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Congress's Consistent Intent to Utilize Military Commissions in the War against Al-Qaeda and Its Adoption of Commission Rules That Fully Comply with Due Process.

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ARTICLE

CONGRESS'S CONSISTENT INTENT TO UTILIZE MILITARY COMMISSIONS IN THE WAR AGAINST AL-QAEDA AND ITS ADOPTION OF COMMISSION RULES THAT FULLY COMPLY WITH DUE PROCESS

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I. INTRODUCTION

For most Americans, the horrific images from the terrorist attacks carried out on the morning of September 11, 2001, that targeted our national financial, government, and military centers left no doubt that the United States was at war with a foreign enemy. Congress responded to the attack by passing the Authorization for the Use of Military Force (AUMF), which authorized President George W. Bush to pursue, capture, and kill those enemies who had targeted the United States.[1] In the following years, Congress augmented that authority when it passed the Military Commissions Act of 2006 (MCA of 2006) and the Military Commissions Act of 2009 (MCA of 2009), which established military commissions to try captured unlawful combatants.[2] In doing so, Congress responded to the Supreme Court's decision in

1. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541).

2. Military Commissions Act of 2006, Pub. L. 109-366, § 3, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a–950w), *amended by* Military Commissions Act of 2009, Pub. L. 111-84, § 1802, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a–950t (2006 & Supp. III 2009)).

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Hamdan v. Rumsfeld,[3] which found that President Bush's attempt to establish military commissions required authorization from Congress.[4] As this Article discusses, when drafting the Military Commissions Acts, Congress recognized that numerous evidentiary and trial procedures present in the federal civilian court system were inappropriate for trying unlawful combatants. Thus, Congress provided a forum that could bring al-Qaeda and its associated organizations to justice and that could allay the security and evidentiary concerns inherent with trying enemy combatants, who engaged in hostilities against the United States and its coalition partners, or materially supported hostilities.[5] Despite the actions of Congress, President Barack Obama reversed the policy of the United States when he announced on November 13, 2009, that the Department of Justice would prosecute Khalid Sheikh Mohammed, the self-described mastermind of the terrorist attacks of September 11, 2001, and his co-conspirators in federal civilian court.[6]

President Obama's abrupt reversal signaled the Administration's attempt to recast the war against jihadist terrorists as a criminal matter, contrary to U.S. policy prior to the attacks of September 11, 2001. Many in Congress realized that the Administration's policy sent the wrong message. After meeting with military, intelligence, and law enforcement officials in Afghanistan, Republican Representative Mike Rogers from Michigan, who will chair the House Permanent Select Committee on Intelligence in the 112th Congress, described the

3. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

4. *Hamdan*, 548 U.S. at 645–46.

5. Military Commissions Act of 2006, Pub. L. 109-366, § 3, 120 Stat. 2600 (codified as amended at 10 U.S.C. § 948a (2006 & Supp. III 2009)). As amended, the MCA authorizes military commissions to try any "unprivileged enemy belligerent," which includes "an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under [chapter 47A of title 10 of the U.S. Code]." Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2575 (codified at 10 U.S.C. § 948a(7) (Supp. III 2009)). A "privileged belligerent" is defined as "an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War." *Id.* (codified at 10 U.S.C. § 948a(6) (Supp. III 2009)).

6. *Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial*, CNN.COM (Nov. 13, 2009), http://articles.cnn.com/2009-11-13/justice/khalid.sheikh.mohammed_1_ al-nashiri-uss-cole-military-commissions?_s=PM:CRIME.

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Administration's flawed policy as follows:

> The [Obama] administration has decided to change the focus to law enforcement. Here's the problem. You have foreign fighters who are targeting US troops today—foreign fighters who go to another country to kill Americans. We capture them and they're reading them their rights—Mirandizing these foreign fighters. . . .
>
> . . . .
>
> . . . The problem is you take that guy at three in the morning off of a compound right outside of Kabul where he's building bomb materials to kill US soldiers, and read him his rights by four, and the Red Cross is saying take the lawyer—you have now created quite a confusion amongst the FBI, the CIA and the United States military. And confusion is the last thing you want in a combat zone.[7]

I tried to remind Congress of the history of past cases and explain the repercussions of civilian trials from a trial attorney's perspective in argument on the House floor in 2009.

> Mr. McCaul. Are we not in a war on terror . . . . My point is that that language has been taken out of the vernacular by this administration for whatever reason . . . . What happened by the decision to bring in the mastermind of 9/11 to the very city where 3,000 Americans were murdered basically was a signal by this administration that the war on terror is over, that we are no longer going to treat terrorists as enemies of war; but, rather, we're going to go back to the Clinton administration years where we're going to treat them as criminal defendants, like Ramzi Yousef, the 1993 World Trade Center bomber, a criminal defendant. Not an act of war, but he is a criminal defendant.
>
> By the way, Ramzi Yousef did not get the death penalty. And he went to talk to his Uncle Khalid Shiekh Mohammed about flying airplanes into buildings, and look what happened. Moussaoui did not get the death penalty because a lot of evidence was held to be inadmissible in a Federal court.
>
> If they are true enemies of war, the best venue to try them is, as we did in World War II, by military tribunals.
>
> . . . .

7. Stephen F. Hayes, *Miranda Rights for Terrorists*, THE WEEKLY STANDARD (June 10, 2009, 2:05 PM), http://www.weeklystandard.com/weblogs/TWSFP/2009/06/miranda_rights_for_terrorists.asp (internal quotation marks omitted).

... [W]hat was the first thing that Khalid Shiekh Mohammed said when he was apprehended in Islamabad? It was two things.

....

One, I want an attorney, and, number two, Take me to New York. And you know what? President Obama and this administration gave him his wish.

... I have tried cases. This is going to be a circus, a show trial of the maximum. The motions to transfer venue, the motions to suppress the evidence, none of the information we got from Khalid Shiekh Mohammed using water-boarding, which has protected American lives, which, by the way, this administration wants to investigate and put those CIA and intelligence people in jail. The discovery alone, as the gentleman from Arizona stated, will keep this thing alive for years to come, will involve classified information that will not be properly protected as it would in the military court.

....

... And what came out in a shocking story that has not been told enough, in my view, was that FBI agents were there at the detention facilities reading them the Miranda rights. This is where this administration has shifted towards treating them as criminal defendants in Afghanistan, with full rights of the U.S. Constitution in Afghanistan. And I believe it is a sad day for America when we bring this mastermind of 9/11 to the very city where he killed 3,000 Americans.

....

... And Osama Bin Laden, in the late 1990s, declared war against the United States. He actually declared war against the United States.

....

... Political correctness. And when has the Constitution of the United States been applied to enemies who are captured on the battlefield outside of the United States? I don't think that's ever been done. I'm not sure if that has ever been done.

....

... [A] criminal defense lawyer in a civilian court is going to use discovery at every opportunity to embarrass the United States of America and to blame America first for the acts of a terrorist, Khalid Sheikh Mohammed. And what concerns me the most is that they're going to make a mockery of our criminal justice system here

> in the United States and use it as a propaganda weapon in what I still refer to as this war on terror. This was one of the biggest mistakes this President has made.[8]

It is of course ironic that many civilian defendants who have committed one murder are assessed the death penalty in this country but, in part because of civilian rules that prevent the admission of all the evidence,[9] foreign-terrorist defendants who have plotted and or carried out mass murder like Ramsey Yousef and Zacarias Moussoui can receive a lesser sentence.[10]

The Administration's preference failed to recognize that the exigencies surrounding the seizure of terrorists engaged in combat—terrorists like Khalid Sheikh Mohammed and his co-conspirators—are incongruous to those surrounding domestic crime. As Republican Senator Lindsey Graham, a member of the Senate Armed Services Committee, explained:

> [Those terrorists] are not detained because of some violation of domestic criminal law. They are detained because they have been found to be part of al-Qaida and other terrorist organizations that the Congress has previously determined to be enemy combatant belligerents, people who have taken up arms against the United States of America, who are intent on our destruction. They are not accused of robbing a liquor store. They fall within a narrow statutory definition that was created after 9/11.[11]

Without question, the Administration's understanding has changed since its November 2009 announcement.[12] Since that time, the Administration has conceded the necessity for keeping detainees at Guantanamo Bay, has announced that it will reconsider the venue of the trial for the 9/11 conspirators, and has recently issued an executive order providing guidance for the treatment of those detainees being held indefinitely.[13] On April 4,

8. 155 CONG. REC. H12995-96 (daily ed. Nov. 16, 2009) (statement of Rep. McCaul).

9. *See generally* Mapp v. Ohio, 367 U.S. 643, 657 (1914) ("[O]ur holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense.").

10. *Moussaoui in Final Court Outburst*, GUARDIAN.CO.UK (May 4, 2006, 7:16 PM) *available at* 2006 WLNR 25797974; Greg B. Smith, *WTC Bombmaster Guilty Ramzi Yousef Faces a Life in Jail for '93 Terror Blast*, N.Y. DAILY NEWS, Nov. 13, 1997, at 4, *available at* 1997 WLNR 6765775.

11. 155 CONG. REC. S8003 (daily ed. July 23, 2009) (statement of Sen. Graham).

12. *See infra* Part I (detailing the Obama Administration's policy).

