying military detainees.<sup>23</sup> That is, imprisonment based on proof of guilt beyond a reasonable doubt is more legitimate than detention predicated on a habeas court upholding detention by a preponderance of the evidence. As has been noted though,<sup>24</sup> the recently revamped military commissions have achieved few successes to this point<sup>25</sup> (whether as a result of politics or structure, depending on one's point of view), and high profile criminal terrorism

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methods if it simply dropped its attempts to prosecute high-level terrorists and relied exclusively on military detention.”); Benjamin Wittes & Jack Goldsmith, *Skip the Trial for Terrorists*, WASH. POST, Nov. 19, 2010, at A21; Jack Goldsmith, *Problems with Military Detention*, LAWFARE (Oct. 14, 2010, 4:53 AM), <http://www.lawfareblog.com/2010/10/problems-with-military-detention/> (“[T]he prodigious resources the Executive branch currently spends prosecuting with great difficulty a tiny few of the Guantanamo Bay terrorists would better be spent working with Congress to strengthen and further legitimate the detention power.”).

20. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

21. *Id.*

22. See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

23. E.g., Benjamin Wittes & Jack L. Goldsmith, *The best trial option for KSM: none*, WASH. POST, Mar. 19, 2010, at A23 (“A trial potentially adds three things: the option of the death penalty; enhanced legitimacy in some quarters, especially abroad; and a certain catharsis and historical judgment in the form of a criminal verdict.”). *But see* Jack Goldsmith, *More on Military Detention*, LAWFARE (Oct. 11, 2010, 5:20 PM), <http://www.lawfareblog.com/2010/10/more-on-military-detention/> (arguing that given Ghailani’s potential military detention regardless of a conviction, Ghailani’s trial will be seen by many as illegitimate in case of a conviction or acquittal).

24. E.g., Goldsmith, *Inevitability*, *supra* note 19 (“The United States government has tried very hard to bring some of these terrorists to military commissions, but that has not worked out for either the Bush administration or the Obama administration.”); Goldsmith, *Don’t Try Terrorists*, *supra* note 19 (“Military commissions have secured frustratingly few convictions. . . . Commissions do not work because they raise scores of unresolved legal issues like the proper rules of evidence and whether material support and conspiracy, usually the main charges, can be brought in a tribunal since they may not be law-of-war violations.”).

25. E.g., Jerry Markon, *Hamdan Guilty of Terror Support; Former Bin Laden Driver Acquitted Of Aiding Attacks*, WASH. POST, Aug. 7, 2008, at A01 (reporting on the military commission conviction of Salim Hamdan for material support for terrorism); Carol Rosenberg, *Guantanamo detainee pleads guilty to conspiracy with al Qaeda*, MIAMI HERALD, Feb. 16, 2011 (reporting on the guilty pleas of Noor Uthman Mohammed and others).

trials have had their own hurdles.<sup>26</sup> One may reasonably question whether the relatively few detainee trial successes have led to increased legitimacy. In addition, whether the government chooses a criminal trial or military commission for a particular detainee, the choice will be reflexively lauded by one political side and criticized by the other, thoughtfully or not.<sup>27</sup> Finally, with the trial of these detainees comes the potential for an acquittal, the very real risks of which were underlined by the *Ghailani* conviction hanging by a single count.<sup>28</sup> While the government argues that it has the authority to detain individuals in military detention even if they are acquitted by military commission or criminal trial,<sup>29</sup> one wonders whether the political

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26. See Amos N. Guiora & John T. Parry, Debate, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356, 359 (2008), <http://www.pennumbra.com/debates/pdfs/terrorcourts.pdf> (discussing the “many problems attendant with trying suspected terrorists in an Article III court”); Benjamin Weiser, *Judge Bars Major Witness From Terrorism Trial*, N.Y. TIMES, Oct. 7, 2010, at A1 (reporting on Judge Kaplan’s barring the testimony of a “crucial witness” in the *Ghailani* trial); Benjamin Weiser, *Detainee Acquited on Most Counts in ‘98 Bombings*, N.Y. TIMES, Nov. 18, 2010, at A1 (hereinafter Weiser, *Detainee Acquited*) (reporting on the *Ghailani* verdict).

27. See, e.g., *Civil Justice, Military Injustice*, N.Y. TIMES, Oct. 6, 2010, at A32 (arguing from the left that the guilty plea of Faisal Shahzad is a clear counter to “[s]upporters of the tribunals at Guantanamo Bay, Cuba, who insist military justice, not the federal courts, is the best way to deal with terrorists . . . .”); Marc Thiessen, *Holder’s terror trial catastrophe*, WASH. POST (Oct. 11, 2010), [http://www.washingtonpost.com/wp-dyn/content/article/2010/10/11/AR2010101102834\\_pf.htm](http://www.washingtonpost.com/wp-dyn/content/article/2010/10/11/AR2010101102834_pf.htm) (arguing from the right that after Judge Kaplan’s ruling barring the testimony of a key witness, “[t]he *Ghailani* prosecution is hanging by a thread today not because of the interrogation techniques employed against him, but because of the Obama administration’s ideological insistence on treating terrorists like common criminals and trying them in federal courts,” despite the fact that the witness’s testimony may well have been barred in a military commission as well). But see Benjamin Wittes, *Marc Thiessen on “Holder’s Terror Trial Catastrophe,”* LAWFARE (Oct. 12, 2010, 3:19 PM), <http://www.lawfareblog.com/2010/10/marc-thiessen-on-holders-terror-trial-catastrophe/> (“While the rules on the admissibility of evidence do appear to give commissions latitude to hear from a witness like the one Kaplan excluded, the ultimate admissibility will depend on the judge’s sense of the ‘interests of justice.’”); *Torture’s Consequences*, WASH. POST, Oct. 10, 2010, at A18 (“Some on the right argue that the case illustrates why suspects like Mr. *Ghailani* should be tried in a military commission, where rules of evidence are more flexible. But since last fall, military commissions have also barred introduction of evidence obtained by torture. The results in this case would likely have been the same—and rightly so.”).

28. *Ghailani* was convicted of a single crime after being charged with over 280 counts. Weiser, *Detainee Acquitted*, *supra* note 26.

29. See Michael Isikoff, *‘Heads I Win, Tails You Lose’: In 9/11 Case, KSM Won’t Walk Free Even If Found Not Guilty*, NEWSWEEK (Nov. 18, 2009), <http://www.newsweek.com/blogs/declassified/2009/11/18/heads-i-win-tails-you-lose-in-9-11-case-ksm-won-t-walk-free-even-if-found-not-guilty.html> (noting Attorney General Eric Holder’s assertion that even if found not guilty, KSM and his co-conspirators would likely remain in detention); Karen De Young, *Indefinite Detentions Are Backed*, WASH. POST, July 8, 2009 at A9 (reporting on Department of Defense General Counsel Jeh Johnson’s view

ramifications of doing so would prevent the President taking that action.<sup>30</sup> Even assuming that incarceration based on a conviction is more legitimate than military detention, the question is whether that potential gain is outweighed by the considerable drawbacks.

Clearly, in a world in which the *New York Times* erroneously editorializes that military detention is “certainly illegal,”<sup>31</sup> “clash[es] with the most basic legal protections of the Constitution,”<sup>32</sup> and is “in violation of basic constitutional protections and international treaties,”<sup>33</sup> the perceived legitimacy of detention is a valid concern for the government.<sup>34</sup> The idea of indefinite military detention as a legal and legitimate tool for the government has not yet reached the popular consciousness.<sup>35</sup> Not surprisingly, there is a clear public preference for some form of trial over indefinite detention.<sup>36</sup> One wonders, though,

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that the administration has the authority to continue to detain Guantanamo detainees who are acquitted).

30. See Benjamin Wittes & Jack Goldsmith, *Ghailani verdict makes stronger case for military detentions*, WASH. POST, Nov. 19, 2010, at A21 (“The first option [of releasing an acquitted detainee] would be unsafe for the nation and suicidal politically. The second option [of detaining an acquitted detainee] would look terrible in light of an acquittal and would harm the legitimacy of every subsequent terrorist trial.”).

31. *Civil Justice, Military Injustice*, supra note 27; contra Benjamin Wittes, *Clearly Illegal?*, LAWFARE (Oct. 6, 2010, 10:12 PM), <http://www.lawfareblog.com/2010/10/clearly-illegal/>.

32. *A Step Toward Fairness*, N.Y. TIMES, Dec. 28, 2010, at A22 (arguing that “judges have upheld [military detention] because of the public-safety issues involved”).

33. *The Rule of Law*, N.Y. TIMES, Jan. 8, 2011, at A20.

34. Commentators have rightfully pointed out the misleading nature of these statements. See, e.g., Robert Chesney, *The NY Times Editorial Page and Its Potentially Misleading Account of the Detention Status Quo*, LAWFARE (Dec. 28, 2010, 5:28 PM), <http://www.lawfareblog.com/2010/12/the-ny-times-editorial-page-and-its-potentially-misleading-account-of-the-detention-status-quo/>; Benjamin Wittes, *More on Yesterday’s Times Editorial*, LAWFARE (Dec. 29, 2010, 9:43 PM), <http://www.lawfareblog.com/2010/12/more-on-yesterdays-times-editorial/#more-1073> (“This strikes me . . . as perilously close to simple lying.”); Benjamin Wittes, *The New York Times Lies Its Way to Incoherence*, LAWFARE (Jan. 9, 2011, 10:46 PM), <http://www.lawfareblog.com/2011/01/the-new-york-times-lies-its-way-to-incoherence/#more-1121> (“[T]he Times is clearly alleging that detention without trial is unlawful . . . either without reference to or by grossly mischaracterizing a large and growing body of case law that stands for precisely the opposite proposition . . .”).

35. *Compare Justice 5, Brutality 4*, N.Y. TIMES, June 13, 2008, at A28 (lauding *Boumediene* as a “stirring defense of habeas corpus” and a “eminently reasonable decision”) with *Civil Justice, Military Injustice*, supra note 27 (describing long-term military detention as “certainly illegal” and detainees with habeas corpus rights as “in limbo”).

36. Instead of seeing military detention as an alternative and complement to criminal trials and military commissions, the public may see them purely as competitive substitutes. When viewed in this way, it is unsurprising that the public prefers a system of detention after trial to detention without trial. In a December 2009 *Bloomberg* poll, when asked about “the best way to handle” Guantanamo detainees, fifty-seven percent chose military commissions, twenty-one percent chose civilian trials, ten percent chose indefinite

whether the potential for civilian and military commission trials of detainees contributes to popular misconceptions about military detention. While particular individuals may be subject to both military detention and the criminal or military commissions systems, they are separate legal tracks set up for different purposes. The use of military commissions and (especially) criminal trials for military detainees may foster popular confusion from the conflation of the military detention and military/criminal justice systems. Without knowledge of the distinction between the legal background and purpose of the military detention and military/criminal trial systems, respectively, detaining these individuals without a conviction may seem wrong and “certainly illegal.”<sup>37</sup>

Of course, the military commissions system, which was revamped in 2009<sup>38</sup> and used by both the Bush and Obama administrations,<sup>39</sup> is separate and distinct from civilian criminal trials. Still though, it is designed to try individuals for (war) crimes, and to some it seems merely a poor substitute for a civilian criminal trial, for use when the government’s evidence is not sufficient to produce a conviction in a “real” court of law.<sup>40</sup> The fact that there are common political arguments about the relative superiority of criminal trials versus military commissions for all terrorism cases contributes to the popular conception of them as pure substitutes,<sup>41</sup> rather than complements with

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detention. Heidi Przybyla & Nicholas Johnston, *Obama’s War Plan Gains Amid Doubts on Domestic Policy*, BLOOMBERG (Dec. 8, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aAjRAh8aSJ1g>. See also *Bloomberg National Poll*, BLOOMBERG (Dec. 8, 2009), <http://media.bloomberg.com/bb/avfile/rZcGSAfhSOTk>.

37. *Civil Justice, Military Injustice*, *supra* note 27.

38. Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

39. *E.g.*, Markon, *supra* note 25 (reporting on the military commission conviction of Salim Hamdan for material support for terrorism); Peter Finn, *Detainee Khadr pleads guilty*, WASH. POST, Oct. 26, 2010, at A06 (discussing Omar Khadr’s guilty plea in a military commission).

40. *E.g.*, Press Release, AM. CIVIL LIBERTIES UNION, ACLU At Guantanamo To Observe Military Commissions Proceedings (July 12, 2010), *available at* <http://www.aclu.org/human-rights-national-security/aclu-guantanamo-observe-military-commissions-proceedings> (“[T]errorism cases should be tried in federal criminal courts . . . military commissions are unable to deliver reliable justice and should be shut down for good.”); see generally David Glazier, *Still a Bad Idea: Military Commissions under the Obama Administration*, LOY. L.A. LEGAL STUD. PAPER No. 2010-32 (2010), *available at* <http://ssrn.com/abstract=1658590>.