13. *See* Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011) (issuing an order

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2011, 507 days after Attorney General Holder announced his intention to try Khalid Sheik Mohammed and his co-conspirators in federal court,[14] the Administration finally announced that it was no longer trying these particular defendants in a civilian court but, rather, that it would try them before a military commission.[15] Yet, in announcing the policy reversal, Attorney General Holder took a decidedly confrontational tone, choosing to stand by his original decision and lay the blame on "unwise and unwarranted" congressional interference.[16] The Attorney General remained adamant that "[d]ecisions about who, where and how to prosecute have always been—and must remain—the responsibility of the executive branch."[17] Even those who agree with the Attorney General's separation of powers argument nonetheless made clear that the Administration had no one to blame but itself.[18]

At least the Administration once again embraced, in part, the wartime detention policies of its predecessor and reinforced the legally firm foundation upon which military commissions stand. The recent action taken by the Administration also highlights the difference between being the President of the United States and being a candidate for President of the United States. One

entitled, "Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force"); *see also* Peter Finn & Anne E. Kornblut, *Indefinite Detention Possible for Suspects at Guantanamo Bay*, WASH. POST, Dec. 22, 2010, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/21/AR2010122105523.html (reporting on the details of an executive order and a bill being considered by Congress).

14. Press Release, [Chairman Peter] King Statement on Obama Administration Decision on Khalid Sheikh Mohammed Trial (Apr. 4, 2011) (on file with author), *available at* http://homeland.house.gov/press-release/king-statement-obama-administration-decision-khalid-sheikh-mohammed-trial.

15. Abby Phillip, *Eric Holder Transfers Khalid Sheik Mohammed Case*, (Apr. 4, 2011), http://www.politico.com/news/stories/0411/52509.html.

16. *See* Eric H. Holder, Jr., U.S. Att'y Gen., Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html ("Unfortunately, since I made that decision [to try the defendants in federal court], Members of Congress have intervened and imposed restrictions blocking the administration from bringing any Guantanamo detainees to trial in the United States, regardless of the venue.").

17. *Id.*

18. *See* Benjamin Wittes, *Thought #1 on the Holder Statement*, LAWFARE BLOG (Apr. 4, 2011, 4:11 PM), http://www.lawfareblog.com/2011/04/thought-1-on-the-holder-statement/ (arguing that the Administration's claim that the recent decision was "forced" is untenable when that same Administration "dawdled so long that it gave the opposition time to rally against its policies, . . . announced New York as a trial venue and then didn't move any defendants there, . . . [and then] sat on the question for a year without action").

commentator aptly noted: "President Obama should apologize to George W. Bush[,] whose very policy he has adopted as his own, and who he maligned so unfairly to obtain his current position as a War President and a detainer of foreign enemies."[19] Certainly, Khalid Sheikh Mohammad understood the limitations of Article III courts when he told his captors, "I'll talk to you guys after I get to New York and see my lawyer."[20] With a helpful push from Congress, the Administration has now avoided that route.

II. THE EVOLUTION OF A MILITARISTIC THREAT

While the war on terror cannot be considered merely criminal, it does not fit the parameters of conventional warfare either. There is no declaration of war against a foreign nation, there are no clear boundaries in time or space, and it is often difficult to identify the enemy. As explained by Chairman of the House Armed Services Committee Duncan Hunter during consideration of the MCA of 2006, the United States is engaging in a war against "a ruthless enemy who doesn't wear a uniform[;], an enemy who kills civilians, women and children, and then boasts about it; a barbaric enemy who beheads innocent civilians by sawing their heads off; an uncivilized enemy who does not acknowledge or respect the laws of war."[21] While the terrorist attacks of September 11, 2001, awakened the nation to the severity of the war, an evolving timeline of prior attacks by radical jihadists demonstrated an increasingly serious and strategic threat:

On February 26, 1993, a group with ties to al-Qaeda carried out the first attack on the World Trade Center in New York City by exploding a massive bomb in a subterranean parking garage. Six people were killed and more than 1,000 injured in the blast.[22]

19. John Vecchione, *Obama's KSM Flip-Flop: A Win for Bush*, FRUMFORUM.COM (Apr. 5, 2011, 12:45 AM), http://www.frumforum.com/obamas-ksm-flip-flop-a-win-for-bush.

20. Stephen F. Hayes, *Miranda Rights for Terrorists*, THE WEEKLY STANDARD (June 10, 2009, 2:05 PM), http://www.weeklystandard.com/weblogs/TWSFP/2009/06/miranda_rights_for_terrorists.asp (internal quotation marks omitted).

21. 152 CONG. REC. 20,094 (2006) (statement of Rep. Hunter); *see also* 152 CONG. REC. 20,097 (2006) (statement of Rep. Saxton) (commenting that the MCA of 2006 was needed "to fill a gaping hole in our legal system, both in our ability to bring criminals of 9/11 to justice, the bombings for the USS *Cole* and the American embassies in Kenya and Tanzania to justice, and to protect our American troops and agents from frivolous prosecutions and lawsuits").

22. John Diamond, *U.S. Says Iraq Sheltered Suspect in '93 WTC Attack*, USA

On June 25, 1996, a powerful truck bomb exploded outside a U.S. military housing complex named Khobar Towers near Dhahran, Saudi Arabia, killing nineteen American servicemen and wounding several hundred people.[23]

On August 7, 1998, two bombs exploded within minutes of each other near the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing 224 people.[24]

In 1999, as the end of the millennium approached, the United States narrowly avoided several attacks when Jordanians disrupted an al-Qaeda cell in Amman.[25] An alert U.S. Customs agent discovered Ahmed Ressam attempting to cross into the United States from Canada carrying a carload of explosives intended for Los Angeles International Airport.[26]

On January 3, 2000, an al-Qaeda attack on the U.S.S. *The Sullivans* in Yemen failed when terrorists overloaded their small boat.[27]

On October 12, 2000, seventeen American sailors were killed and thirty-nine wounded by a bomb aboard a small boat that targeted the U.S.S. *Cole*, a U.S. Navy destroyer refueling in Aden, Yemen.[28]

TODAY, Sept. 18, 2003, at 01A, *available at* 2003 WLNR 6059479; Craig Whitlock, *Homemade, Cheap and Dangerous: Terror Cells Favor Simple Ingredients in Building Bombs*, WASH. POST, July 5, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/04/AR2007070401814.html?hpid=moreheadlines.

23. Youssef M. Ibrahim, *Saudi Rebels Are Main Suspects in June Bombing of a U.S. Base*, N.Y. TIMES, Aug. 15, 1996, at 1, *available at* 1996 WLNR 4373506; Douglas Jehl, *Fatal Lapses—A Special Report.; How U.S. Missteps and Delay Opened Door to Saudi Blast*, N.Y. TIMES, July 7, 1996, at 1, *available at* 1996 WLNR 4382821.

24. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, TERRORISM IN THE UNITED STATES 1998: COUNTER-TERRORISM THREAT ASSESSMENT AND WARNING UNIT, at 1, http://www.fbi.gov/stats-services/publications/terror_98.pdf (last visited Feb. 6, 2011).

25. Gina Pace, *Jordan Blasts Kill More than 50: At Least 300 Injured in Amman at Grand Hyatt, Radisson SAS, Days Inn*, CBS NEWS, Nov. 9, 2005, http://www.cbsnews.com/stories/2005/11/09/world/main1031533.shtml.

26. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, TERRORISM IN THE UNITED STATES 1999: COUNTER-TERRORISM THREAT ASSESSMENT AND WARNING UNIT, at 2, http://www.fbi.gov/stats-services/publications/terror_99.pdf (last visited May 12, 2011); *Man Convicted in Millennium Bomb Plot is Sentenced*, ASSOCIATED PRESS, July 28, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/07/27/AR2005072701170.html.

27. David S. Morgan, *10th Anniversary of USS* Cole *Attack Marked: Norfolk Ceremony Honors 17 Killed in 2000 Terrorist Attack*, CBS NEWS, Oct. 12, 2010, http://www.cbsnews.com/stories/2010/10/12/national/main6950964.shtml.

28. *Id.*; *Timeline: Al-Qaida Attacks on Western Targets*, National Public Radio (July

In hindsight, the war against al-Qaeda and its supporters has been at the United States' door for many years. Even as al-Qaeda increasingly turns its focus on civilian targets, it retains unanimity in its purpose: Weaken the American economy and force a military withdrawal in the war on terror.[29] Al-Qaeda confirmed its objectives when discussing the recent Yemeni air cargo bombing plot in its propagandist *Inspire* magazine: "[O]ur objective was not to cause maximum casualties but to cause maximum losses to the American economy."[30] Dubbing the Yemeni plot as "Operation Hemorrhage," al-Qaeda announced that the operation was retribution for the "aggression against the Muslims of Afghanistan, Iraq, Somalia, the Maghreb, Chechnya and the Arab Peninsula."[31] Moreover, they warned that the operation was one of many small-scale operations to be understood as "the strategy of a thousand cuts. The aim is to bleed the enemy to death."[32]

III. THE MILITARY COMMISSIONS ACT OF 2006

Congress initially responded to the attacks of 9/11 when it passed the Authorization for the Use of Military Force (AUMF).[33] Shortly thereafter, on November 13, 2001, President Bush issued a military order pertaining to the detention, treatment, and trial of certain non-citizens in the war against terrorism.[34] Unfortunately, several years were expended to clarify the Bush Administration's legal authority for the utilization of military

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7, 2005), *available at* http://www.npr.org/templates/story/story.php?storyID=4733944.

29. *See The Objectives of Operation Hemorrhage: Head of Foreign Operations*, INSPIRE, no. 3, Nov. 2010, at 7, 7 (on file with St. Mary's Law Journal) (stating that one of the goals of operations linked to al-Qaeda is to cause economic loss); Shaykh Ibrahim Al-Banna, *Tawaghit Exposed*, INSPIRE, no. 3, Nov. 2010, at 10, 10 (on file with St. Mary's Law Journal) ("This operation has struck fear in the hearts of the Americans and their allies. This operation is a response to the Crusader's aggression against the Muslims of Afghanistan, Iraq, Somalia, the Maghreb, Chechnya and the Arab Peninsula.").

30. *The Objectives of Operation Hemorrhage: Head of Foreign Operations*, INSPIRE, no. 3, Nov. 2010, at 7, 7 (on file with St. Mary's Law Journal).

31. Shaykh Ibrahim Al-Banna, *Tawaghit Exposed*, INSPIRE, no. 3, Nov. 2010, at 10, 10 (on file with St. Mary's Law Journal).

32. *Letter from the Editor*, INSPIRE, no. 3, Nov. 2010, at 3, 3 (on file with St. Mary's Law Journal).

33. *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., R 41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES 4–6 (2010) (providing a general background on the history of military commissions).

34. Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

commissions created through executive orders. As noted, after military commission trials commenced in November 2004, the United States Supreme Court invalidated that system as an improper exercise of executive power and found that, under the circumstances, authorization from Congress was required.[35] Within three months of the *Hamdan* decision, Congress responded by passing the MCA of 2006 to provide the legislative authority necessary for military commissions to proceed.[36] As Senator Graham explained, Congress passed the legislation with the realization that "the way to balance the interests of our need to protect ourselves and to adhere to the rule of law is to apply the law of armed conflict, not criminal law."[37] Congress approved the MCA of 2006 to "provide basic fairness in our prosecutions, [while] also preserv[ing] the ability of our warfighters to operate effectively on the battlefield."[38] No challenge to the military commissions provisions enacted under the MCA of 2006 ever reached the Supreme Court.[39]

IV. THE MILITARY COMMISSIONS ACT OF 2009

During his presidential campaign, then-Senator Barack Obama

35. Hamdan v. Rumsfeld, 548 U.S. 557, 631–32 (2006); *see also* H.R. REP. NO. 109-664, pt. 1, at 4 (2006) (commenting that "the structure and procedures of the Hamdan-related military commission violated the UCMJ").

36. Military Commissions Act of 2006, Pub. L. 109-366, § 3, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a–950w (2006 & Supp. III 2009)).

37. 152 CONG. REC. 19,973 (daily ed. Sept. 27, 2006) (statement of Sen. Graham).

38. *Id.* at 20,728 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter). As evidence of the basic fairness of military commissions, Representative Hunter noted the twenty-six rights extended to defendants under the MCA of 2006 to ensure due process for the defendants including, inter alia, "The right to [c]ounsel, provided by government at trial and throughout appellate proceedings"; the presumption of innocence; a "[s]tandard of proof beyond a reasonable doubt; [t]he right to be informed of the charges against him as soon as practicable" and "sufficiently in advance of trial to prepare a defense"; to peremptory challenges and challenges for cause against the commission members and judge; to obtain and present witnesses and evidence; to receiving exculpatory evidence as soon as practicable; "to be present at court with the exception of certain classified evidence"; to be free from compulsory self-incrimination and double jeopardy; "[t]he defense of lack of mental responsibility"; "[a two-thirds] vote of members required for conviction; [a three-fourths] vote required for sentences of life or over ten years; [a] unanimous verdict required for death penalty"; and "at least two appeals including to a federal Article III appellate court." *Id.* at 20,729.

39. *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., R 41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES 2 (2010) (providing a history of the MCA of 2006).

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promised to "close Guantanamo [and] reject the Military Commissions Act [of 2006]."[40] In an effort to fulfill that promise, the President signed an executive order shortly after his inauguration that halted all proceedings before military commissions and set a one-year deadline for the closure of the detention facility at Guantanamo Bay.[41] Several months later, Congress passed the Military Commissions Act of 2009 (MCA of 2009) to introduce procedural changes favored by the Obama Administration that would keep military commissions viable.[42] Throughout that legislative process, however, Congress unwaveringly supported military commissions as the forum for jihadist terrorists and urged the Secretary of Defense to act quickly to issue revised procedures in order "to minimize any further delay in such cases."[43] Perhaps with the hindsight gained from confronting the threat of terrorism, the Obama Administration altered its early course and has implemented policies more in-line with the prior administration.[44] Today, the Guantanamo Bay detention facility remains open. After mulling over issuing an executive order to address the need for some terrorist suspects at Guantanamo Bay to be held indefinitely without trial, the Administration recently issued an executive order allowing for periodic review of Guantanamo detainees.[45] As discussed below, the Administration has announced support for military commissions following the MCA of 2009, even though mostly minor changes were made and the basic structure of military commissions remained intact, thereby largely validating the prior scheme for military commissions.[46] The Administration's current course acknowledges

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40. Andrew Malcolm, *Obama and Guantanamo: A Chronology of His Broken Promise*, L.A. TIMES, July 2, 2010, http://latimesblogs.latimes.com/washington/2010/07/obama-guantanamo.html (internal quotation marks omitted).

41. Exec. Order No. 13,492, § 7, 74 Fed. Reg. 4,897, 4,898 (Jan. 27, 2009).

42. Military Commissions Act of 2009, Pub. L. 111-84, § 1802, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a–950t (Supp. III 2009)).

43. H. REP. NO. 111-288, at 864 (2009).

44. *See* Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011) (The order expressly states: "This order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases.").

45. Josh Gerstein, *White House Mulling Indefinite Detention Review Order*, POLITICO (Dec. 21, 2010), http://www.politico.com/blogs/joshgerstein/1210/White_House_mulling_indefinite_detention_review_order.html.

46. *Compare* Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600 (establishing the structure for military commissions), *with* Military Commissions Act

the need for a specifically tailored forum to accommodate the procedural obstacles inherent in recovering evidence from the battlefield or during intelligence interrogations.

V. THE MCA OF 2009 CONTINUES TO RECOGNIZE THE NEED FOR GREATER FLEXIBILITY IN ADMITTING STATEMENTS INTO EVIDENCE

Both the MCA of 2006 and the MCA of 2009 were drafted to allow the use of hearsay in military commissions beyond the exceptions to the rule against hearsay followed by federal civilian courts.[47] Aware that similar hearsay rules were used in war crime tribunals for the conflicts in Rwanda and Yugoslavia, Congress maintained its support for relaxing the standard on hearsay to accommodate "the exigencies of the battlefield."[48] Thus, Congress intended for military commissions to provide the military judge with the necessary discretion to determine if the evidence is reliable and probative.[49] Both before and after the MCA of 2009, either side could offer hearsay testimony, so long as they provided the adversary with notice of their intention to offer the evidence along with "the particulars of the evidence (including information on the circumstances under which the evidence was obtained)."[50] Notably, in the MCA of 2009, Congress shifted the burden for demonstrating the reliability of the evidence.[51] Where previously

of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2574 (amending the previous Military Commissions Act but retaining the basic structure of the commissions).

47. *See* Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2582 (codified at 10 U.S.C. § 949a(b)(3)(D) (Supp. III 2009)) (providing for the admission of evidence normally excluded by hearsay rules); Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2609 (codified as amended at 10 U.S.C. § 949a(b)(2)(E)(ii) (2006 & Supp. III 2009)) (allowing the admission of regularly excluded hearsay evidence only when the proponent follows specific procedures).

48. *See* 152 CONG. REC. 20,728 (2006) (statement of Rep. Hunter) (stating a need to accommodate the rules of evidence to fit the "exigencies of the battlefield").

49. *See id.* (communicating a desire to utilize all reliable materials noting the relaxation of evidence rules war crimes tribunals in Rwanda and Yugoslavia).

50. *See* Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2582 (codified at 10 U.S.C. § 949a(b)(3)(D)(i) (Supp. III 2009)) (requiring the proponents of hearsay evidence to provide the adverse party with "the particulars of the evidence"); Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2609 (codified as amended at 10 U.S.C. § 949a(b)(2)(E)(i)) (directing proponents of hearsay evidence to provide the adverse party with "the particulars of the evidence").

51. *See* Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2582 (codified at 10 U.S.C. § 949a(b)(3)(C)(i) (Supp. III 2009)) (instructing the judge to weigh the reliability of the evidence to determine if there is a sufficient basis for finding

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the party opposing the admission of the evidence had to demonstrate that the evidence was unreliable or lacked in probative value, the MCA of 2009 requires the proponent of the hearsay to demonstrate its reliability, establish that its admission will best serve the interest of justice, and show that direct testimony is either not available or that the production of the witness will have an adverse impact on military or intelligence operations.[52] When drafting the MCA of 2006, Congress rejected a similar scheme where demonstrating reliability would have been the burden of the proponent.[53]

In addition to redrawing the parameters for the admission of hearsay in military commissions, the MCA of 2009 also excluded statements obtained through torture or through cruel, inhuman, or degrading treatment.[54] However, Congress once again departed from federal civilian court procedure by permitting the admission of coerced statements under certain circumstances.[55] While that exception was more restrictive than the prior law, it recognized that military detentions are inherently coercive, and that providing *Miranda* rights to detained combatants and predicating admissibility on voluntariness is impracticable.[56]

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what the evidence is claimed to be).