41. When given a choice in a December 2010 poll between military commissions and civilian trials for detainees, without the choice of “both” or “neither,” Americans favored military commissions, sixty-three percent to twenty-three percent. Josh Gerstein, *Poll: 63% Favor Military Tribunals Over Civilian Trials*, UNDER THE RADAR (Dec. 15, 2010), [http://www.politico.com/joshgerstein/1210/Poll\\_63\\_favor\\_military\\_tribunals\\_over\\_civilian](http://www.politico.com/joshgerstein/1210/Poll_63_favor_military_tribunals_over_civilian)

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particular strengths that lend each to certain types of cases.<sup>42</sup> At this point, perhaps foregoing detainee trials of any kind and focusing popular attention on military detention and the procedural protections thereof would best legitimize the process.

Other arguments in favor of trying military detainees include punishing the convicted for their actions as opposed to holding them off the battlefield as part of the enemy force,<sup>43</sup> and the definite duration of the sentence upon conviction including the ability to detain a convicted individual after hostilities end.<sup>44</sup> While society may distinguish between imprisonment to pass moral judgment on the actions of the convicted and detention to keep warriors off the battlefield, the difference is mostly semantic for the detainees themselves. From the perspective of the detained, the defined term of detention from a criminal or military commission conviction (assuming release after completion of the sentence) is likely preferable to an indefinite term of military detention, depending on the sentence. In addition, the *Ghailani* trial, for example, took place some twelve years after the alleged criminal activity.<sup>45</sup> Such a delay between criminal acts and trial decreases the possibility of the convicted internalizing his sentence as punishment for his actions, especially when he would be detained as a combatant in any case. So, if the government is to try these individuals for the purposes of punishment, it should do so to satisfy society's desire to see the convicted punished, not out of any hope that the convicted will view their detention differently as a result of the trial.

It is possible, but unlikely, that hostilities could end before the termination of a convicted detainee's criminal or military commission sentence. In that case, a conviction would provide the only legal means

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42. As Senator Lindsey Graham argues, military commissions are well-suited for the core of enemy groups and civilian courts present superior charging opportunities for financiers and some other defendants. See Jonathan Weisman & Evan Perez, *Deal Near on Gitmo, Trials for Detainees*, WALL STREET J., March 19, 2010, at A1 (reporting on Senator Lindsey Graham's belief that civilian courts should be used to prosecute "low-level Al Qaeda operatives and terrorist financiers," for example).

43. *United States v. Ghailani*, 751 F. Supp. 2d 515, 519 (S.D.N.Y. 2010) ("This prosecution therefore serves at least two purposes that our government could not lawfully achieve without an appropriate conviction—to pass a moral judgment on and to punish Ghailani if in fact he committed the alleged crimes.").

44. *Id.* ("[Absent a conviction, the United States] would be obliged to release [Ghailani] if hostilities with Al Qaeda were to end."); see also Richard H. Pildes, *Detentions for how long?*, WASH. POST, Oct. 10, 2010, at A19 (discussing the importance of fixed-length terms in any system of detention).

45. *Ghailani*, 751 F. Supp. 2d at 518.

of detaining the individual.<sup>46</sup> Practically, hostilities in this war will continue for the foreseeable future and a light criminal or military commission sentence may increase political pressure on the government to release the convicted after the sentence is served, rather than return them to military detention. For example, a military commission found Salim Hamdan guilty of material support for terrorism and sentenced him to five years and five months imprisonment, with five years credit for time already served.<sup>47</sup> After serving four months on his sentence, Hamdan was sent to Yemen to fulfill his sentence and live thereafter.<sup>48</sup> While technically a successful prosecution, Hamdan's lenient sentence forced the administration to choose between further detaining a man after the completion of his sentence and releasing an individual whom prosecutors argued should be detained for a much longer period.<sup>49</sup> Lenient sentences, like acquittals, are a risk for the government when prosecuting detainee cases, whether in criminal court or military commission. If the administration officials were blessed with foresight in Hamdan's case, they may have preferred the flexibility of military detention to the additional legitimacy of what turned out to be a five month sentence.

The rationales for trying military detainees in either criminal courts or military commissions are under stress due to the long delays between detainees' apprehension and possible trial. The arguments in favor of forsaking trials in favor of military detention include: a weak connection between criminal acts and punishment caused by lengthy pre-trial delays, a lack of expected legitimacy gains from detention based on a trial by jury and a reasonable doubt standard of proof, danger to the government in the form of unexpected acquittals and lenient sentences, and the high likelihood that hostilities will continue for the foreseeable future, obviating the need for a legal basis for detention after their end. Still, the government should try military detainees when possible to pass moral judgment on and punish the convicted,<sup>50</sup> as well

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46. *Id.* at 519.

47. Jess Bravin, *Hamdan to Go Back to Yemen as Saga Ends*, WALL STREET J., Nov. 25, 2008, at A5 ("Prosecutors sought a 30-year sentence; instead, the jury sentenced him to just five months beyond the five years he already had spent in pretrial detention.").

48. *Id.*

49. *Id.* (noting that prosecutors argued for a much longer sentence than the jury imposed and denial of credit for time served for Hamdan's pre-trial detention).

50. See Ghailani, 751 F. Supp. 2d at 518-19; Jennifer Rubin, *The Decline of the Justice Department*, THE WKLY. STANDARD (Jan. 31, 2011), [http://www.weeklystandard.com/articles/decline-justice-department\\_536871.html](http://www.weeklystandard.com/articles/decline-justice-department_536871.html) (quoting former Attorney General Michael Mukasey as stating that detainees should be tried so that victims may see perpetrators tried and punished).

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as to allow the defendant an opportunity to clear his name in a forum with a higher standard of proof than a habeas proceeding. In conjunction with continuing detainee trials in some venue, the administration should more clearly explain to the public the differences in both form and purpose between military detention and its accompanying habeas corpus petitions and criminal courts/military commissions. Also, while it may be politically tempting to demonstrate a preference for one venue over the other,<sup>51</sup> the administration would be wise to publicly discuss criminal trials and military commissions as complements, each with strengths and weaknesses that lend themselves to particular detainee cases. A substantive national discussion of the venues, their relative strengths, and their complementary relationship with military detention could lead away from the either/or perspective that is so often espoused<sup>52</sup> and may be the most effective force toward consensus on detention policy.

**A. Padilla & Ghailani**

Both Jose Padilla and Ghailani were tried in criminal court after transfers from military detention. Both unsuccessfully argued that their Sixth Amendment speedy trial rights were violated, albeit on different grounds. *Padilla* held that the defendant's speedy trial rights were not triggered until his indictment, which occurred years after his detention commenced.<sup>53</sup> In *Ghailani*, the court determined that the defendant's speedy trial rights vested, due to his indictment years before his arrest, detention, and trial, but the Sixth Amendment was not violated.<sup>54</sup> After briefly discussing the facts of *Padilla* and *Ghailani*, this Article will use those cases, among others, to discuss and analyze the Fifth and Sixth Amendment rights of military detainees tried in civilian court.

Padilla, an American citizen, was arrested at O'Hare Airport in Chicago on May 8, 2002, on a material witness warrant in connection to

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51. See, e.g., *Determination of Guantanamo Cases Referred for Prosecution*, DEP'T OF DEF. & DEP'T OF JUST. (2009), <http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf> (including a presumption in favor of civilian trials).

52. E.g., *supra* note 27.

53. Order Denying Motion to Dismiss Indictment for Speedy Trial Violations in Derogation of Sixth Amendment Rights, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Apr. 4, 2007), ECF No. 951; Peter Whoriskey, *Judge Refuses to Dismiss Padilla's Charges*, WASH. POST, Mar. 24, 2007, at A09 ("[Judge Marcia G.] Cooke found that in determining whether Padilla is getting a speedy trial, only the time after the filing of formal charges applies. His time at the brig doesn't enter that calculation. 'I agree that the law in this case is that a criminal trial proceeding begins with the filing of the criminal process,' Cooke said. 'Mr. Padilla has been promptly brought to court in that matter.'").

54. See *Ghailani*, 751 F. Supp. 2d at 541.

the September 11 attacks.<sup>55</sup> He was subsequently declared an enemy combatant and held in the Naval Brig in Charleston, South Carolina, until January 2006, when he was transferred to civilian custody to stand trial on terrorism charges.<sup>56</sup> Padilla argued that the three year and eight month delay between his arrest and indictment violated his Sixth Amendment speedy trial<sup>57</sup> and Fifth Amendment due process rights.<sup>58</sup>

In contrast, in June 2009, the government transferred Ghailani from Guantanamo Bay to the Southern District of New York to stand trial for his involvement in the 1998 bombings of American embassies in Kenya and Tanzania that killed 224 people and injured over a thousand.<sup>59</sup> At the time of his transfer, his indictment on those charges was over ten years old.<sup>60</sup> While indicted in 1998, Ghailani remained at large until he was captured abroad in 2004.<sup>61</sup> Once captured, he was quickly transferred to the custody of the Central Intelligence Agency (CIA), which detained and interrogated him at secret sites for roughly two years.<sup>62</sup> The Department of Defense (DOD) then held Ghailani at Guantanamo Bay for almost three more years.<sup>63</sup> During his time in DOD custody, a Combatant Status Review Tribunal (CSRT) determined that Ghailani was an enemy combatant, and military commission charges were referred.<sup>64</sup> Military commission proceedings were ultimately halted, and the government transferred Ghailani to New York to stand trial for his 1998 indictment.<sup>65</sup> He was ultimately convicted on one of 285 counts and sentenced to life in prison.<sup>66</sup>

Whether the decision was half-baked or not,<sup>67</sup> the Obama

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55. Motion to Dismiss Indictment for Speedy Trial Violations in Derogation of Sixth Amendment Rights at 1, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Oct. 4, 2006), ECF No. 596 [hereinafter *Padilla Speedy Trial Motion*].

56. *Id.* at 2.

57. *Id.* at 3.

58. Motion to Dismiss Indictment for Pre-Indictment Delay, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Oct. 5, 2006), ECF No. 595.

59. *Ghailani*, 751 F. Supp. 2d at 518, 526.

60. *Id.* at 529.

61. *Id.* at 518.

62. *Id.*

63. *Id.*

64. *Ghailani*, 751 F. Supp. 2d. at 518, 524-25.

65. *Id.* at 526.

66. Weiser, *supra* note 4.

67. See David Ingram, *Obama's Ex-Counsel Reveals White House Tensions*, THE BLT: THE BLOG OF LEGAL TIMES (Sep. 25, 2010, 12:22 PM), <http://legaltimes.typepad.com/blt/2010/09/obamas-ex-counsel-reveals-white-house-tensions.html> (describing an off the record conversation between former White House Counsel Greg Craig and former Associate White House Counsel Trevor Morrison in which Morrison stated the decision to transfer Ghailani was half-baked).

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administration transferred Ghailani after clearly indicating a preference for civilian trials over military commissions.<sup>68</sup> Within hours of assuming office, President Obama halted military commissions at Guantanamo Bay.<sup>69</sup> The Department of Justice (DOJ) later issued a prosecution protocol establishing a presumption in favor of civilian trials.<sup>70</sup> Even after reforming the military commissions system with Congress in the Military Commissions Act of 2009,<sup>71</sup> the administration halted<sup>72</sup> and later restarted<sup>73</sup> the commission prosecution of the alleged bomber of the USS Cole, Abd al-Rahim al-Nashiri, which Attorney General Eric Holder had held up as the paradigmatic case for the military commission venue.<sup>74</sup>

In *Padilla* and *Ghailani*, the first Article III criminal trial of a Guantanamo detainee, the government confronted many of the issues expected in potential civilian prosecutions of other military detainees, including KSM and his co-conspirators. Indeed, the pre-trial rulings will inevitably serve as precedent in any future prosecutions of military detainees. One such major threshold issue was whether the Fifth and Sixth Amendments would allow prosecution at all.

## II. THE NATURE OF THE SPEEDY TRIAL RIGHT

### A. *The Goals the Speedy Trial Right Protects*

Society's interest in providing defendants with a speedy trial is at least twofold: (1) ensuring that the accused are treated fairly, and (2) avoiding the host of problems that comes with a large backlog of cases jamming up the courts.<sup>75</sup> As to the first concern, the Supreme Court declared that the Speedy Trial Clause is designed to protect three basic demands of justice:<sup>76</sup> (1) preventing undue and oppressive pretrial incarceration, (2) minimizing anxiety and concern accompanying public

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68. *E.g.*, *Determination of Guantanamo Cases Referred for Prosecution*, *supra* note 51.

69. Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

70. *See Determination of Guantanamo Cases Referred for Prosecution*, *supra* note 51.

71. Pub. L. No. 111-84, 123 Stat. 2190 (2009).

72. Finn, *supra* note 17. *But see* Charlie Savage, *U.S. Prepares to Lift Ban on Guantanamo Cases*, N.Y. TIMES, Jan. 19, 2011, at A1 (reporting on the possibility of the administration restarting military commissions at Guantanamo Bay).

73. *New Charges Filed Against Suspect in U.S.S. Cole Bombing*, *supra* note 18.

74. *E.g.*, *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 28 (2009) (statement of Att'y Gen. of the United States Eric Holder) (describing Nashiri's case as "uniquely situated for a military commission as opposed to an Article III court").

75. *See* *Barker v. Wingo*, 407 U.S. 514, 519-521 (1972).

76. These goals factor prominently in the *Barker* analysis's inquiry into prejudice to the defendant. *See infra* Part III.D.

accusation, and (3) limiting the possibility that delay will impair the ability of the accused to protect himself.<sup>77</sup> As to the problems that accompany long pretrial delays, *Barker*, the seminal speedy trial case, warns of defendants gaining increased leverage in plea bargain negotiations, individuals released on bond committing additional crimes, a weakening of the connection between crime and punishment, additional financial cost to both society and the accused, and jails overcrowded with pretrial detainees.<sup>78</sup>

Society's interest in ensuring that indicted military detainees are treated fairly is similar or even superior to that in the normal criminal context. Beyond society's standard interest in the legitimacy of criminal trials, the global interest in and high-profile nature of trials involving law of war detainees present an opportunity to demonstrate the effectiveness and fairness of the American justice system, whether in Article III courts or military commissions. Further, as discussed in *Ghailani*, detainee defendants may remain imprisoned regardless of whether they are ultimately convicted.<sup>79</sup> Because the President may detain such individuals with or without a conviction, criminal prosecution is a societal luxury, not a requirement.

The problems associated with delayed trials are less relevant to criminal cases involving law of war detainees than other cases. If the defendants are subject to military detention whether convicted or not, there is little danger of increased plea bargain leverage, the commission of additional crimes, larger government financial outlays, or jail overcrowding. If detainee criminal trials are not adjudicated swiftly, the connection between crime and punishment may be strained in cases involving law of war detainees, as in other cases. Practically, though, detainees are unlikely to discern the difference between incarceration as punishment for criminal acts and detention to remove a combatant from the battlefield. With most or all of the dangers against which the Speedy Trial Clause is meant to protect eliminated by the presence of defendants who could be detained regardless of conviction, the societal interest in speedy trials becomes less obvious. Of course, if one does not assume that the government would seek to detain former military detainee defendants in the case of an acquittal, society's speedy trial interest in those cases becomes coterminous with that of ordinary criminal cases.

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77. *Smith v. Hooey*, 393 U.S. 374, 377-78 (1969) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

78. *Barker*, 407 U.S. at 519-21.

79. *See United States v. Ghailani*, 751 F. Supp. 2d 515, 541 (S.D.N.Y. 2010).

The nature of the Speedy Trial Clause is not dependant on the circumstances of any particular defendant. Despite the clear differences between military detainees and more ordinary defendants, the aims of the Speedy Trial Clause—limiting pretrial incarceration, the anxiety of the accused, and hindrances to the defense—remain consistent.

### *B. Triggering the Speedy Trial Clause*

#### *1. Delays Before Indictment or Arrest*

The Speedy Trial Clause applies to delays between indictment or arrest and trial.<sup>80</sup> The Supreme Court held in *United States v. Marion*, though, that it does not apply to delays between alleged criminal acts and indictment or arrest, before a defendant is an “accused.”<sup>81</sup> In *Marion*, the defendants were indicted on April 21, 1970, for criminal activity that allegedly occurred between March 1965 and February 1967.<sup>82</sup> The Supreme Court rejected the lower court’s ruling that the delay between the alleged crime and indictment violated the Sixth Amendment.<sup>83</sup> The Supreme Court held that the Sixth Amendment speedy trial right attaches upon either “formal indictment or information”<sup>84</sup> or “the actual restraints [on liberty] caused by arrest and holding to answer a criminal charge,” not at the time of the alleged criminal activity.<sup>85</sup> Before indictment or arrest in connection with a crime, a defendant suffers no restraints on his liberty and is not the subject of public accusation.<sup>86</sup> That is, the goals that the Speedy Trial Clause protects are not yet implicated.<sup>87</sup> Instead of the Sixth Amendment Speedy Trial Clause, statutes of limitation<sup>88</sup> and the Fifth

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80. *See* *United States v. Marion*, 404 U.S. 307, 320 (1971).

81. *See id.* at 313, 321.

82. *Id.* at 308-09.

83. *See id.* at 311-12.

84. Two current Supreme Court justices, Justices Thomas and Scalia, have taken the position that indictment without prejudice to the defendant should not trigger the speedy trial right. *Doggett v. United States*, 505 U.S. 647, 663 (1991) (Thomas, J., dissenting) (“Although being an ‘accused’ is necessary to trigger the Clause’s protection, it is not sufficient to do so. The touchstone of the speedy trial right, after all, is the substantial deprivation of liberty that typically accompanies an ‘accusation,’ not the accusation itself.”) (emphasis in original); *see also infra* Part II.D.

85. *Marion*, 404 U.S. at 320; *United States v. Loud Hawk*, 474 U.S. 302, 310 (1986).

86. *Marion*, 404 U.S. at 321.

87. *See supra* Part I.A.; *infra* Part II.D.

88. *United States v. Ewell*, 383 U.S. 116, 122 (1966) (“[T]he applicable statute of limitations . . . is usually considered the primary guarantee against bringing overly stale criminal charges.”); *Marion* 404 U.S. at 323 (“There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that

Amendment Due Process Clause<sup>89</sup> guard against delays between alleged criminal activity and indictment.

### 2. *Dismissing Charges or Vacating Convictions*

Just as the Speedy Trial Clause is inapplicable to delays between alleged criminal activity and indictment or arrest, its application is wiped clean if pending charges are dropped in good faith and the defendants are not subject to limitations on their liberty.<sup>90</sup> For example, in *United States v. MacDonald*, the Army charged the defendant with three counts of murder in May 1970, and the charges were dropped that October.<sup>91</sup> After MacDonald was charged in federal criminal court for the same crimes in 1975, the Supreme Court held that the speedy trial inquiry related only to the time between the 1975 charges and the trial, rather than the delay between the earlier 1970 charges and the trial.<sup>92</sup> In effect, the Army's decision to dismiss the charges reset the speedy trial clock because, upon dismissal, MacDonald was in the same position as any other subject of a criminal investigation, not an "accused" under the Speedy Trial Clause.<sup>93</sup>

Likening MacDonald's situation to that of a defendant in procedural limbo and subject to prosecution at any time, Justice Marshall dissented from the view that good faith dismissal of charges resets the speedy trial clock.<sup>94</sup> Justice Marshall distinguished former defendants from other persons subject to criminal investigation because the "special anxiety" that comes with public accusation does not disappear when charges are temporarily dismissed, especially if the accused and the public know that an investigation is ongoing.<sup>95</sup> Further, the dissent argued that the Fifth Amendment Due Process Clause is insufficient to protect against delay and government abuse in the context of second prosecutions.<sup>96</sup>

Justice Marshall's contention that individuals whose charges have

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function.").

89. *Marion*, 404 U.S. at 324 (noting that the Due Process Clause, in addition to statutes of limitation, protect against pre-indictment delays); *United States v. Lovasco*, 431 U.S. 783, 789 (1977) ("[T]he Due Process Clause has a limited role to play in protecting against oppressive [pre-indictment] delay.") (discussing the holding in *Marion*).

90. *United States v. MacDonald*, 456 U.S. 1, 7 (1982); *Loud Hawk*, 474 U.S. at 312.

91. *MacDonald*, 456 U.S. at 4-5.

92. *Id.* at 9-10.

93. *Id.* at 8-9.

94. *Id.* at 15-16 (Marshall, J., dissenting) (analogizing *MacDonald* to *Klopfers v. North Carolina*, 386 U.S. 213 (1967)).

95. *Id.* at 17 (Marshall, J., dissenting).

96. *MacDonald*, 456 U.S. at 20 (Marshall, J., dissenting); see also *infra* Part II.C.

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been dismissed are still subject to the “special anxiety” of the publicly accused invites scrutiny. Of course, it is only in hindsight that one knows if charges were dropped temporarily or permanently. Indeed, upon dismissal of the military charges, it is possible that MacDonald thought himself in a better position than another person subject to criminal investigation precisely because the prosecutors chose to dismiss the charges against him. On one hand, he was charged after an investigation, indicating the prosecutors had special interest in him, at least at some point. On the other, the prosecution expressly decided to abandon the charges against MacDonald, which would not have occurred absent a strong sense that he had either been ruled out as a suspect or that there was insufficient evidence to garner a conviction. At the least, MacDonald would have been reasonable to think it unlikely that the particular prosecuting office involved would revisit its abandonment of charges and begin prosecution anew. While reasonable individuals may disagree about whether having charges brought and dropped leaves former defendants in an inferior, superior, or similar position to those under initial investigation, the current state of the law is that the relative positions are equivalent.<sup>97</sup>

Like dropped charges, vacated convictions clear the speedy trial clock until a new charge or arrest.<sup>98</sup> In *United States v. Ewell*, defendants indicted in December 1962 had their convictions vacated in 1964, and they were immediately rearrested and reindicted.<sup>99</sup> The Supreme Court held that the Speedy Trial Clause was not violated because speedy trial rights depend on the circumstances involved, and finding a Sixth Amendment violation in those circumstances would undercut the policy that a defendant may be retried in the case of a vacated conviction.<sup>100</sup>

In the case of a detainee who was charged in a military commission and later charged in criminal court,<sup>101</sup> the key question would likely be whether the defendant’s speedy trial rights attached upon his military detention or, as in *Padilla*, they were not triggered

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97. *MacDonald*, 456 U.S. at 7.

98. *United States v. Ewell*, 383 U.S. 116, 121 (1966).

99. *Id.* at 118-19.

100. *Id.* at 121.

101. *United States v. Ghailani*, 751 F. Supp. 2d 515 (S.D.N.Y. 2010); see also Michael B. Mukasey, *The Obama Administration and the War on Terror*, 33 HARV. J.L. & PUB. POL’Y 953, 960-61 (2010) (“One could see an argument that says, ‘[w]e were already charged before a military commission in Guantanamo with that crime. The government cannot charge us and then delay proceedings for years before recharging us in a different forum, so we are entitled to a speedy trial.’”).

until indictment.<sup>102</sup> If a detainee defendant's speedy trial rights were vested, the military detention would likely be the trigger, not bringing and dismissing military commission charges. *MacDonald* indicates that the coming and going of military commission charges would have little effect on the analysis.

### 3. Arrest by a Foreign Sovereign

"Arrest and holding to answer a criminal charge" activates a defendant's speedy trial rights,<sup>103</sup> but the situation is murkier when the arrest is made by a foreign sovereign. Although not concerning a military detainee, the case of Ahmed Omar Abu Ali<sup>104</sup> demonstrates this issue. Abu Ali, an American citizen, was captured by Saudi Arabian law enforcement on June 8, 2003.<sup>105</sup> FBI agents observed Abu Ali's interrogation by Saudi Arabian law enforcement on June 15, 2003, and interrogated him themselves in September 2003.<sup>106</sup> On February 3, 2005, Abu Ali was criminally charged for joining Al Qaeda and participating in a terrorist conspiracy, including a plot to assassinate President Bush.<sup>107</sup> He was then transferred to federal custody on February 21, 2005.<sup>108</sup>

Abu Ali claimed violations of both the Sixth Amendment Speedy Trial Clause and the Speedy Trial Act, which mandates indictment within thirty days of arrest in connection with the charge.<sup>109</sup> Both of these claims turned on when the speedy trial clock began running—at the time of Abu Ali's arrest by Saudi Arabian law enforcement, his transfer to United States custody, or some point in between. Abu Ali argued that the clock should commence from (in order of preference): when he was arrested in Saudi Arabia;<sup>110</sup> when he contended the joint venture between the United States and Saudi Arabia for his arrest was clear, as shown by FBI agents observing his interrogation;<sup>111</sup> and when a State Department cable indicated that Saudi Arabia would transfer Abu Ali to the United States at any time upon formal request.<sup>112</sup> The

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102. See *infra* Part II.B.4.

103. *United States v. Marion*, 404 U.S. 307, 320 (1971).

104. *United States v. Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005).

105. *Id.* at 343.

106. *Id.*

107. *Id.* at 341, 384.

108. *Id.* at 384.

109. *Abu Ali*, 395 F. Supp. 2d at 384-85; 18 U.S.C. § 3161(b) (2006); U.S. CONST. amend. VI.

110. *Abu Ali*, 395 F. Supp. 2d at 384.

111. *Id.* at 385.