52. *Compare* Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2582–83 (codified at 10 U.S.C. § 949a(b)(2)(D)(ii) (Supp. III 2009)) (mandating that the evidence be reliable, serve the interests of justice by its admission, and that direct testimony is not available or would adversely impact military operations), *with* Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2609 (codified at 10 U.S.C. § 949a(b)(2)(E)(ii)) (requiring the party opposing the evidence to prove its unreliability or lack of probative value).

53. *See* U.S. Senate Roll Call Vote No. 254 (Sept. 27, 2006) 109th Cong., 2d Sess., http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00254 (rejecting an amendment to the Military Commissions Act of 2006).

54. Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2580 (codified at 10 U.S.C. § 948r(a) (Supp. III 2009)).

55. *See* 123 Stat. at 2580 (codified at 10 U.S.C. § 948r(c) (Supp. III 2009)) (providing for the admission of statements obtained by torture under § 948r if the judge determines certain perquisites have been met).

56. *Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War*, 111th Cong. 20 (2009) (statement of Vice Admiral Bruce E. MacDonald, Judge Advocate General, United States Navy).

VI. THE MCA OF 2009 RECOGNIZES CONSISTENT JURISDICTION FOR MILITARY COMMISSIONS

When Congress passed the MCA of 2006, it created a forum for trying "alien unlawful enemy combatants" for violations of the laws of war.[57] With little congressional debate, the MCA of 2009 modified that term by granting jurisdiction over "alien unprivileged enemy belligerents."[58] While that modification responded to the Supreme Court's holding in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Convention applies to al-Qaeda[59] and placed the language of the statute more in line with the language of the Geneva Convention,[60] both terms shared the common purpose of differentiating al-Qaeda and its associated

57. Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2602 (codified at 10 U.S.C. § 948b(a)).

58. Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2575 (codified at 10 U.S.C. § 948b(a) (Supp. III 2009)). Despite Supreme Court precedent holding that the U.S. government was not precluded from trying citizen enemy belligerents for violations of the law of war, even regardless of the operational status of the civilian courts, the military commissions established by President Bush's military order, the MCA of 2006, and the MCA of 2009 limited jurisdiction to only "alien" detainees. In doing so, Congress avoided the ambiguities for determining whether military commissions would apply to citizen combatants who are not members of regularly constituted armed forces. *Compare Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121–22 (1866) (explaining while citizens may be subject to trial in military tribunals under certain circumstances, the Fifth and Sixth Amendments mandated civilian trials for citizens when available, and "no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service"), *with Ex parte* Quirin, 317 U.S. 1, 19 (1942) ("We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission . . . ."). However, it established a scheme where detainees can be tried in different forums under disparate procedures based on their citizenship and location.

59. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 631–32 (2006) ("Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" (quoting Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316)).

60. *See* Charles Babington & Michael Abramowitz, *U.S. Shifts Policy on Geneva Conventions Bowing to Justices, Administration Says It Will Apply Treaties to Terror Suspects*, WASH. POST, July 12, 2006, at A01, *available at* 2006 WLNR 26025252 (reporting a shift in Pentagon policy toward requiring defense officials to "adhere to Common Article 3 of the Geneva Conventions"). The third Geneva Convention sets criteria that combatants must meet to be legal: follow a hierarchy of command by a person responsible for his subordinates; have a fixed distinctive sign recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316.

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forces from prisoners of war.[61] In contrast to prisoners of war, unlawful or unprivileged enemy combatants need not receive full protections of the Geneva Convention and may be prosecuted for killings.[62] In addition, the MCA of 2009 also altered the jurisdictional language with regard to the Taliban.[63] Under the MCA of 2006, an "unlawful enemy combatant" was a "person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (*including a person who is part of the Taliban, al Qaeda, or associated forces*)."[64] However, that language did not automatically qualify members of the Taliban, al-Qaeda, or associated forces for jurisdiction before a military commission without a further finding that the individual engaged in hostilities or had purposefully and materially supported hostilities against the United States or its allies.[65]

With the MCA of 2009, Congress omitted any reference to the Taliban, but established jurisdiction over an "unprivileged enemy

61. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316 (defining prisoners of war as those "who have fallen into the power of the enemy" and specifying categories that fulfill this condition). The fundamental difference between an unlawful combatant and the prisoner of war is that a regular soldier, if he kills an enemy soldier, has committed a lawful act. An unlawful combatant, by its term, suggests that this person did not have authority to go onto the battlefield and engage in the killing of enemy soldiers or the attack of military property. Moreover, pursuant to Article 118, a prisoner of war is entitled to repatriation at the cessation of hostilities. Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316.

62. *See* John Bellinger, *Unlawful Enemy Combatants*, OPINIO JURIS (Jan. 17, 2007, 7:01 AM), http://opiniojuris.org/2007/01/17/unlawful-enemy-combatants/ (limiting many rights of the treaty to prisoners or war, the drafters of the third Geneva Convention were aware that "[not] everyone who took up weapons on a battlefield would receive POW status .... Al Qaida members are not members of the armed forces of a party to the Geneva Conventions, meaning that they are not entitled to protection under Article 4(A)(1).").

63. *See* Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2575 (codified at 10 U.S.C. § 948a(7) (Supp. III 2009)) (defining an unprivileged enemy belligerent as an individual "who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; (C) or was a part of al-Qaeda at the time of the alleged offense" without any reference to the individual's membership in the Taliban).

64. Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2601 (codified as amended at 10 U.S.C. § 948a(1)(i)).

65. *See id.* (codified as amended at 10 U.S.C. § 948b(a)) (requiring a combatant to be classified as an "unlawful enemy combatant" before being subject to the jurisdiction of the military commission).

belligerent," who is defined as a person who engaged in hostilities, purposefully and materially supported hostilities, or is a part of al-Qaeda at the time of an offending act.[66] While that change might suggest disparate treatment for al-Qaeda and the Taliban, with only membership in al-Qaeda serving as an automatic qualifier for finding jurisdiction, the distinction should yield little difference. Although the Taliban became the most powerful Afghani armed force following the fall of former Soviet-backed government in the 1990s, it never constituted the armed forces of a government recognized by the United States.[67] Moreover, the Taliban does not conduct its operations in accordance with the laws of war.[68] Because the Taliban contravenes the law of war by failing to distinguish itself from the general population—dressing like civilians to evade capture and targeting civilians through techniques like suicide bombing—its members are unlawful combatants similar to al-Qaeda.[69]

As demonstrated by this debate, Congress intended for military commissions to apply to the militaristic members of al-Qaeda and its affiliated organizations, pursuant to the AUMF. The military commission was never viewed as suitable for every terrorist, and some cases are best handled by domestic law enforcement. To identify which forum would better serve the trial of each Guantanamo detainee, in July 2009, the Obama Administration, through the Departments of Justice and Defense, developed criteria for determining for each case whether to proceed in federal court or by military commission, with consideration going to factors such as the nature of the offense, the location in which the offense occurred, the identity of the victims, and the manner in which the case was investigated.[70] Thus, foreign fighters captured

66. *See* Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2575 (codified at 10 U.S.C. § 948a(7) (Supp. III 2009)) (defining the term "unprivileged enemy belligerent" without reference to membership in the Taliban).

67. Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 16 (2004).

68. *See id.* at 2 ("In the case of captured al-Qaeda and Taliban combatants, their combined unlawful actions in armed conflict and al-Qaeda's failure to adequately align with a state show POW status is not warranted.").

69. *See id.* at 15 (asserting that al-Qaeda and Taliban tactics include exploiting civilian disguises, thus making their actions comparable to other unlawful combatants who are not entitled to POW status upon capture).

70. *See* Eric H. Holder, Jr., U.S. Att'y Gen., *Attorney General Announces Forum Decisions for Guantanamo Detainees* (Nov. 13, 2009), http://www.justice.gov/

on the field of battle should be tried in military commissions, but a person residing in the United States, who self-radicalizes and carries out a terrorist attack within the United States, may be better suited for federal civilian courts. In contrast, a fighter seized on a battlefield of Afghanistan should be tried by a military commission.

Too often, there has been too much of a preference to use federal civilian courts. For example, after Umar Farouk Abdulmutallab failed to detonate his explosive device aboard Northwest Flight 253, he was immediately taken into federal law enforcement custody. However, Abdulmutallab's plot was conceived and made operational overseas,[71] and his plan was clearly conceived with the assistance of al-Qaeda operatives.[72] That instance deserved greater consideration of the option to handle the case as an intelligence matter, with detention pursuant to the AUMF. Similarly, while the Administration has decided to try Abd al-Rahim al-Nashiri, the suspected bomber of the U.S.S. *Cole*, in a military commission, the prolonged handwringing over that decision seems inexplicable.[73] More tellingly, while the Administration stepped back from its initial plan to try Khalid Sheikh Mohammed in federal civilian court, it has yet to indicate any desire to move forward with a military commission. Hopefully, the maturation of the Administration will preclude any further possibility of trial in a civilian court.

Notably, radical cleric Anwar al-Awlaki, who inspired Abdulmutallab and leads al-Qaeda in the Arabian Peninsula,

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ag/speeches/2009/ag-speech-091113.html ("[T]he Department of Justice will pursue prosecution in federal court of the five individuals accused of conspiring to commit the 9/11 attacks.").

71. *See* James Gordon Meek, *American Jihadi Alert. Terror Pros Say Yemen Qaeda to Send Yank Recruits*, N.Y. DAILY NEWS, Feb. 4, 2010, at 20, *available at* 2010 WLNR 2347906 (reporting that counterterror chiefs in Yemen believe American jihadis extremists may soon attack the U.S.).