112. *Id.*

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court rejected each of these claims, finding that the Speedy Trial Act's thirty-day clock does not begin, "unless and until a defendant is arrested or summoned *in connection* with . . . a federal charge,"<sup>113</sup> and that there was no joint venture between the United States and Saudi Arabia relating to Abu Ali's capture and detention.<sup>114</sup> Further, the court found that the State Department cable that Abu Ali cited simply demonstrated prosecutorial cooperation between the two countries, and other evidence showed that the United States specifically requested that Saudi Arabia not hold Abu Ali for its benefit prior to his transfer to federal custody.<sup>115</sup> Reasoning that the speedy trial clock did not commence until Abu Ali's indictment, the court rejected the defendant's claim that his Sixth Amendment rights were violated.<sup>116</sup>

Like Abu Ali, Omar Mohammed Ali Rezaq was detained by another country before being transferred to the United States.<sup>117</sup> Rezaq was alleged to have participated in hijacking a flight from Greece to Egypt in 1985, forcing the plane to land in Malta.<sup>118</sup> The hijackers executed a number of American and Israeli passengers before Egyptian commandos stormed the plane.<sup>119</sup> By the end of the ordeal, fifty-seven passengers were killed.<sup>120</sup> Rezaq was convicted and sentenced to twenty-five years imprisonment in Malta, but he served only seven years before being released and cleared to fly to Sudan.<sup>121</sup> His flight was scheduled to travel to Sudan via Ghana, Nigeria, and Ethiopia, but Rezaq was detained and released upon arriving in Ghana, and then detained by Nigerian officials and transferred to United States custody.<sup>122</sup>

Rezaq argued that his Speedy Trial Act rights were violated because more than thirty days elapsed between his arrest and indictment.<sup>123</sup> Like Abu Ali's argument that his speedy trial clock began running upon his arrest by Saudi Arabia,<sup>124</sup> Rezaq argued that his arrest by Ghanaian and Nigerian law enforcement triggered his speedy

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113. *Id.* at 384.

114. *Id.* at 385.

115. *Abu Ali*, 395 F. Supp. 2d at 385.

116. *Id.*

117. In fact, Rezaq was detained by three other countries before his ultimate transfer to United States custody—Malta, Ghana, and Nigeria. *United States v. Rezaq*, 899 F. Supp. 697, 701 (D.D.C. 1995).

118. *Id.* at 700.

119. *Id.* at 700-01.

120. *Id.* at 701.

121. *Id.*

122. *Rezaq*, 899 F. Supp. at 701.

123. *Id.* at 704.

124. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 384 (E.D. Va. 2005).

trial rights.<sup>125</sup> The court rejected Rezaq's argument, stating that the "the Speedy Trial Act can only be triggered by a *federal* arrest made in connection with *federal* charges," and "such deprivation cannot occur until the defendant is turned over to *federal* authorities."<sup>126</sup> Similar to Abu Ali's Saudi Arabian detention,<sup>127</sup> the court in *Rezaq* determined that the defendant's arrest was solely at the hands of Ghanaian and Nigerian law enforcement, and involvement by American agents did not "magically transform" a foreign arrest into a federal arrest.<sup>128</sup>

*United States v. Abu Ali* and *United States v. Rezaq* demonstrate that speedy trial rights are not triggered by arrest by a foreign sovereign, even if effected with the observation or involvement of the United States.<sup>129</sup> The importance of this holding in the context of trying military detainees is clear, as many Guantanamo detainees were originally arrested abroad by foreign governments and held for some time before being transferred to United States custody.<sup>130</sup>

Those in favor of trying Guantanamo detainees in civilian courts have cited *Abu Ali* and *Rezaq* as evidence that speedy trial issues will not derail such prosecutions.<sup>131</sup> While those cases favor the ability of the government to try similarly situated defendants, they do not completely eliminate the issue. First, one wonders what level of federal participation in a foreign arrest would constitute a "joint venture" between the two countries<sup>132</sup> and a "federal arrest,"<sup>133</sup> such that the defendant's speedy trial rights would be triggered. The question of which branch of the United States government participated with a foreign government in an arrest may also be relevant to whether there was a "joint venture" and "federal arrest." As discussed later in this

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125. *Rezaq*, 899 F. Supp. at 704.

126. *Id.* at 705 (emphasis in original).

127. *Abu Ali*, 395 F. Supp. 2d at 385.

128. *Rezaq*, 899 F. Supp. at 706.

129. *Abu Ali*, 395 F. Supp. 2d at 385; *Rezaq*, 899 F. Supp. at 706.

130. A 2006 report stated that ninety-three percent of detainees then held at Guantanamo Bay were not captured by the United States. MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES, A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 14 (Seton Hall University School of Law 2006), *available at* [http://law.shu.edu/publications/guantanamoReports/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf).

131. *E.g.*, RICHARD B. ZABEL & JAMES B. BENJAMIN, JR., IN PURSUIT OF JUSTICE, PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 112-13 (Human Rights First 2008), *available at* [http://www.law.yale.edu/documents/pdf/Alumni\\_Affairs/USLS-pursuit-justice.pdf](http://www.law.yale.edu/documents/pdf/Alumni_Affairs/USLS-pursuit-justice.pdf).

132. *But see Abu Ali*, 395 F. Supp. 2d at 385 (holding that the arrest in that case was not a "joint venture").

133. *But see Rezaq*, 899 F. Supp. at 705 (holding that the arrest in that case was not a "federal arrest").

Article, if detention by the United States military itself does not trigger speedy trial rights, as in *Padilla*, it is difficult to see how American military cooperation in an arrest by a foreign government would do so.

<sup>134</sup> Second, it is possible that an arrest could be motivated and authorized by the United States such that foreign law enforcement was effectively “deputized” to make federal arrests.<sup>135</sup> Those precise limitations have not yet been drawn by the courts.

#### 4. Military Detention

*Padilla* is illustrative on the crucial issue of whether military detention starts the speedy trial clock. *Padilla* argued that his arrest in Chicago by federal civilian officials triggered his speedy trial rights.<sup>136</sup> The defense attempted to distinguish the case from *Marion*, in which a multi-year delay between alleged criminal activity and indictment was not a Sixth Amendment violation, by *Padilla*’s physical restraint prior to the indictment, satisfying the need for either “formal indictment or information” or “actual restraints imposed by arrest and holding to answer a criminal charge” to activate his speedy trial rights.<sup>137</sup> Because *Padilla*’s motion was denied without an opinion,<sup>138</sup> it is difficult to discern the court’s reasoning.<sup>139</sup> The court could have rejected *Padilla*’s argument that his arrest and military detention triggered his speedy trial rights, so the time period in question was not long enough to violate the Sixth Amendment. Alternatively, like *Ghailani*,<sup>140</sup> the court could have decided that *Padilla*’s speedy trial clock effectively began upon his capture, but the government’s justification for the delay prevented a

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134. See *infra* Part II.B.4.

135. But see *Rezaq*, 899 F. Supp. at 706 (holding that the Ghanaian officials arresting the defendant were not “deputized” to make federal arrests).

136. *Padilla Speedy Trial Motion*, *supra* note 55, at 2.

137. *Id.* at 5-8.

138. See Order Denying Defendant *Padilla*’s Motion to Dismiss Indictment for Speedy Trial Violations in Derogation of Sixth Amendment Rights, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Apr. 3, 2007) (order denying motion to dismiss indictment for speedy trial violations in derogation of Sixth Amendment rights).

139. The court has been criticized for issuing an order without opinion on this issue. See Steve Vladeck, *Five Years On . . . How Significant is Padilla?*, CONCURRING OPINIONS (May 8, 2007, 1:52 PM), [http://www.concurringopinions.com/archives/2007/05/five\\_years\\_on\\_h.html](http://www.concurringopinions.com/archives/2007/05/five_years_on_h.html) (“It’s a troubling reflection upon the law ‘after 9/11’ that it’s taken five years to get to this point . . . with the almost summary rejection of the argument that such a delay violates *Padilla*’s right to a speedy trial.”).

140. Even though *Ghailani* was indicted in 1998 and arraigned in 2009, the court did not hold the government responsible for the time period before he was captured, from 1998 to 2004. Thus, the applicable delay began upon *Ghailani*’s transfer into CIA custody. *United States v. Ghailani*, 743 F. Supp. 2d 261, 285 (S.D.N.Y. 2010)

constitutional violation. From the judge's reported comments, it is clear that the court found the former—that Padilla's speedy trial rights were not triggered by his military detention—not that the speedy trial period began at his capture and was justified under the rest of the *Barker* analysis.<sup>141</sup>

As part of its argument that civilian courts should be the preferred venue for detainee trials, one human rights organization contends that *Padilla* clearly demonstrates that “speedy trial rights are not triggered when an individual is held in military custody.”<sup>142</sup> Certainly, *Padilla* should give the government some assurance that military detention does not activate defendants' speedy trial rights, but the holding should not be considered *carte blanche* for the government. For example, even without applying the Speedy Trial Clause, the court in *Padilla* could have dismissed the indictment as a violation of the Fifth Amendment Due Process Clause if it found bad faith on the part of the government and prejudice to Padilla's defense.<sup>143</sup> Still, *Padilla* should be heartening to the government because it indicates that criminal defendants captured abroad by the United States military, such as in Afghanistan or Pakistan, are unlikely to successfully argue that their military detention should be included in the relevant delay for speedy trial purposes. After all, if a citizen who was initially arrested in the United States by civilian authorities and then transferred to military custody cannot count his period of military detention for speedy trial purposes,<sup>144</sup> it is doubtful that an individual who was captured abroad by the military would be able to do so, absent unusual circumstances like Ghailani's preexisting indictment.

Hopefully, the Eleventh Circuit Court of Appeals will be more forthcoming in its reasoning on appeal,<sup>145</sup> but the district court's summary decision that the Speedy Trial Clause did not apply to Padilla's period of military detention was correct. Padilla was not an

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141. See Whoriskey, *supra* note 53.

142. ZABEL & BENJAMIN, *supra* note 131, at 113.

143. In fact, the court rejected Padilla's due process motion as well. *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Apr. 3, 2007) (order denying motion to dismiss indictment for pre-indictment delay); see also *infra* Part II.C. (discussing the Fifth Amendment due process test).

144. *E.g.*, Order Denying Defendant Padilla's Motion to Dismiss Indictment for Speedy Trial Violations in Derogation of Sixth Amendment Rights, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Apr. 3, 2007) (order denying motion to dismiss indictment for speedy trial violations in derogation of Sixth Amendment rights).

145. See John Pacenti, *Convicted Terrorists' Appeal Focuses on Miami Judge*, LAW.COM (Jan. 11, 2010), <http://www.law.com/jsp/article.jsp?id=1202437815082> (reporting that oral arguments were held on January 12, 2010).

“accused” under the Sixth Amendment<sup>146</sup> while detained by the military because he was not subject to “actual restraints imposed by arrest *and holding to answer a criminal charge.*”<sup>147</sup> It is not detention alone that triggers the Speedy Trial Clause, but detention in connection to a criminal investigation.<sup>148</sup>

Padilla argued that his Sixth Amendment rights vested while he was detained by the military because his military detention and criminal prosecution related to the same underlying activity.<sup>149</sup> Whether a defendant’s military detention and prosecution are related to the same activity is immaterial to the triggering of a defendant’s speedy trial rights, though, because the military detention is still not a “restraint imposed by arrest and holding to answer a criminal charge.”<sup>150</sup> If detainees’ speedy trial rights were dependent on whether the basis of the detention was consistent with the basis of the criminal prosecution, new issues arise. For example, must the underlying activity be exactly the same in both cases? If not, how similar does the activity have to be? Further, if any detention triggered an individual’s speedy trial rights, the government’s ability to change course from military custody to the civilian justice system would be impaired. The government may have a variety of different rationales for military detention, not just military prosecution. If any detention triggered a defendant’s speedy trial rights, the government could decide to hold an individual in military detention purely on national security and intelligence gathering grounds, but be foreclosed from transferring him for criminal trial. Such a system could force individuals into military commissions or indefinite military detention when the government would prefer to try them criminally.

The parties in *Padilla* argued about the relevance of *D’Aquino v. United States*,<sup>151</sup> the 1951 “Tokyo Rose” prosecution.<sup>152</sup> In that case, the defendant appealed her conviction for treason on the grounds that

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146. U.S. CONST. amend. VI (“In all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial.” (emphasis added)).

147. *United States v. Marion*, 404 U.S. 307, 327-28 (1971) (emphasis added); *see also* Government’s Opposition to Defendant Padilla’s Motions to Dismiss for Lack of Speedy Trial and for Pre-indictment Delay at 6-7, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Nov. 13, 2006) [hereinafter *Government Response to Padilla*].

148. *Marion*, 404 U.S. at 328.

149. Reply to the Government’s Response to the Motion to Dismiss for Speedy Trial Violations of Sixth Amendment Rights at 5, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Dec. 1, 2006) [hereinafter *Padilla Speedy Trial Reply*].

150. *Marion*, 404 U.S. at 320.

151. 192 F.2d 338 (9th Cir. 1951).

152. *See Padilla Speedy Trial Reply*, *supra* note 149, at 6-9. *Contra Government Response to Padilla*, *supra* note 147, at 8-10.

the Speedy Trial Clause was violated.<sup>153</sup> D'Aquino was convicted for working as a broadcaster/propagandist in aid to Japanese forces from 1943 to 1945.<sup>154</sup> After Japan's defeat, she was detained by the United States military from October 1945 to October 1946, and then released.<sup>155</sup> In August 1948, she was arrested in Tokyo and transferred to the United States for trial.<sup>156</sup> The Ninth Circuit rejected D'Aquino's speedy trial claim, holding that her speedy trial rights did not vest until her indictment.<sup>157</sup> D'Aquino's period of military detention did not factor in the speedy trial calculation because of its military nature and separation from the criminal prosecution by two years of freedom.<sup>158</sup>

The government argued that *D'Aquino* was "virtually indistinguishable from Padilla's claim," and should be denied.<sup>159</sup> As the defense noted, *D'Aquino* predated *Marion*, which clarified the triggering of speedy trial rights, by some twenty years.<sup>160</sup> More importantly, unlike Padilla, D'Aquino was freed for two years between her military detention and criminal prosecution.<sup>161</sup> Those two years of freedom are enough to distinguish *D'Aquino* from *Padilla*. Like *MacDonald*, in which military charges were dismissed and the defendant was released years before his criminal prosecution,<sup>162</sup> D'Aquino's release from military custody reset the speedy trial clock. Thus, *D'Aquino* is inapposite to *Padilla*, where the defendant's military detention and criminal prosecution were continuous in time.<sup>163</sup>

Differences between *D'Aquino* and *Padilla* prevent the former case from direct application to the latter. However, the result in *Padilla* was correct. Absent unusual circumstances like the preexisting indictment

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153. *D'Aquino v. United States*, 192 F.2d 338, 349 (9th Cir. 1951).

154. *Id.* at 348.

155. *Id.* at 349.

156. *Id.*

157. *Id.* at 350.

158. *D'Aquino v. United States*, 203 F.2d 390, 391 (9th Cir. 1951) (clarifying the earlier opinion in a denial of a motion for rehearing).

159. *Government Response to Padilla*, *supra* note 147, at 8.

160. *Padilla Speedy Trial Reply*, *supra* note 149, at 6-7.

161. *D'Aquino*, 203 F.2d at 391; *Padilla Speedy Trial Reply*, *supra* note 149, at 7.

162. *United States v. MacDonald*, 456 U.S. 1, 5 (1982).

163. While arguing this point, Padilla chided the government for its citation of *D'Aquino*:

After [D'Aquino's] trial, two prosecution witnesses recanted their testimony, stating that they had been threatened by the government and had been told what to say and what not to say just prior to testifying. In one of his last acts in office, President Gerald Ford pardoned Ms. D'Aquino in 1977. It is ironic that in Mr. Padilla's matter, the government would rely on a case whose prosecution is a blemish on our justice system and involved the persecution of an innocent scapegoat caught up in post-war hysteria.

*Padilla Speedy Trial Reply*, *supra* note 149, at 9.

in *Ghailani*, the Speedy Trial Clause should not apply to periods of military detention because detainees are not “accused” under the Sixth Amendment. Such cases will not completely escape review, though, because the courts should carefully consider the harm to the defendant and reason for the delay under the Fifth Amendment Due Process Clause.

*C. Interaction Between the Sixth Amendment Speedy Trial Clause & Fifth Amendment Due Process Clause*

The Fifth Amendment Due Process Clause requires dismissal if pre-indictment delay: (1) caused substantial prejudice to the defendant’s fair trial rights and (2) was an intentional device to gain tactical advantage over the accused.<sup>164</sup> The Supreme Court has cautioned judges not to second guess prosecutors’ decisions to defer prosecution for legitimate reasons or impose their own personal notions of fairness.<sup>165</sup> Instead, courts are limited to considering whether the delay violates the “fundamental conceptions of justice which lie at the base of our civil and political institutions” and define “the community’s sense of fair play and decency.”<sup>166</sup>

The Supreme Court expounded on the due process test in *United States v. Lovasco*,<sup>167</sup> which considered whether a pre-indictment delay ran afoul of the Due Process Clause. In that case, the Supreme Court avoided adopting a bright-line test to determine whether a delay between crime and indictment is a due process violation, but held that a seventeen-month delay for investigative purposes was not unconstitutional.<sup>168</sup> The Court described the Due Process Clause as having “a limited role in protecting against oppressive delay,” and rejected strict tests requiring the filing of charges whenever there is actual prejudice to the defendant, or as soon as the prosecution develops probable cause or has enough evidence to convict.<sup>169</sup> First, the Court stated that prejudice to the defendant is a necessary but non-determinative element of a due process claim.<sup>170</sup> Second, requiring indictment whenever probable cause exists would increase the

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164. *United States v. Marion*, 404 U.S. 307, 324 (1971).

165. *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Rochin v. California*, 342 U.S. 165, 170 (1952)).

166. *Id.* (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Rochin*, 342 U.S. at 173).

167. *Id.* at 784.

168. *Id.* at 797.

169. *Id.* at 789.

170. *Lovasco*, 431 U.S. at 790 (quoting *United States v. Marion*, 404 U.S. 307, 324-25 (1971)).

possibility of unwarranted charges, shorten and complicate criminal investigations, and consume limited judicial resources on unready cases.<sup>171</sup> Third, demanding prosecution when the government is satisfied that it has assembled enough evidence to convict would impair cases involving multiple crimes or defendants, depend on subjective judgments about when sufficient evidence is accumulated, and preclude the government from fully considering abstaining from prosecution.<sup>172</sup> After rejecting bright-line rules, the Court indicated that the due process inquiry should be done in a case-by-case manner and a delay for investigative purposes, like that in *Lovasco*, is fundamentally different from a delay for tactical reasons.<sup>173</sup>

*Padilla's* rejection of the defendant's due process claim was, like the speedy trial order, in summary form without opinion.<sup>174</sup> One cannot know whether *Padilla's* arguments related to prejudice, government intention, or both were deficient. The arguments themselves, though, are enlightening. For example, the parties argued about the scope of the "prejudice" prong in the due process inquiry.<sup>175</sup> *Padilla* contended that he experienced prejudice through: (1) his treatment at the hands of the government<sup>176</sup> and (2) harm to his defense.<sup>177</sup> Even the defense recognized that "prejudice" in the due process context is generally limited to only the latter form,<sup>178</sup> but argued that *Padilla* "suffered a prejudice never endured by another defendant in the history of the United States."<sup>179</sup> As the government pointed out, "prejudice" for due process purposes is narrower than under the speedy trial inquiry.<sup>180</sup> That is, the Speedy Trial Clause is meant to protect against "lengthy incarceration prior to trial" and the "disruption of life caused by arrest and the presence of unresolved criminal charges,"<sup>181</sup> while the Due

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171. *Id.* at 791-92.

172. *Id.* at 792-94.

173. *Id.* at 795.

174. Order Denying Defendant *Padilla's* Motion to Dismiss Indictment for Pre-Indictment Delay, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. April 3, 2007).

175. See *Government Response to Padilla*, *supra* note 147, at 18. *Contra* Reply to the Government's Response to the Motion to Dismiss for Pre-indictment Delay at 2-4, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. Dec. 1, 2006) [hereinafter *Padilla Pre-indictment Delay Response*].

176. *Padilla Pre-indictment Delay Response*, *supra* note 175 at 2.

177. *Id.* at 3.

178. *Id.* at 2 ("[O]ther pre-indictment delay cases do not present prejudice in the form of pre-indictment detention, but instead are limited to prejudice of the sort that impairs one's defense at trial.").

179. *Id.* at 3.

180. *Government Response to Padilla*, *supra* note 147, at 16; see also *infra* Part III.D.

181. *United States v. MacDonald*, 456 U.S. 1, 8 (1982); see also *infra* Part III.D.

Process Clause safeguards defendants' "right to a fair trial."<sup>182</sup> On the more ordinary claim of prejudice to his defense, Padilla contended that he suffered from the loss of witnesses and evidence, as well as an inability to assist in his defense as a result of his mistreatment.<sup>183</sup> Citing *Marion*, the government argued<sup>184</sup> that a defendant must show more than the loss of memories, evidence, and witnesses due to the passage of time.<sup>185</sup>

Even assuming that Padilla demonstrated prejudice, he had to show that the pre-indictment "delay was an intentional device to gain tactical advantage over the accused" to prevail on his due process motion.<sup>186</sup> For defense counsel, this is undoubtedly the more difficult of the two prongs in the due process inquiry. Padilla argued that the pre-indictment delay provided the government with tactical advantages in the form of incapacitating the defendant without the risk of court challenge, damaging his ability to mount a defense, and facilitating the coercion of statements from him.<sup>187</sup> Showing that a particular delay advantaged the government is not enough, though, as the government must have intended to use the delay to gain such an advantage.<sup>188</sup>

The intent component of the due process inquiry was Justice Marshall's concern in his *MacDonald* dissent.<sup>189</sup> After authoring the majority opinion in *Lovasco*, Justice Marshall argued in his *MacDonald* dissent that the due process inquiry is deficient in the context of subsequent prosecutions because it only protects against purposeful or tactical delay that causes the defendant prejudice.<sup>190</sup> As such, he continued, the Due Process Clause "does not protect against delay which is not for a tactical reason, but which serve[] no legitimate prosecutorial purpose."<sup>191</sup> Of course, that argument may be made against applying only the Due Process Clause, and not the Speedy Trial Clause, to pre-indictment delays in general, not just subsequent

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182. *United States v. Marion*, 404 U.S. 307, 324 (1971).

183. *Padilla Pre-indictment Delay Response*, *supra* note 175, at 3.

184. *Government Response to Padilla*, *supra* note 147, at 17-18 (quoting *Marion*, 404 U.S. at 325-26).

185. The Supreme Court has stated that statutes of limitations, not the Due Process Clause, are the primary safeguard against pre-indictment delay. *United States v. Ewell*, 383 U.S. 116, 122 (1966); *Marion*, 404 U.S. at 326 ("In light of the applicable statute of limitations . . . [the loss of memories, etc.] are not in themselves enough to demonstrate that appellees cannot receive a fair trial.") (emphasis added).

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

187. *Padilla Pre-indictment Delay Response*, *supra* note 175, at 4.

188. *Marion*, 404 U.S. at 324.

189. *United States v. MacDonald*, 456 U.S. 1, 20 (1982) (Marshall, J., dissenting).

190. *Id.*

191. *Id.*; *see also United States v. Lovasco*, 431 U.S. 783 (1977).

prosecutions. After all, the Due Process Clause does not protect against delays which “serve no legitimate prosecutorial purpose”<sup>192</sup> before initial indictment either. So as not to be inconsistent with his opinion in *Lovasco*, Justice Marshall distinguished delays before initial indictment from those concerning subsequent prosecutions by asserting that after a defendant has been investigated and accused, the government has a special responsibility to reinvestigate and re prosecute with reasonable promptness.<sup>193</sup> Meanwhile, before initial prosecution, more limited protection is appropriate because of the state’s interest in conducting a relatively unrestricted investigation.<sup>194</sup>

Justice Marshall was certainly correct that defendants must meet a higher burden to prove a violation of the Due Process Clause than a violation of the Speedy Trial Clause. Unlike the Sixth Amendment analysis,<sup>195</sup> there is no balancing test under the Fifth Amendment, and defendants must satisfy both prongs of the inquiry: (1) substantial prejudice to the defendant’s fair trial rights and (2) “an intentional device to gain tactical advantage over the accused.”<sup>196</sup> Because, as held by *Padilla*, military detention should not trigger a defendant’s speedy trial rights, the Due Process Clause becomes especially important in guarding against bad faith by the government. Without the check of the Due Process Clause, the government could game the system by detaining individuals until just before an adverse habeas ruling, and then transferring them to civilian court without recourse for the defendant.<sup>197</sup> As such, the due process inquiry into the two most important factors of the speedy trial balancing test—the reason for the delay<sup>198</sup> and prejudice to the defendant<sup>199</sup>—plays a crucial role in protecting the defendant’s right to a fair trial. Although the due process prongs are similar to those factors of the *Barker* speedy trial test, they are rightfully more difficult to satisfy. In the military detention context, the application of the Due Process Clause and not the Speedy Trial Clause (absent unusual circumstances, à la *Ghailani*) allows the government flexibility to move from military custody to the criminal justice system unless it is

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192. *MacDonald*, 456 U.S. at 20; see also *Lovasco*, 431 U.S. at 783.

193. *MacDonald*, 456 U.S. at 20.

194. *Id.*; see also *Lovasco*, 431 U.S. at 790-95.

195. See *infra* Part III.

196. *United States v. Marion*, 404 U.S. 307, 324 (1971).

197. See *Vladeck*, *supra* note 139 (“[O]ne could see [*Padilla*] as setting a dangerous precedent for the future, where the government can hold terrorism suspects in military custody up until the point that a court is set to rule on the merits of such detention, and then moot such a decision by indicting the individual in a civilian criminal court.”).

198. See *infra* Part III.B.

199. See *infra* Part III.D.

operating in bad faith to the detriment of detainees' fair trial rights. Given the national security implications and executive military decisions involved in these cases, the application of only the Due Process Clause is appropriate.