72. *See* James Gordon Meek & Rich Schapiro, *Heroic Passengers Foil Terror Plot! Al-Qaeda-Tied Fiend Tackled As He Tries to Down Jet over Detroit*, N.Y. DAILY NEWS, Dec. 26, 2009, at 5, *available at* 2009 WLNR 25949198 (writing that a terrorist linked to al-Qaeda attempted to blow up a commercial jet over Detroit).

73. *See* Catherine Herridge, *9/11 Detainees May Still Head to Civilian Courts*, FOXNEWS.COM (Jan. 20, 2011), http://www.foxnews.com/politics/2011/01/20/detainees-head-civilian-courts/?test=latestnews ("Though the Obama administration is pursuing a military trial for the suspected bomber of the USS Cole, . . . the [P]resident and his team have the left the door open to a civilian trial for the men though responsible for the 9/11 attacks.").

which U.S. National Counterterrorism Center Director Michael Leiter described as "probably the most significant risk to the U.S. homeland,"[74] is not eligible for trial before a military commission. Pursuant to the MCA of 2009, military commissions do not have jurisdiction over U.S. citizens[75]—a policy consistent with the Bush Administration.[76] It remains an open question whether Congress should provide flexibility for that limitation under certain circumstances.

VII. CONGRESS RECOGNIZED THE NATIONAL INTEREST IN SECURING CONVICTIONS AGAINST DANGEROUS TERRORISTS

In contrast to the unanimous verdicts required in U.S. jury trials, the MCA of 2006 drew policy from military courts-martial to require a two-thirds vote to convict.[77] However, a sentence of life or more than ten years required three-fourths of the panel to vote to convict, and a sentence of death required a unanimous verdict.[78] Importantly, the MCA of 2009 maintains that voting structure.[79] With the two-thirds provision, detainees are guaranteed the same due process that we provide to our military.[80] At the same time, Congress recognized that there is a greater national interest in securing convictions against enemy combatants and belligerents where there is sufficient evidence to convince the

74. *Most-Wanted Terrorist Lists Missing Most Wanted*, HOMELAND SECURITY NEWSWIRE (Feb. 22, 2011), http://homelandsecuritynewswire.com/most-wanted-terrorist-lists-missing-most-wanted.

75. *See* Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2602 (codified as amended at 10 U.S.C. § 948b(a)) (providing that the purpose of the use of military commissions is to try "alien unlawful enemy combatants").

76. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

77. *See* 10 U.S.C. § 852 (2006) (requiring a two-thirds vote of the members of the court-martial for conviction).

78. *See* Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2616 (codified as amended at 10 U.S.C. § 949m(b)(1)–(2)) (requiring that all members concur in a sentence of death and three-fourths concur in a sentence greater than ten years or life imprisonment).

79. *See* Military Commissions Act of 2009, Pub. L. No. 111–84, § 1802, 123 Stat. 2190, 2589 (codified at 10 U.S.C. § 949m(b)(1)–(3) (Supp. III 2009)) (retaining the requirements that military commissions have a two-thirds vote for a conviction, a three-fourths vote for greater than then years or life imprisonment, and all members for a sentence of death).

80. *Compare id.* (codified at 10 U.S.C. § 949m (Supp. III 2009)) (requiring a two-thirds vote for a conviction by a military commission), *with* 10 U.S.C. § 852 (2006) (requiring a two-thirds vote for conviction by the jury members during a court-martial).

majority of fact-finders.[81] When compared with ordinary criminal defendants, the risk posed by these individuals is far more significant. To realize the significance of this policy, one need only look to the acquittal of the U.S. Embassy bomber Ahmed Khalfan Ghailani. Ghailani faced 285 felony charges, including more than 200 counts of murder, and, reportedly, all but one juror found sufficient evidence to convict.[82] Nevertheless, because of one holdout, the jury found Ghailani guilty of one count of conspiracy to damage U.S. property and acquitted him of 284 other charges.[83] Had the Government failed to secure a conviction on that last count, one of the world's most dangerous terrorists could be a free man today.

VIII. THE RULES ESTABLISHED BY CONGRESS AND DUE PROCESS

Military Commissions can better protect the United States in part through congressionally authorized rules that help ensure that military officers judging highly dangerous terrorists and war criminals are more likely to hear all of the important evidence than might be the case if the defendants were tried in civilian court. Military judges are encouraged to admit reliable hearsay rather than suppress the evidence because it does not exactly fit within a specific technical "hearsay exception."[84] Solid, probative evidence seized on the battlefield is not barred simply because every soldier who touched the evidence from the moment of first possession did not fill out an evidence collection form or is not personally present to testify he handed it off to someone else. Reliable statements made by the defendant at the point of capture or close to a military engagement are not kept from the jury because the enemy was not first advised of his rights to remain silent and obtain an attorney. In addition, military judges with a true

81. *See* Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2616 (codified as amended at 10 U.S.C. § 949m(a)) (requiring only a two-thirds vote to convict enemy combatants and belligerents).

82. *See* Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1, *available at* 2010 WLNR 22969481 (explaining that "a juror asked to be removed because she was alone in her view of the case" prior to conviction on one count of conspiracy to destroy government buildings and property).

83. *See id.* (reporting that the jury acquitted Ghailani on 284 out of 285 charges).

84. *See infra* Part VIII(A) (discussing the use of hearsay evidence within military commission proceedings).

appreciation of the life and death sensitivity of classified material, while fully committed to a fair trial, decide what will be disclosed to the public and the defendant.

Those who criticize military commissions often characterize these rules and the entire process as amounting to some type of kangaroo court in which due process will be violated and the innocent convicted.[85] Human Rights Watch maintains that the commissions are "fundamentally flawed,"[86] while the John Adams Project proclaims that they "[do] not reflect our country's commitment to justice and due process."[87] The ACLU has stated that military commissions are "inherently illegitimate, unconstitutional and incapable of delivering outcomes we can trust,"[88] and a *Washington Post* editorial noted that with military commissions, "innocent people likely will be convicted and punished" because of "[t]he nature of the rules."[89] Finally, Human Rights First opines that the "rules fail to [e]nsure that military commission trials will satisfy the key goals of a trial system—full and fair procedures designed to . . . protect the innocent, and to convict the guilty . . . ."[90] These attacks have continued unabated even after the modifications made by the Obama Administration to the rules regulating admission of hearsay and confessions in the MCA of 2009.[91]

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85. *See US: Don't Revive Guantanamo Military Commissions*, HUMAN RIGHTS WATCH (May 12, 2009), http://www.hrw.org/en/news/2009/05/12/us-don-t-revive-guantanamo-military-commissions (commenting on the "unfair nature" of the tribunals and claiming the purpose of the commissions is to circumvent due process protections).

86. *See US: New Legislation on Military Commissions Doesn't Fix Fundamental Flaws*, HUMAN RIGHTS WATCH (Oct. 8, 2009), http://www.hrw.org/en/news/2009/10/08/us-new-legislation-military-commissions-doesn-t-fix-fundamental-flaws (arguing that "[d]raft legislation on military commissions fails to remedy the system's serious flaws" and the revised tribunals are "unfair, harming international cooperation and counterterrorism").

87. *John Adams Project: Protecting the Rule of Law*, NAT'L ASS'N CRIM. DEF. LAW., http://www.nacdl.org/public.nsf/freeform/nationalsecurity_JAP?OpenDocument (last visited May 12, 2011).

88. *Obama Administration Should Not Revive Military Commissions, Says ACLU*, ACLU.ORG (June 29, 2009), http://www.aclu.org/national-security/obama-administration-should-not-revive-military-commissions-says-aclu.

89. William P. Barr & Andrew G. McBride, Op-Ed., *Military Justice for al Qaeda*, WASH. POST, Nov. 26, 2001, at A24.

90. *Analysis of Proposed Rules for Military Commissions Trials*, HUMAN RIGHTS FIRST, 1, http://www.humanrightsfirst.org/wp-content/uploads/pdf/07125-usls-hrf-rcm-analysis.pdf (last visited May 12, 2011).

91. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a–950t (Supp. III 2009)); *US: New Legislation on Military*

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The authors suspect that these criticisms may in part be motivated by an anti-military bias or the natural desire of the defense bar to try their case before civilian judges and twelve civilian jurors.[92] We have, however, been unable to find any statistics that remotely suggest that the military convicts the innocent at any greater rate than is alleged by those who also routinely attack our civilian justice system.[93] Professor D. Michael Risinger, for example, estimates an "empirically justified factual innocence wrongful conviction rate" in the civilian system of approximately five percent,[94] while Judge Bork, on the other hand, has noted that he never observed an innocent man convicted in the military and that, based on his opinion and others, "[military courts] were superior to the run of civilian courts, more scrupulous in examining the evidence and following the plain import of the law."[95] In fact, as explained in Part III of this Article, there are good reasons to believe that, in a war crimes context, military jurors may in some cases be more empathetic and understanding than civilian jurors.[96] At the same time, as suggested by Judge Mukasey, military commissions may be more likely to ensure the guilty are convicted and avoid

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Commissions Doesn't Fix Fundamental Flaws, HUMAN RIGHTS WATCH (Oct. 8, 2009), http://www.hrw.org/en/news/2009/10/08/us-new-legislation-military-commissions-doesn-t-fix-fundamental-flaws. The ACLU referred to President Obama's military commission decision as "a striking blow to due process and the rule of law." *Obama Resurrects Military Trials for Terror Suspects*, CNN.COM (May 15, 2009), http://www.cnn.com/2009/POLITICS/05/14/obama.military.tribunal/index.html? eref=rss_-politics (referencing a statement made by Anthony Romero of the ACLU concerning the Administration's decision to keep military trials in place).