### III. THE *BARKER* TEST

The Supreme Court handed down a multi-factor test to determine whether there has been a violation of a defendant's Sixth Amendment speedy trial rights in *Barker*.<sup>200</sup> In that case, a Kentucky defendant's trial for murder occurred over five years after his initial arrest.<sup>201</sup> After examining the goals of the speedy trial right,<sup>202</sup> the Court discussed the "vague," "relative," and "amorphous" qualities of the right<sup>203</sup> and rejected its quantification<sup>204</sup> or restriction to cases in which the defendant demanded a speedy trial.<sup>205</sup> Instead of those more rigid tests, the Court adopted a four-factor test, balancing: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.<sup>206</sup> The Court went on to emphasize the balancing nature of the test, interconnection of the four factors, and relevance of other circumstances particular to the case at hand.<sup>207</sup>

After proceeding through the balancing test, the Court held that the five years between the arrest and trial of the defendant did not violate

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200. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

201. *Id.* at 516-17 (Barker's trial date was October 9, 1963, and he was arrested around the time of the murders on July 20, 1958.).

202. *See supra* Part II.A.

203. *Barker*, 407 U.S. at 521-22; *see also* *United States v. Ewell*, 383 U.S. 116, 120 (1966) ("[T]his Court has consistently been of the view that '[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.'" (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905))).

204. *Barker*, 407 U.S. at 523 ("We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.").

205. *Id.* at 525-28 ("[P]resuming waiver of a fundamental right from inaction is inconsistent with this Court's pronouncements on waiver of constitutional rights . . . . We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.").

206. *Id.* at 530. The "reason for the delay" and "prejudice to the defendant" factors are particularly important and mirror the Due Process Clause inquiry into whether the delay was "an intentional device to gain tactical advantage over the accused" or "caused substantial prejudice to the defendant's fair trial rights," albeit on a broader scale; *see also supra* Part II.C.

207. *Barker*, 407 U.S. at 533 ("We regard none of the four factors . . . as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.").

the Sixth Amendment.<sup>208</sup> For the purposes of military detainee cases and, for that matter, all other criminal trials, the Court's discussion of the factors and their interaction was more important than the outcome of the case. Indeed, the *Barker* factors have reached such importance that they have been criticized as having "taken on a life of their own," becoming "a source of new liberties under the Clause" rather than guiding the adjudicative process.<sup>209</sup> While this article argues that military detention should not trigger a defendant's speedy trial right in most cases, unusual circumstances like the preexisting indictment in *Ghailani* demand Sixth Amendment analysis. This part of the article will analyze each factor in the *Barker* test and its application to military detainee cases, including *Ghailani*.

#### A. *The Length of the Delay*

The length of the delay is a threshold issue in deciding whether there has been a denial of the speedy trial right.<sup>210</sup> As the Supreme Court wrote in *Barker*, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."<sup>211</sup> Whether a particular delay is prejudicial, in turn, depends on its length and the "peculiar circumstances of the case."<sup>212</sup> The Court indicated that relatively simple crimes demand quicker processing than large, complex cases.<sup>213</sup> That said, the Court has observed that lower courts generally recognize delays over one year as presumptively prejudicial.<sup>214</sup>

Cases involving terrorism charges are among the most serious and complex that prosecutors try.<sup>215</sup> Even so, in analyzing a terrorism case involving an eighteen month continuance (and twenty-two month total delay between indictment and arrest), the threshold for proceeding to the rest of the *Barker* test was whether the delay was over one year.<sup>216</sup> That case, *United States v. Al-Arian*, involved fifty criminal counts

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208. *Id.* at 536.

209. *Doggett v. United States*, 505 U.S. 647, 670 (1991) (Thomas, J., dissenting).

210. *Barker*, 407 U.S. at 530 ("The length of the delay is to some extent a triggering mechanism.").

211. *Id.*

212. *Id.* at 530-31.

213. *Id.* at 531 ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

214. *Doggett*, 505 U.S. at 652 n.1.

215. *See e.g.*, *United States v. Al-Arian*, 267 F. Supp. 2d 1258, 1264 (M.D. Fla. 2003) (finding a case charging conspiracy to provide material support to terrorists to be "a complex, multi-defendant case in a relatively new area of law"); *see also* *United States v. Moussaoui*, 2001 WL 1887910, at \*1 (E.D. Va. 2001).

216. *See Al-Arian*, 267 F. Supp. 2d at 1265.

relating to more than nineteen years of activity, as well as 21,000 hours of wiretap recordings, 550 videotapes, thirty hard drives, and hundreds of boxes of hard evidence.<sup>217</sup> Thus, no matter how complex the case, a delay of over one year will generally be considered “presumptively prejudicial.”<sup>218</sup>

In *Ghailani*, the defendant’s speedy trial rights attached when he was indicted in 1998, but he conceded that the government was not responsible for the period before his capture in 2004.<sup>219</sup> Ghailani was arraigned in 2009, so the relevant delay for speedy trial purposes was around five years.<sup>220</sup> While not citing one year as the threshold for a presumptively prejudicial delay or explicitly stating that the five-year delay was sufficient to trigger the rest of the analysis, the *Ghailani* court quickly moved on to the next *Barker* factor.<sup>221</sup> Like Ghailani, the individuals currently detained at Guantanamo have been imprisoned there for years,<sup>222</sup> so assuming that their speedy trial rights vested, the length of the delay would be sufficient to proceed to the rest of the *Barker* analysis.

#### B. The Reason for the Delay

As the Supreme Court put it in *United States v. Loud Hawk*, “[t]he flag all litigants seek to capture is the second factor, the reason for delay.”<sup>223</sup> The Supreme Court acknowledged that the reason for the delay, along with prejudice to the defendant, weighs disproportionately on courts analyzing whether there has been a violation of the Speedy Trial Clause.

*Barker* discussed three types of reasons for a particular delay: (1) deliberate attempts to hamper the defense, (2) neutral reasons, and (3) valid reasons.<sup>224</sup> First, a deliberate attempt by the government to hamper the defense is characterized by bad faith or dilatory purpose,<sup>225</sup> and weighs heavily against the government.<sup>226</sup> Second, neutral reasons

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217. *Id.* at 1260.

218. *Id.* at 1265.

219. *United States v. Ghailani*, 751 F. Supp. 2d 515, 529 (S.D.N.Y. 2010).

220. *Id.*

221. *Id.* The court spent less than two pages discussing the first *Barker* factor.

222. Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 405 (2010) (“Anecdotal information suggests that inflows to the base largely dried up in 2004, after the Supreme Court’s first interventions in the field.”).

223. 474 U.S. 302, 315 (1986).

224. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

225. *But see, e.g., Loud Hawk*, 474 U.S. at 316 (finding that the delay in question was not a deliberate attempt by the government to hamper the defense).

226. *Barker*, 407 U.S. at 531.

are causes like government negligence or overcrowded courts that weigh against the government, but less heavily than delays intentionally pursued by the government.<sup>227</sup> Third, valid reasons, which do not weigh against the government, include missing witnesses<sup>228</sup> and legitimate interlocutory appeal.<sup>229</sup>

*Ghailani* demonstrates the importance of the reason for the delay in speedy trial adjudication.<sup>230</sup> *Ghailani* found that the relevant delay began with the defendant's transfer to CIA custody rather than his indictment three years earlier.<sup>231</sup> Thus, the court examined the period of nearly five years between the beginning of CIA custody and Ghailani's indictment.<sup>232</sup> The court bifurcated its analysis of the five year period into (1) the two years of CIA custody before Ghailani's transfer to the Department of Defense at Guantanamo Bay and (2) the three years from Ghailani's arrival at Guantanamo Bay to his arraignment, including his CSRT and military commission proceedings.<sup>233</sup> The government argued that the entire five year period at issue was justified by valid reasons—the first two years of CIA custody by national security concerns, and the subsequent three years by pending CSRT and military commission proceedings.<sup>234</sup>

Quoting the Supreme Court's statement that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," the court agreed that national security concerns were a valid reason for the initial two year delay.<sup>235</sup> Because Ghailani was and continued to be a valuable source of intelligence during those two years, the delay was justified.<sup>236</sup> Notably, the court rejected as irrelevant Ghailani's argument that his mistreatment at the hands of the government negated any valid reason for the delay.<sup>237</sup>

The court was more skeptical of the government's justification for

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227. *Id.*

228. *Id.*

229. *Loud Hawk*, 474 U.S. at 316-17.

230. *Padilla*, on the other hand, held that the defendant's speedy trial rights did not vest until his indictment, so the court did not proceed to the rest of the *Barker* analysis. See Order Denying Defendant Padilla's Motion to Dismiss Indictment for Speedy Trial Violations in Derogation of Sixth Amendment Rights, *United States v. Padilla*, No. 04-60001-CR-COOKE (S.D. Fla. April 3, 2007); Whoriskey, *supra* note 53.

231. See *United States v. Ghailani*, 751 F. Supp. 2d 515, 521-22 (S.D.N.Y. 2010).

232. *Id.* at 522-26.

233. See *id.* (discussing the respective time periods).

234. *Id.* at 534.

235. *Id.* at 540 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

236. *Ghailani*, 751 F. Supp. 2d at 535.

237. *Id.*

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the subsequent three years.<sup>238</sup> First, the government argued that the period from Ghailani's arrival at Guantanamo in September 2006 to his CSRT in March 2007 was justified by the need to hold him as an enemy combatant.<sup>239</sup> The court rejected that contention, stating that civilian detention of Ghailani in the United States would have been equally effective in preventing him from returning to the battlefield, and his presence was generally not required to begin criminal proceedings.<sup>240</sup> Second, the court noted that Ghailani's presence was not required for the CSRT, and that proceeding was not a "material part of the delay" in any case.<sup>241</sup> Finally, the government justified the period from March 2007 to Ghailani's arraignment in 2009 by the military commission investigation and prosecution that was ultimately aborted.<sup>242</sup> The court distinguished *Ghailani* from cases involving two prosecutions by different sovereigns or based on different activity.<sup>243</sup> Instead, it noted that the delay was simply caused by the government pursuing the military commission prosecution and then altering its course to civilian court.<sup>244</sup> Ultimately, the court found that Ghailani's military detention and pending military commission proceedings were neutral reasons that weighed against the government for the delay from Ghailani's arrival at Guantanamo in September 2006 to his arraignment.<sup>245</sup>

In attempting to persuade the court that the reason for the delay was "deliberate" and should weigh heavily against the government, Ghailani made a number of arguments that may be repeated in future detainee trials. First, Ghailani argued that because the government deliberately decided to place him in military detention and pursue trial by military commission, those decisions should weigh heavily against the government as a deliberate attempt to hamper the defense.<sup>246</sup> As the government noted in its brief,<sup>247</sup> though, by using the shorthand

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238. *Id.* at 540 ("The considerations affecting the remaining delay of almost three years present a somewhat closer case.").

239. *Id.* at 536.

240. *See id.*

241. *Ghailani*, 751 F. Supp. 2d at 537.

242. *Id.*

243. *Id.* at 537-38.

244. *Id.* at 537-39.

245. *Id.* at 540.

246. Memorandum of Law in Support of Defendant Ahmed Khalfan Ghailani's Motion to Dismiss Indictment Due to the Denial of his Constitutional Right to a Speedy Trial at 22, *United States v. Ghailani*, 751 F. Supp. 2d 515 (S.D.N.Y. Nov. 16, 2010) (No. 98 Cr. 1023 (S-10) (LAK)) [hereinafter *Ghailani Speedy Trial Motion*].

247. Memorandum of Law in Opposition to Defendant Ahmed Khalfan Ghailani's Motion to Dismiss the Indictment Due to the Denial of his Constitutional Right to a Speedy Trial at 39-40, *United States v. Ghailani*, 751 F. Supp. 2d 515 (S.D.N.Y. Dec. 15, 2009) (No. S(10) 98 Cr. 1023 (LAK)) [hereinafter *Government Response to Ghailani*] ("For delay

“deliberate” to label the reason that *Barker* described as a “deliberate attempt to delay the trial in order to hamper the defense,”<sup>248</sup> Ghailani’s brief confused intentional decisions leading to a delay with intentional decisions made for the specific purpose of harming the defense. Deliberate attempts to hamper the defense are more accurately labeled “invalid” reasons for delay, rather than Ghailani’s description of them as “deliberate” reasons.

Second, Ghailani argued that the government’s goal in holding and interrogating him was to gain a tactical advantage, which should weigh heavily against the government.<sup>249</sup> In so doing, Ghailani conceded that courts have generally considered “tactical advantage” in terms of a litigation advantage in the instant case,<sup>250</sup> but advocated for a dramatically broader conception of the term, including gaining intelligence relating to co-defendants and others.<sup>251</sup> In his case, Ghailani argued that the government gained information during its interrogation useful in cross examination and identifying possible defense witnesses and strategies.<sup>252</sup> Also, Ghailani contended that the detention and interrogation damaged his capacity to assist in his defense.<sup>253</sup>

In finding that the reason for Ghailani’s detention and military commission prosecution was “neutral,” the court was not persuaded that because the government’s decision was intentional, it should be weighed heavily in the defendant’s favor. Nor was it convinced that the government intended to gain a tactical advantage over either Ghailani or other potential defendants.<sup>254</sup> Indeed, even if Ghailani’s interrogation and detention harmed his defense in the ways he described, the key question is whether the government’s decisions were intentionally made

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to weigh heavily against the government, it not only has to be deliberate or intentional, but it also has to be for an unreasonable purpose.”) (citing *Garcia-Montalvo v. United States*, 862 F.2d 425, 426 (2nd Cir. 1988); *United States v. Jones*, 91 F.3d 5, 8 (2nd Cir. 1996)).

248. *Id.* at 13 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

249. *See Barker*, 407 U.S. at 531 n.32 (1972) (“[I]t is improper for the prosecution intentionally to delay to ‘gain some tactical advantage over (defendants) or to harass them.’”) (citing *United States v. Marion*, 404 U.S. 307, 325 (1971); *Pollard v. United States*, 352 U.S. 354, 361 (1957)).

250. *Ghailani Speedy Trial Motion*, *supra* note 246, at 32 (“Cases that have examined ‘tactical advantage’ in the past generally focus on ‘tactical advantage’ gained against the defendant at trial.”).

251. *Id.* at 33 (arguing that the government’s tactical advantage relating to Ghailani’s detention and interrogation extends to “any other case that might conceivably be brought in relation to the information gained”).

252. *Id.* at 38-39.

253. *Id.* at 41.

254. *United States v. Ghailani*, 751 F. Supp. 2d 515, 534 (S.D.N.Y. 2010).

“to delay to gain some tactical advantage.”<sup>255</sup> While the government deliberately decided to interrogate Ghailani and place him in military detention, and those decisions may have led to litigation advantages for the government, if the decisions were not made for the purpose of achieving those litigation advantages, they are not invalid under *Barker*.<sup>256</sup> As the court stated in declaring the reason for the detention and prosecution delay neutral:

Just as the executive branch was entitled . . . to detain Ghailani at Guantanamo as an enemy combatant, it was entitled to make the judgments it did as to the most appropriate forum in which to prosecute Ghailani. By the same reasoning, however, it is responsible for the delay that those judgments caused.<sup>257</sup>

What import does the *Ghailani* discussion on the reason for the delay have for other detainee cases? The decision indicates that the courts will not force, at least via the Speedy Trial Clause, the government to choose between detaining an individual in the best interests of national security and immediately pursuing a criminal prosecution. That is, when the government captures an individual who is potentially both an intelligence asset and a criminal defendant, the government may detain and interrogate the individual without forfeiting its right to bring a criminal prosecution later. Had *Ghailani* held that the government’s decision to detain and interrogate the defendant weighed heavily in favor of his speedy trial claim, by either its “deliberate” nature or its purpose being to gain a “tactical advantage” over Ghailani or other defendants, a finding of a Sixth Amendment violation probably would have followed. That, in turn, would have likely foreclosed criminal prosecution of current Guantanamo detainees and, for future captures, “forc[ed] the Executive Branch, ‘in a time of war and of grave public danger,’ and on pain of a constitutional violation that would preclude criminal prosecution forever, to prioritize law enforcement over national security.”<sup>258</sup>

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255. See *Barker v. Wingo*, 407 U.S. 514, 531 n.32 (1972). Interestingly, the government argued that the fact that it did not read Ghailani his Miranda rights, maintain a strict chain of custody, or ask for a waiver of speedy presentment showed that its detention and interrogation of Ghailani was not to gain a tactical litigation advantage. This raises the possibility of defendants in other detainee cases arguing the inverse—that government steps to preserve the option of criminal trial prove a bad faith purpose for the delay. See *Government Response to Ghailani*, *supra* note 247, at 75.

256. See *Government Response to Ghailani*, *supra* note 247, at 46 (“Where the Government has a legitimate reason to seek a delay, and it does not do so for the purpose of ‘hamper[ing] the defense, it is ‘valid’ under *Barker*.”) (citing *Barker*, 407 U.S. at 531).

257. *Ghailani*, 751 F. Supp. 2d at 539.

258. *Government Response to Ghailani*, *supra* note 247, at 66-67 (quoting *Ex parte*

As to the time Ghailani spent in DOD custody and awaiting military commission prosecution, the court's analysis demonstrates that for delays caused less by compelling national security interests than government policy choices concerning the most appropriate venue for detaining and trying detainees, the other *Barker* factors beyond the reason for delay will play a heightened role. A major question remaining is under what circumstances the length of the delay, defendant's assertion of the speedy trial right, and prejudice to the defendant combine with a neutral reason for the delay (government policy preference) to trigger a Sixth Amendment violation. While *Ghailani* does not answer that question definitively, it hints that prejudice to the defendant is especially important in that analysis.<sup>259</sup>

### C. The Defendant's Assertion of the Right

The defendant's timely assertion of the speedy trial right is nearly<sup>260</sup> a prerequisite for a finding of a Sixth Amendment violation.<sup>261</sup> Like the length of the delay, the assertion of the right is a threshold issue for the defendant to satisfy before moving on to the meat of the *Barker* analysis—the reason for the delay and prejudice to the defendant. Indeed, *Barker* largely turned on the assertion of the right, as the Court was convinced that the Defendant did not actually desire a speedy trial during his five-year delay.<sup>262</sup>

*Ghailani* explicitly mentioned the relative unimportance of the assertion of the right to its analysis.<sup>263</sup> Ghailani did not demand a speedy trial until March 9, 2009, in a habeas petition a little over two months before his transfer to criminal court.<sup>264</sup> The court absolved Ghailani of his responsibility for demanding a speedy trial while he was

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Quirin, 317 U.S. 1, 25 (1942)).

259. See *infra* Part III.D.

260. *Barker* explicitly rejected the rule that would have made demanding a speedy trial an absolute prerequisite to finding a Sixth Amendment violation. *Barker*, 407 U.S. at 528 (“We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.”).

261. Even though the Court rejected assertion of the right as an absolute necessity, it cautioned that failure to assert the right would be weighed heavily in the analysis. *Id.* at 532 (“We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.”).

262. The Court surmised that the defendant did not seek a speedy trial in hopes that his codefendant would be acquitted and not testify against him. *Id.* at 536.

263. *United States v. Ghailani*, 751 F. Supp. 2d 515, 529 (S.D.N.Y. 2010) (“In practice, a defendant's demand for or failure to demand a speedy trial tends not to influence the analysis strongly except at the extremes.”).

264. *Id.* at 530 n.92.

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a fugitive, in CIA custody,<sup>265</sup> and in DOD custody.<sup>266</sup> Ultimately, the court found that the assertion of the right favored neither Ghailani nor the government, as neither party acted inappropriately by failing to demand a speedy trial or ignoring the Defendant's request.<sup>267</sup>

*Ghailani* implies that the assertion of the right is unlikely to be a substantial obstacle for detainee defendants claiming a violation of their speedy trial rights. As mentioned previously, *Ghailani* is unusual in that the Defendant was indicted years before his capture, detention, and arraignment.<sup>268</sup> If there are future trials, most detainee defendants will likely be indicted close in time to their transfer to civilian custody. Thus, *Ghailani* is the rare detainee case that could have been materially affected by the defendant's assertion of the right, but even it was not.

*D. Prejudice to the Defendant*

Like the reason for the delay, prejudice to the defendant is especially important in the *Barker* analysis, and a showing of prejudice is generally necessary to find a Sixth Amendment violation.<sup>269</sup> Prejudice is considered in light of the interests the right was designed to protect: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired.<sup>270</sup> Of those goals of the Speedy Trial Clause, limiting the possibility that the defense will be impaired "by dimming memories and loss of exculpatory evidence" is primary.<sup>271</sup> As a result, a court analyzing whether there has been a violation of the Speedy Trial Clause must consider the effect of the delay on the defense

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265. The government conceded that Ghailani "did not have a meaningful opportunity to assert [his speedy trial] interest" while in CIA custody. *Government Response to Ghailani*, *supra* note 247, at 81 n.13.

266. *Ghailani*, 751 F. Supp. 2d at 530 (finding no evidence that Ghailani was aware of his speedy trial right on the indictment while in DOD custody, that his assigned military counsel was focused on his military commission proceedings, and that there was no persuasive evidence that Ghailani purposefully neglected to request a speedy trial because he preferred trial by military commission, where the death penalty was not in play).

267. *Id.*

268. *Id.* at 518.

269. See *Reed v. Farley*, 512 U.S. 339, 353 (1994) ("A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause . . .") (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

270. *Barker*, 407 U.S. at 532 (citing *United States v. Ewell*, 383 U.S. 116, 120 (1966); *Smith v. Hooy*, 393 U.S. 374, 377-78 (1969)).

271. *Doggett v. United States*, 505 U.S. 647, 654 (1992) (citing *Barker*, 407 U.S. at 532). *Contra id.* (Thomas, J., dissenting) (arguing that *Barker* is in conflict with *Marion* and "preventing prejudice to the defense is not one of [the Speedy Trial Clause's] independent and fundamental objectives.").

once the defendant's right has been triggered by arrest or indictment.<sup>272</sup> Further, a defendant is not necessarily required to show with particularity how his defense was harmed because delay carries a presumption of prejudice.<sup>273</sup>

In both *Ghailani* and *Padilla*, the defendants complained of prejudice caused by (1) mistreatment at the hands of the government and (2) the relevant delay's harmful effect on their ability to defend themselves.<sup>274</sup> Presumably, these would be common arguments by other detainees facing trial as well. *Ghailani* disposed of the mistreatment argument by denying any effect of the alleged misconduct on the defense or the length of his pretrial incarceration.<sup>275</sup> The court also found no prejudice related to the "anxiety or the concern of the accused" due to the possibility of the government seeking the death penalty in criminal court.<sup>276</sup> As it had in the military commission setting, the government ruled out pursuing the death penalty in the criminal trial shortly after Ghailani's transfer to civilian custody, so any possible period of anxiety was short.<sup>277</sup>

More importantly, the court rejected Ghailani's contention that the delay harmed his ability to defend himself by citing the defense's inability to identify a witness made unavailable because of the delay.<sup>278</sup> However, a defendant may prevail without showing particularized prejudice, on the argument that the delay presumptively harms his ability to defend himself.<sup>279</sup> In *Doggett v. United States*, the Supreme

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272. *Id.* at 655. *But see id.* at 663 (Thomas, J., dissenting) (contending that an indictment alone is not enough to trigger a defendant's speedy trial rights because "[t]he touchstone of the speedy trial right, after all, is the substantial deprivation of liberty that typically accompanies an 'accusation,' not the accusation itself"). In the absence of a deprivation of liberty, Justice Thomas would have delay analyzed under the Due Process Clause and the appropriate statute of limitations.

273. *Id.* at 655 ("[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."). *Contra Doggett*, 505 U.S. at 659 (O'Connor, J., dissenting) (arguing that courts should require "a showing of actual prejudice to the defense before weighing it in the balance").

274. *United States v. Ghailani*, 751 F. Supp. 2d 515, 532 (S.D.N.Y. 2010); *Padilla Speedy Trial Motion*, *supra* note 55, at 13-14. There is no indication that the *Padilla* court actually considered the prejudice issue, as it determined that Padilla's speedy trial rights were not implicated until indictment, obviating the need for further analysis.

275. The court argued that Ghailani would have been incarcerated in any case, the government did not intend to use evidence gained through the CIA's interrogation, and the defendant's mental state was not degraded as a result of the interrogation. *Ghailani*, 751 F. Supp. 2d at 532.

276. *Id.* at 533.

277. *Id.*

278. *Id.* at 532-33.

279. *Doggett v. United States*, 505 U.S. 647, 658 (1992) (finding a violation of the Speedy Trial Clause because a six year delay presumptively prejudiced the defense).

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Court indicated that with a neutral reason for the delay,<sup>280</sup> a defendant without a particularized showing of prejudice must endure a longer delay than a defendant with such a showing to warrant speedy trial relief.<sup>281</sup> The Court stated, “the weight we assign to [a neutral reason] compounds over time as the presumption of evidentiary prejudice grows.”<sup>282</sup>

*Ghailani* held that there was no prejudice to the defendant during either his time in CIA or DOD detention, because he would have been detained in any event and the delay did not cause him greatly added anxiety or impair his ability to defend himself.<sup>283</sup> Once the court ruled out *Ghailani*’s ability to demonstrate particular harm to his defense caused by the delay, it did not proceed to consider presumptive prejudice caused by the delay.<sup>284</sup> Presumably, this is because the other *Barker* factors favored the government to a degree that such analysis was inapplicable.<sup>285</sup> For *Ghailani*’s two-year period of CIA custody and interrogation, which was justified by the valid purpose of protecting national security,<sup>286</sup> delving into the possibility of presumptive prejudice was unnecessary. The three-year period of DOD custody, though, is more difficult to differentiate from *Doggett*, where presumptive prejudice led to a Sixth Amendment violation. Both delays were caused by neutral reasons (prosecutorial negligence in *Doggett*,<sup>287</sup> detention and prosecutorial discretion in *Ghailani*),<sup>288</sup> but the relevant portion of the delay in *Doggett* was six years,<sup>289</sup> while it was merely three in *Ghailani*.<sup>290</sup> With the Supreme Court’s implication that a delay must be relatively long to trigger presumptive prejudice sufficient for a Sixth Amendment violation,<sup>291</sup> that three-year difference is likely

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280. In *Doggett*, the delay was caused by prosecutorial negligence, which the Court stated was in “the middle ground” and should be weighed “more lightly than a deliberate intent to harm the accused’s defense.” *See id.* at 656-57.