92. *See generally* Press Release, The Constitution Project, Constitution Project Welcomes Federal Prosecution of Some Detainees While Criticizing Use of Military Commissions for Others (Nov. 13, 2009), http://www.constitutionproject.org/news/2009/11132009n_cp.php (asserting that the military commissions are rigged for convictions while the federal judicial system ensures defendants the right to a fair trial).

93. *See* Robert H. Bork, *Having His Day in (a Military) Court*, NAT'L REV. ONLINE (Dec. 17, 2001), http://www.nationalreview.com/17dec01/bork121701.shtml (noting that the debate surrounding military tribunals consists largely of propaganda and has little analysis to support it).

94. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 761 (2007).

95. Robert H. Bork, *Having His Day in (a Military) Court*, NAT'L REV. ONLINE (Dec. 17, 2001), http://old.nationalreview.com/17dec01/bork121701.shtml.

96. Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT'L L. 645, 755 n.460 (2006) (citing Robert H. Bork, *Having His Day in (a Military) Court*, NAT'L REV. ONLINE (Dec. 17, 2001), http://old.nationalreview.com/17dec01/bork121701.shtml).

the "friction and eventual disaster" of an O.J. Simpson case.[97]

The repeated references to lack of "due process" refer to our belief that no person should be denied life, liberty, or property without fundamentally fair proceedings that do not offend our traditional concept of justice.[98] This includes an individual's right to receive notice of the charges and proceedings, an opportunity to be heard at those proceedings, and judgment by an impartial magistrate or panel.[99] These principles are inviolate. But all specific rules designed to achieve these ends, whether state or federal, civilian or military, detention or trial, are not always exactly the same. Accordingly, as the Supreme Court made clear in *Mathews v. Eldridge*,[100] there is some flexibility in determining what rules must apply in particular circumstances.[101] As summarized by Justice O'Connor in *Hamdi v. Rumsfeld*[102] this involves a balance of:

> [T]he private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process. . . . [This involves] an analysis of the risk of an erroneous deprivation of the private interest if the process were reduced and the probable value, if any, of additional or substitute procedural safeguards.[103]

The recent remarks of David Kris, Assistant Attorney General for the Justice Department's National Security Division, before the Brookings Institution provided an immediate and noteworthy general rebuttal to the constant claims from critics that military commissions somehow deny fundamental due process.[104] Noting

97. Michael Mukasey, *Guantanamo is No Venue for a Civilian Jury Trial*, WASH. POST, July 20, 2010, at A21, *available at* http://www.washingtonpost.com/wpdyn/content/article/2010/07/09/AR2010071903688.http.

98. Snyder v. Massachusetts, 291 U.S. 97, 104–05 (1934) (discussing the privileges of the Fourteenth Amendment), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

99. Goldberg v. Kelly, 397 U.S. 254, 267–68, 271 (1970).

100. Mathews v. Eldridge, 424 U.S. 319 (1976).

101. *Mathews*, 424 U.S. at 334 ("'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

102. Hamdi v. Rumsfeld, 542 U.S. 507 (2005).

103. *Id.* at 529 (internal citations and quotation marks omitted) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

104. David Kris, Assistant Att'y Gen., Dep't of Justice, Nat'l Sec. Div., Remarks at

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that the Administration was willing to utilize military commissions in some cases where the government felt they were the best available tool, he went on to state:

> Before I focus on the differences between these systems, however, I want to acknowledge the similarities of the two prosecution systems. Whether you're in civilian court or a military commission, there is the presumption of innocence; a requirement of proof beyond a reasonable doubt; the right to an impartial decision-maker; similar processes for selecting members of the jury or commission; the right to counsel and choice of counsel; the right to qualified self-representation; the right to be present during proceedings; the right against self-incrimination; the right to present evidence, cross-examine the government's witnesses, and compel attendance of witnesses; the right to exclude prejudicial evidence; the right to exculpatory evidence; protections against double jeopardy; protections against ex post facto laws; and the right to an appeal. Both systems afford the basic rights most Americans associate with a fair trial.[105]

What is even more fascinating is that when one closely examines the military commissions' rules that are subject to the most criticism—such as those involving hearsay, confessions, classified information, and search and seizure[106]—it is clear that they often actually reflect the essential principles contained in civilian statutory and case law. The huge difference is that in many reported cases, civilian judges are extremely reluctant to apply the rules to their fullest extent, or the statutory rules have not been modified to meet their subsequent case law interpretation. This is demonstrated by the following detailed comparisons.

A. *Hearsay*

One of the basic concerns expressed by critics of military commissions is that that the rules authorize hearsay evidence to be

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the Brookings Institution (June 11, 2010), *available at* http://www.prnewswire.com/news-releases/remarks-as-prepared-for-delivery-by-assistant-attorney-general-david-kris-at-the-brookings-institution-96163109.html.

105. *Id.*

106. *See Analysis of Proposed Rules for Military Commissions Trials*, HUMAN RIGHTS FIRST, 3, http://www.humanrightsfirst.org/wp-content/uploads/pdf/07125-usls-hrf-rcm-analysis.pdf (last visited May 12, 2011) (arguing that the key flaws in "military commission trial procedures that would violate U.S. and international fair trial standards . . .").

admitted to a much greater extent than permitted in civilian courts.[107] This centers on the admission of hearsay that is beyond what may be admitted under the traditional hearsay exceptions for excited utterances,[108] credible records,[109] statements against interest,[110] and other narrow categories considered to be inherently reliable. Section 949a(b)(3)(D) of the MCA of 2009 provides that:

> (D) Hearsay evidence not otherwise admissible under the [traditional] rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—
>
> (i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and
>
> (ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that—
>
> (I) the statement is offered as evidence of a material fact;
>
> (II) the statement is probative on the point for which it is offered;
>
> (III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and
>
> (IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.[111]

Thus, the MCA requires notice, probative value on a material fact, indicia of reliability, that direct testimony not be available as

107. *Id.* at 4 (explaining "the Manual [for military commissions] provides that hearsay evidence will be admitted on the same terms as any other evidence").

108. FED. R. EVID. 803(2).

109. *Id.* R. 803(5)–(8).

110. *Id.* R. 804(b)(3).

111. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2582 (codified at 10 U.S.C. § 949a(b)(3)(D) (Supp. III 2009)).

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a practical matter, and that the general purposes of the rules of evidence and interests of justice be served.[112] Compare the above language and elements with the residual exception under Rule 807 of the Federal Rules of Evidence:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.[113]

It is obvious that the elements of the two rules are almost exactly the same. What is different is that while the military commission rule, through meticulous listing of the elements, encourages use of the residual exception, the civilian rule in actual practice is seldom applied. As Professor Leonard Birdsong stated in 2001, "A review of recent cases reveals that the admission of residual hearsay pursuant to the exception is being used sparingly and only after a good deal of analysis by both the federal courts and by the courts of states which allow the exception."[114] "Since the 1997 Amendment, the residual exception has been reported in few federal criminal cases. No more than eight such cases have been found."[115]

An earlier survey by Professor James Beaver found that use of the residual exception was reported in 140 cases over a twenty-three year period,[116] which, as Birdsong noted, is hardly a

112. *Id.*

113. FED. R. EVID. 807.

114. Leonard Birdsong, *The Residual Exception to the Hearsay Exception—Has It Been Abused—A Survey Since the 1997 Amendment*, 26 NOVA L. REV. 59, 62–63 (2001).

115. *Id.* at 84.

116. James E. Beaver, *The Residual Hearsay Exception Reconsidered*, 20 FLA. ST. U. L. REV. 787, 790 (1993).

significant number considering the length of time and the fact that there are thirteen federal circuit courts of appeals.[117]

It is possible that civilian trial courts have been discouraged in applying the residual exception because a statement in the legislative history by the Senate Judiciary Committee expressed that the exception should be used "very rarely and only in exceptional circumstances."[118] This, in combination with case law specifically citing the legislative intent,[119] would naturally lead the courts to fear appellate reversal any time they applied the rule. The key point, however, is that the substance of the rules is almost exactly the same. This being the case, it is clearly false to suggest that the military commission rule is somehow a violation of due process.

B. *Chain of Custody*

Because the military commission rules appear to encourage admission of reliable hearsay, this naturally makes it less likely that military commission trials will have to include extensive first-hand personal testimony to establish a "chain of custody" before evidence is admitted. Experienced civilian trial attorneys quickly become familiar with the basic civilian authentication rules indicating that the sponsor of most physical evidence must present this chain of custody before evidence is admitted.[120] As interpreted at the discretion of individual civilian trial judges, this evidentiary principle can be quite daunting.[121] The proponent

117. Leonard Birdsong, *The Residual Exception to the Hearsay Exception—Has It Been Abused—A Survey Since the 1997 Amendment*, 26 NOVA L. REV. 59, 63 (2001).

118. S. REP. NO. 93-1277, at 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7062.

119. United States v. Thevis, 665 F.2d 616, 629 (5th Cir. 1982) (noting that "Congress intended evidence to be admitted under 804(b)(5) only if the reliability of the evidence *equals or exceeds* that of the other exceptions in Rule 804(b)"), *superseded by rule*, FED. R. EVID. 804(b)(6), *as recognized in* United States v. Zlatogur, 271 F.3d 1025, 1028 (11th Cir. 2001).

120. *See* FED. R. EVID. 901(b)(1) (contemplating a broad spectrum of testimony, ranging from testimony of a witness who can readily identify the evidence at issue to testimony establishing evidence that was acquired, and accounting for custody through such time period until trial).

121. *See, e.g.*, United States v. Armstrong, 626 F. Supp. 2d 229, 234 (D.P.R. 2009) ("[I]f the offered evidence is of the type that is not readily identifiable or is susceptible to alteration, a testimonial tracing of the chain of custody is necessary." (quoting United States v. Anderson, 452 F.3d 66, 80 (1st Cir. 2006))); United States v. Ellis, 15 F. Supp. 2d 1025, 1032 (D. Colo. 1998) (providing that chain of custody is used to ensure that evidence is not tampered with, lost, adulterated, or otherwise changed in any respect); Wilson v.

must present testimony that a piece of evidence is what it purports to be, testimony of continuous possession by each individual who has had possession from the time it was seized until it was presented for examination in court, and testimony by each person who had possession that the piece of evidence remained in substantially the same condition from the moment they took possession until it was released to the custody of another.[122] Thus, consider the following example:

> [P]olice sergeant A recovers drugs from the defendant; A gives police officer B the drugs; B then gives the drugs to scientist C . . . ; C gives the drugs to police detective D, who brings the drugs to court. The testimony of A, B, C, and D constitute a "chain of custody" for the drugs, and the prosecution would need to offer testimony by each person in the chain to establish both the condition and identification of the evidence . . . .[123]

If hearsay rules are applied strictly, it is impossible, for example, for C to note that B said he received the evidence from A.

As stated by Colonel Lawrence Morris, Chief Prosecutor of the Office of Military Commissions, the chain of custody principle can be quite problematic in the trial of enemy belligerents.

> Soldiers in the midst of combat operations . . . don't issue receipts. A hard drive found in a cave, a forged passport from a terrorist guesthouse, or a fingerprint on a terrorist training camp graduation certificate (yes, there really are such documents) can be compelling pieces of proof. They should not be barred from evidence because the evidentiary chain does not have the same rigor as an FBI bank

State, 609 S.E.2d 703, 706–07 (Ga. Ct. App. 2005) (holding that the State failed to adequately prove chain of custody of fungible evidence); People v. Howard, 902 N.E.2d 720, 727 (Ill. App. Ct. 2009) (explaining that the proponent of evidence has the burden to prove chain of custody to a degree substantial enough to make it improbable that such evidence has been altered or tampered with); State v. Mangos, 957 A.2d 89, 92–93 (Me. 2008) (noting that a complete break in chain of custody evidence results in reliance on hearsay evidence).

122. *See* 29 AM. JUR. 2d *Evidence* § 962 (2010) (discussing evidence that is susceptible to change and not readily identifiable and addressing the standard chain of custody requirements used to authenticate such evidence).

123. Chain of Custody, WEST'S ENCYC. OF AM. LAW (2005), http://www.encyclopedia.com/doc/1G2-3437700784.html; *see also* Frank v. Dep't of Transp., 35 F.3d 1554, 1557 (Fed. Cir. 1994) (stating that a break in the chain of custody does not absolutely undermine the evidence so long as the chain of custody, taken on the record as a whole, is strong enough to support authentication); Dixon v. Dep't of Transp., 8 F.3d 798, 804–07 (Fed. Cir. 1993) (establishing a chain of custody).

> robbery investigation. In commission practice, as in federal court, the parties may contest the chain of custody, and in the end juries will decide whether to trust it. However, a less-pristine chain of custody should not, by itself, foreclose the admissibility of such evidence.[124]

The military commission rules are written so that a "less pristine" chain of custody should not generally preclude the admission of evidence. This is accomplished through rules that encourage the use of reliable hearsay, as noted above, and the context and wording of Military Commission Rule 949a(b)(3)(C), which states:

> (C) Evidence shall be admitted as authentic so long as—
> (i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and
> (ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.[125]

This Rule contrasts in language and tone with Federal Rule of Evidence 901(a), which states that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that that the matter in question is what it proponent claims" and which is followed by factual illustrations such as by "testimony of a witness with knowledge." [126] Such language and related principles have led many civilian trial courts over time to regularly exclude evidence that did not have a perfect chain.[127] Yet it is clear that the focus on admission, as opposed to exclusion, in the military commission rule does not violate any traditional standard of due process. This is because the courts repeatedly hold that, in the final constitutional analysis, "gaps in the chain [of custody] normally go to the weight of the evidence rather than the admissibility."[128]

124. Lawrence Morris, *Military Commissions Are America's Best Option*, WASH. POST GLOBAL (Mar. 22, 2011), http://newsweek.washingtonpost.com/postglobal/needtoknow/2009/02/military_commissions.

125. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2582 (codified at 10 U.S.C. § 949a(b)(3)(C) (Supp. III 2009)).

126. FED. R. EVID. 901(a), (b)(1).

127. *See supra* note 115 (reviewing cases that discuss chain of custody).

128. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 n.1 (2009) (quoting

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It should further be noted that the resurrection of the Confrontation Clause in hearsay analysis by the decision in *Crawford v. Washington*[129] should not in practice greatly restrict the military commission provisions that sanction the use of hearsay and ease the burden of establishing chain of custody.[130] The Supreme Court and appellate courts have noted that *Crawford* does not generally apply where statements have been taken in emergency situations,[131] where witnesses—such as soldiers overseas—are genuinely unavailable,[132] and where failure to complete the chain of custody in most cases should not by itself prevent the admission of evidence.[133]

C. *Admission of Statements Made by the Defendant*

The Supreme Court's landmark decision in 1966, *Miranda v. Arizona*,[134] required that once a defendant was in custody, "law enforcement officers" would have to inform the defendant of his Fifth Amendment right to remain silent, his right to an attorney, his right to an appointed attorney if he could not afford counsel, and his right to terminate interrogation after he had already responded to questions.[135] In 2000, the Court made clear in *Dickerson v. United States*[136] that this principle was "constitutionally based" and could not be limited by a congressional statute.[137] The Court did, however, acknowledge a public safety exception whereby the *Miranda* requirements were not required when questioning was "relate[d] to an objectively reasonable need to protect the police or the public from any immediate danger," such as where officers were searching for a

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United States v. Lott, 854 F.2d 244, 250 (7th Cir. 1988)).

129. Crawford v. Washington, 541 U.S. 36 (2004).

130. *Id.* at 51 (stating the Confrontation Clause applies to out-of-court statements introduced at trial and the admissibility of such is not limited to the hearsay rules of evidence).

131. Davis v. Washington, 547 U.S. 813, 822–23 (2006).

132. Hamilton v. Morgan, 474 F.3d 854, 858–61 (6th Cir. 2007)

133. *See Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (commenting on gaps in the chain of custody).

134. Miranda v. Arizona, 384 U.S. 436 (1966).

135. *Id.* at 478–79.

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

137. *See id.* at 440 (emphasizing the *Miranda* Court's opinion that legislative action should "protect the constitutional right against coerced self-incrimination").

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gun left by the recently arrested defendant in a public place.[138]

Although the authors are aware of no statistics on application of the public safety exception, scholars appear to agree that, for a variety of reasons, it has not been widely utilized by the civilian courts.[139] The primary basis for the reluctance of the courts to apply the rule may be that the Supreme Court itself said that *Quarles* should be a "narrow exception to the *Miranda* rule."[140] In addition, the Court was simply not clear as to how and when the exception should be applied. In the words of Rorie Norton:

> First, the application of the public safety exception in the field by officers was blurred by the *Quarles* Court's insistence that officers would "distinguish almost instinctively" when the circumstances warranted its use. Second, by eschewing a formal test in favor of a case-by-case review of the facts, the *Quarles* Court created doubt throughout the criminal justice system as to when and how this potentially dangerous exception to *Miranda* should be applied.[141]

Professor Alan Raphael made the same point:

> Numerous questions were left unanswered by *Quarles*: should the exception apply to weapons other than guns? Should it apply to dangerous substances other than weapons? Should it apply if a substantial gap in time exists between the use or disposition of the weapon and the questioning? Should it apply to protect potential victims of crime or hostages involved in ongoing crimes? How great must the danger be to trigger applications of the exception? Must the weapon be in a public place or may the exception be applied in private homes?[142]

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138. *See* New York v. Quarles, 467 U.S. 649, 659 n.8 (1984) (holding that legitimate concerns for public safety can outweigh the privilege granted by the Fifth Amendment).

139. *See generally* Alan Raphael, *The Current Scope of the Public Safety Exception to* Miranda *Under* New York v. Quarles, 2 N.Y. CITY L. REV. 63, 63–64 (1998) (discussing the *Quarles* exception to *Miranda* and noting that some courts have extended the *Quarles* exception beyond the bounds set by the Supreme Court, but only to a limited degree); Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel Over the Scope of the* Quarles *Exception to* Miranda, 78 FORDHAM L. REV. 1931 (2010) (discussing the broad treatment of the *Quarles* exception applied by the First, Eighth, and Ninth Circuits and the narrow treatment applied by the Second, Fourth, Fifth, Sixth, and Tenth Circuits).

140. *Quarles*, 467 U.S. at 658.

141. Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel Over the Scope of the* Quarles *Exception to* Miranda, 78 FORDHAM L. REV. 1931, 1947 (2010) (footnote omitted).

142. Alan Raphael, *The Current Scope of the Public Safety Exception to* Miranda *Under* New York v. Quarles, 2 N.Y. CITY L. REV. 63, 68 (1998).