281. *Id.*

282. *Id.*

283. *Ghailani*, 751 F. Supp. 2d at 540-41.

284. *See id.* at 528.

285. This was certainly the government’s contention as to why the court should not presume prejudice. *See Government Response to Ghailani*, *supra* note 247, at 112 (“Where, as here, the other factors weigh in the Government’s favor, a presumption is unwarranted and a showing by the defendant of actual prejudice is generally required.” (citing *United States v. Stone*, 510 F. Supp. 2d 338, 343 (S.D.N.Y. 2007))).

286. *Ghailani*, 751 F. Supp. 2d at 520 (“Two years of the delay served compelling interests of national security.”).

287. *Doggett*, 505 U.S. at 656-57.

288. *Ghailani*, 751 F. Supp. 2d at 539.

289. *Doggett*, 505 U.S. at 657.

290. *Ghailani*, 751 F. Supp. 2d at 540.

291. *See supra* notes 281-82 and accompanying text.

enough to distinguish *Ghailani* from *Doggett*.

The Supreme Court held in *Smith v. Hooy* that a defendant incarcerated for other crimes may experience prejudice from pre-trial incarceration because the delay may cause the defendant to lose the possibility of concurrent sentence, clemency, or parole.<sup>292</sup> Ghailani was not completing a sentence while in military detention, so he was not eligible for a concurrent sentence, and his chances of release were not impacted by his earlier indictment. However, the court's holding that Ghailani was not prejudiced by oppressive pretrial incarceration because he would have been detained by the military regardless of any trial delay assumes that Ghailani's military detention would have recommenced upon acquittal by an Article III court or completion of a criminal sentence. The Obama administration has repeatedly maintained that it has the authority to hold enemy belligerents in military detention, even if they have been acquitted in criminal court or completed their sentence.<sup>293</sup> As previously discussed, one questions whether the administration would actually have the political will to detain such a person.<sup>294</sup> For example, the government likely transferred Padilla and Ali Al-Marri to criminal court at least in part because it wished to avoid an adverse Supreme Court decision on its ability to hold a citizen and permanent resident, respectively, in military detention.<sup>295</sup> If either of those defendants were acquitted, it is highly doubtful that the government would have transferred them back to military detention.

If a defendant's trial was delayed by a period of *unlawful* military detention, *Ghailani's* determination that the defendant would have been detained in any case would not hold. However, courts will rarely, if ever, definitively know that a defendant's prior military detention was unlawful when adjudicating their criminal trial. Presumably, the government would transfer a detainee to civilian court before a habeas court has an opportunity to invalidate his military detention or, once a habeas court ruled in favor of a detainee, the government would simply decline to prosecute.

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292. The Court also stated that an incarcerated person may suffer prejudice via "anxiety and concern accompanying public accusation" via the "depressive effect" on the prisoner, as well as additional potential for impairment of the defense. 393 U.S. 374, 379-80 (1969).

293. See *supra* note 29.

294. See Wittes & Goldsmith, *supra* note 30.

295. The Fourth Circuit denied the government's motion to transfer Padilla to civilian law enforcement custody as an attempt to avoid Supreme Court review. See *Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005). The Supreme Court ultimately allowed the transfer. See *Hanft v. Padilla*, 546 U.S. 1084, 1084-85 (2006).

In the case of a detainee defendant who was ordered released by a habeas court before being criminally charged, the government could not reasonably claim a lack of prejudice to the defendant because he would have been detained regardless of the delay. The more difficult case is that of a defendant who was transferred to civilian custody for trial before a habeas court ruled on the legality of his detention. Ghailani conceded that the government had the authority to detain and interrogate him,<sup>296</sup> but if a defendant contests the legality of his prior military detention, should a court judge the legitimacy of the detention to determine whether he suffered prejudice (i.e. whether the defendant would have been detained in any case, as *Ghailani* found) or simply presume that the detention was lawful? If the former, the court would essentially have to adjudicate the legality of a period of completed military detention, a complex matter in itself, within the context of a speedy trial claim. If the latter, the government could theoretically detain an individual knowing that the detention is likely unlawful, and then transfer the detainee to civilian custody for prosecution immediately before a habeas court ruled with no Sixth Amendment consequences.

Rather than either deciding the legality of the completed detention or assuming that the detention was lawful, courts' best course would be to use the *Barker* "reason for the delay" factor to inquire into the nature of the detention. Detaining a defendant in bad faith—knowing that such detention was likely unlawful—should be considered an invalid reason for the delay, as a deliberate attempt to hamper the defense, and weigh heavily against the government.<sup>297</sup> That would likely turn the speedy trial analysis in the defendant's favor. For example, if the government's military detention of Ghailani was in bad faith and for an invalid reason, the reason for the delay factor would favor the defendant. The prejudice to the defendant factor would likely weigh in Ghailani's favor as well because he would not have been detained regardless of the delay. For defendants like Padilla, whose speedy trial rights were not triggered until just before their arraignment, a slightly narrower inquiry into whether the military detention was in bad faith and prejudiced the fair trial rights of the defendant could be made under the Due Process Clause.<sup>298</sup> Under the Speedy Trial Clause, though, inquiring into the

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296. *United States v. Ghailani*, 751 F. Supp. 2d 515, 535 (S.D.N.Y. 2010).

297. *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (citing *Barker v. Wingo*, 407 U.S. 514, 531 (1972)).

298. Because Padilla's speedy trial rights were found not to begin until his indictment, the Court did not proceed to the *Barker* analysis. Padilla and similar defendants could, however, argue that the pre-indictment delay was inconsistent with the Due Process Clause

government's motivation for the military detention would help determine whether the delay more broadly prejudiced the defendant or if he would have been detained in any event.

#### IV. IMPLICATIONS OF *GHAILANI & PADILLA*

Before *Ghailani*, some commentators predicted that speedy trial litigation would not derail criminal prosecutions of Guantanamo detainees,<sup>299</sup> while another argued that every *Barker* factor cuts in favor of the potential defendants<sup>300</sup> and quoted Department of Justice officials worrying that every prosecution would be dismissed on speedy trial grounds.<sup>301</sup> Rightly, *Ghailani*'s speedy trial motion proved not to foil the government's case, but the government should not take the decision as a sign that it may freely move between the military and civilian systems without risk. Even if the Speedy Trial Clause does not apply to most military detention delays, as this Article argues and *Padilla* held, the government will still have to litigate against motions to dismiss based on the Due Process Clause. In the odd case like *Ghailani* where the Sixth Amendment unambiguously applies, or if other courts reject *Padilla*'s lead and apply the Sixth Amendment to periods of military detention, the *Barker* test will give defendants additional avenues for relief.

More broadly, *Ghailani* and *Padilla* may exacerbate the political fight between proponents of detainee trials by military commissions and Article III courts, respectively. *Ghailani*'s transfer was motivated by a change in policy brought on by President Obama, who favors criminal trials, succeeding President Bush, who favored military commissions. Assuredly, the United States will continue to capture terrorists who will spawn disagreements about whether they should be tried by military commission or civilian court. Depending on which political party holds the presidency, individuals may be transferred from military to civilian custody or vice-versa. Defendants in the military commission setting do

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because it caused substantial prejudice to the defendant's fair trial rights and was an intentional device to gain tactical advantage over the accused. *See supra* Part II.C.

299. *E.g.* ZABEL & BENJAMIN, *supra* note 131, at 111 (declaring that "terrorism trials have not presented novel speedy trial problems" and lengthy pre-trial delays in terrorism cases have not run afoul of the Speedy Trial Clause).

300. Gregory S. McNeal, *Beyond Guantanamo, Obstacles and Options*, 103 NW. U. L. REV. 29, 45 (2008) ("[N]early all of [the *Barker* factors] augur in favor of a colorable claim to denial of speedy trial rights.").

301. *Id.* ("One senior Department of Justice, National Security Division official recently told me that '[w]e would lose all of those cases, not because of a lack of evidence or an inability to prove the case . . . I'd lose them all on speedy trial grounds.'").

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not have speedy trial rights,<sup>302</sup> and *Ghailani* and *Padilla*'s speedy trial and due process rulings provide a procedural basis for transferring future detainees to criminal court. If the *Ghailani* and *Padilla* indictments were dismissed on speedy trial or due process grounds, future detainee trials would have been all but ruled out. As is, though, there is a procedural basis for attempting future transfers should the President so desire, but enormous political obstacles remain, especially after the *Ghailani* verdict and congressional prohibition on spending for that purpose.<sup>303</sup>

Beyond other detainee cases, the precedent established in *Ghailani* and *Padilla* will also apply to more ordinary criminal cases. Attorney General Mukasey, who handled the Omar Abdel Rahman case as a federal district court judge, succinctly described the danger:

There is a certain pressure in these [terrorism] cases that tends to distort rules when the stakes are high. If those pressures are brought to bear here, the law that is created is going to be a law that is applicable straight across the board—in all criminal cases—and it could do a lot of damage. Once the rules are created, it is nearly impossible to confine those rules solely to terrorist cases.<sup>304</sup>

“[I]f conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.”<sup>305</sup> For example, assuming that the ruling is affirmed on appeal, *Padilla* may be used to argue that detention in something other than the military context does not trigger a defendant's speedy trial rights. Likewise, *Ghailani* may be used to generally contend that incarcerated defendants do not suffer prejudice from delay. In sum, as Attorney General Mukasey argues, *Ghailani* and *Padilla* will not be applied only in terrorism cases, and their effect on more ordinary cases is yet unknown.

**CONCLUSION**

*Ghailani* and *Padilla* are almost certainly not the last word on the speedy trial rights of former military detainees tried in civilian courts. Indeed, although the *Ghailani* verdict may halt criminal trials of long-

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302. See Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009).

303. See Landers, *supra* note 8.

304. Mukasey, *supra* note 101, at 961.

305. Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL STREET J., Aug. 22, 2007, at A15.

term military detainees for the foreseeable future, *Ghailani* and *Padilla* are likely only a prelude to further development of this area of law. The cases satisfy a threshold test for the viability of civilian trials of former detainees. Undoubtedly, if the defense's speedy trial motion derailed either of those cases, the basis for attempting future detainee trials would be very tenuous. As is, President Obama has clearly expressed his preference for civilian trials, and before the *Ghailani* verdict and congressional spending prohibition for Guantanamo transfers, future detainee prosecutions seemed likely, if not inevitable. Aside from the considerable political challenges inherent in such trials and their wisdom as a matter of policy, *Ghailani* and *Padilla* validated future trials' potential compliance with the Due Process and Speedy Trial Clauses.

*Padilla* correctly held that periods of military detention generally do not trigger a defendant's speedy trial rights. The language of the Sixth Amendment and Supreme Court precedent in *Marion* clearly support the ruling that *Padilla* was not an "accused" under the Speedy Trial Clause. Further, as military detention determinations cut close to the heart of executive authority as Commander in Chief, decisional flexibility is appropriate absent compelling circumstances.

In the absence of the Speedy Trial Clause, analysis of such prosecutions' consistency with the Fifth Amendment Due Process Clause gains importance. Under both the Speedy Trial Clause and Due Process Clause, prejudice to the defense and the reason for the delay are key determinants of a prosecution's validity. The bar for defendants is higher under the Due Process Clause, though, due to its sole concern with defendants' fair trial rights, rather than the broader delay-based considerations of the Speedy Trial Clause. To prevail on a due process claim, a defendant must show prejudice to his fair trial rights and an invalid reason for the delay. In contrast, under the Speedy Trial Clause, prejudice may be shown in a broader form and a neutral reason for the delay will not rule out relief for the defendant. The balancing nature of the *Barker* test means that some other combination of factors may overcome a weakness in the defendant's case.

While their wisdom and effectiveness may be debated, military detainee trials are extraordinary events in the criminal justice system. Rulings in those unusual cases, though, will apply to more ordinary cases in ways yet unknown. Thus far, the judiciary has exercised proper review over Fifth and Sixth Amendment delay claims in detainee cases. The Speedy Trial Clause does not apply to most periods of military detention, as in *Padilla*, and the Due Process Clause is the bulwark in protecting against bad faith by the government. In those cases in which

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the Sixth Amendment applies, such as *Ghailani*, the balancing test and broader inquiries into prejudice and the reason for the delay safeguard the interests of those “accused” long before their arraignment. Despite commentators’ concern about detainee trials’ survival of Fifth and Sixth Amendment scrutiny, the early returns indicate that such cases are at least facially viable. The political viability of detainee prosecutions, meanwhile, remains in serious doubt.