Finally, the Supreme Court's ringing endorsement of *Miranda* in its decision in *Dickerson*, twenty-six years after *Quarles*, certainly must have given pause to those who might over-rely on a *Quarles* exception to *Miranda*. *Dickerson* had "the potential to undermine the stability of *Quarles* and the rest of the [*Miranda* exceptions]."[143]

Because of the Supreme Court's reference to "immediate danger," there has also been a natural tendency to apply the exception only in cases where the threat is direct and imminent.[144] After conducting a survey of cases, Professor Raphael concluded:

> The bulk of the cases which followed the *Quarles* exception were instances where the police asked a single question or a small number of questions about a weapon, or other dangers, and then ceased further questioning until *Miranda* rights were read. In instances where questioning extended beyond the scope permitted by *Quarles*, the answers were suppressed. For example, in *People v. Roundtree*, where shots were fired during a fight between two men in a car, the court suppressed a defendant's answer to a police question regarding the ownership of a suitcase in the car. The *Roundtree* court reasoned that the police officer "had secured control of the scene before he asked the question. Furthermore . . . [n]either the suitcase [n]or its contents posed a threat to the public safety . . . ."[145]

143. M.K.B. Darmer, *Lessons From the* Lindh *Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 268 (2002).

144. *See* Alan Raphael, *The Current Scope of the Public Safety Exception to* Miranda *Under* New York v. Quarles, 2 N.Y. CITY L. REV. 63, 78–81 (1998) (discussing cases that emphasize the narrow set of circumstances which may trigger the *Quarles* exception to *Miranda*); Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel Over the Scope of the* Quarles *Exception to* Miranda, 78 FORDHAM L. REV. 1931, 1947 (2010) (stating that the Second, Fourth, Fifth, Sixth, and Tenth Circuits have required law enforcement officers to have actual knowledge of an immediate threat to public safety in order to invoke the *Quarles* exception). *But see* Alan Raphael, *The Current Scope of the Public Safety Exception to* Miranda *Under* New York v. Quarles, 2 N.Y. CITY L. REV. 63, 68–71 (1998) (discussing cases where the *Quarles* exception has been expanded beyond cases of direct and imminent threats to public and police safety); Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel Over the Scope of the* Quarles *Exception to* Miranda, 78 FORDHAM L. REV. 1931, 1947 (2010) (arguing that the First, Eighth, and Ninth Circuits have broadly interpreted *Quarles* to apply to any inherently dangerous circumstance without requiring a showing of an immediate or actual threat).

145. Alan Raphael, *The Current Scope of the Public Safety Exception to* Miranda *Under* New York v. Quarles, 2 N.Y. CITY L. REV. 63, 78–79 (1998) (alterations in original) (footnotes omitted).

This restrictive interpretation can be a problem in all cases, but is especially so when domestic federal agents or military officers overseas are trying to determine the identity of the enemy and the location and means of a future terrorist attack. It is logical to believe that the Supreme Court, if confronted with a case involving such a large scale threat, would extend the scope of *Quarles*. As stated by Jeffery Becker:

> While the *Quarles* Court did not discuss how the magnitude of a public threat would influence its decision, it is farfetched to argue that a bomb going off in a crowded building is less of a public safety concern than a hidden gun, simply because the bomb might not detonate for twenty-four hours.[146]

Attorney General Eric H. Holder Jr. and Deputy for National Security David Kris certainly believe such a rule would be constitutional and not a violation of fundamental rights.[147] On May 9, 2010, Attorney General Holder stated on *Meet the Press*:

> The public safety exception was really based on a robbery that occurred back in the '80s . . . . We're now dealing with international terrorists, and I think we have to think about perhaps modifying the rules that interrogators have and somehow coming up with something that is flexible and is more consistent with the threat that we now face.
>
> . . . .
>
> . . . And yes, this is, in fact, big news. This is a proposal that we're going to be making and that we want to work with Congress about.[148]

Assistant Attorney General Kris followed up on June 10, 2010, remarking:

> The question today is how the public-safety exception would apply in a very different context—modern international terrorism. The threat posed by terrorism today is more complex, sophisticated,

146. Jeffrey S. Becker, Comment, *A Legal War on Terrorism: Extending* New York v. Quarles *and the Departure from Combatant Designations*, 53 DEPAUL L. REV. 831, 869 (2003).

147. *See* Transcript of Interview with Eric Holder, Att'y Gen., MEET THE PRESS (May 9, 2010), *available at* http://www.msnbc.msn.com/id/37024384/ns/meet_the_press/ (suggesting that the public safety exception should be modified regarding international terrorism and that more flexibility is needed in the public safety exception so as to better address modern-day public safety concerns).

148. *Id.*

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> and serious than the threat posed by ordinary crime. Correspondingly, therefore, there are arguments that the public safety exception should, likewise, permit more questioning where it's in fact designed to mitigate that threat.
>
> We want to work with Congress to see if we can develop something that could help us, give us some more flexibility and clarity . . . .[149]

The rules set forth in the MCA of 2009 exclude statements obtained by torture or cruel, inhuman and degrading treatment,[150] but do not require that captured enemy belligerents be advised of their right to remain silent, right to a lawyer, and right to terminate questioning.[151] They further provide that a defendant's statements may be admitted if they are reliable and made at capture or were voluntary.[152] The key text of the relevant provisions states:

> (b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter.
>
> (c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—
>
> (1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
>
> (2) that—
>
> (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or
>
> (B) the statement was voluntarily given.
>
> (d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:
>
> (1) The details of the taking of the statement, accounting for the

149. David Kris, Ass't. Att'y Gen., *Remarks as Prepared for Delivery By Assistant Attorney General David Kris at the Brookings Institution* (June 11, 2010), *available at* http://www.prnewswire.com/news-releases/remarks-as-prepared-for-delivery-by-assistant-attorney-general-david-kris-at-the-brookings-institution-96163109.html.

150. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2580 (codified at 10 U.S.C. § 948r(a) (Supp. III 2009)).

151. *Id.* (codified at 10 U.S.C. § 948b(d)(B) (Supp. III 2009)).

152. *Id.* (codified at 10 U.S.C. § 948r(c) (Supp. III 2009)).

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circumstances of the conduct of military and intelligence operations during hostilities.
(2) The characteristics of the accused, such as military training, age, and education level.
(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.[153]

The Military Commission Rule that permits the results of interrogation at points of capture but does not require *Miranda* warnings traces back to two long-established legal principles reflected in case law.[154] First, as noted at the beginning of this section, the Supreme Court held that when a defendant is in custody, "law enforcement" must give him his *Miranda* warnings.[155] *Miranda* does not apply to military personnel, who are not acting as traditional law enforcement officers.[156] Thus, in *United States v. Loukas*,[157] the United States Court of Military Appeals held that an Air Force staff sergeant questioning a subordinate about drug use on a military flight need not give *Miranda* warnings because the questioning was in a military "operational" capacity and the sergeant was not a law enforcement officer.[158] In *United States v. Lonetree*,[159] the Court of Military Appeals held that CIA agents interrogating a military espionage suspect at length to obtain intelligence and to conduct a damage assessment need not give *Miranda* warnings because they were not acting in a law enforcement capacity.[160] Section 948r recognizes that the statements obtained by military officers in the war against al-Qaeda and other terrorists are not statements obtained by law enforcement but, rather, statements obtained by the military in an operational and intelligence capacity.[161]

153. *Id.* (codified at 10 U.S.C. § 948r(b)–(d) (Supp. III 2009)).

154. *Id.*

155. Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

156. *See id.* at 444 (holding the *Miranda* rights apply when custodial interrogation has been "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way").

157. United States v. Loukas, 29 M.J. 385 (C.M.A. 1990).

158. *Id.* at 389.

159. United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992).

160. *Id.* at 402–03.

161. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2580 (codified at 10 U.S.C. § 948r(c) (Supp. III 2009)) (allowing for certain statements of the accused to be admitted in evidence in a military commission); *Lonetree*,

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In addition, statements obtained "at the point of capture or during closely related active combat engagement" may qualify as admission without *Miranda* under the public safety exception.[162] Considering the exact wording of the rule, the statement would be admissible whether it reflected an immediate threat or related to a future threat by, for example, identifying the location, composition, and plans of enemy units.[163] As such, the rule does not fit the exact language of *Quarles*.[164] But, as noted by Jeffrey Becker, it would be farfetched to believe that the Supreme Court would believe that a bomb that might go off in the future is less of a threat to safety than a gun that was hidden by a defendant immediately before arrest.[165] What is clear is that the Military Commission's extension of *Quarles* would not be a violation of traditional notions of due process.[166] This statement is clearly supported by Attorney General Holder and Assistant Attorney General Kris's arguments that Congress should enact exactly such an extension for U.S. civilian cases, as quoted verbatim above.

D. *Access to Classified Information*

It is extremely important to protect classified information in a

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35 M.J. at 402–03 (holding that "[c]onsistent with both military and civilian authority . . . inducement must be made by someone acting in a law enforcement capacity" in order to qualify for protection under article 31); *Loukas*, 29 M.J. at 389 (holding that *Miranda* warnings were not required due to the operational nature of the questioning).

162. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2580 (codified at 10 U.S.C. § 948r(c)(2)(A) (Supp. III 2009)).

163. *See* Jeffrey S. Becker, Comment, *A Legal War on Terrorism: Extending* New York v. Quarles *and the Departure from Combatant Designation*, 53 DEPAUL L. REV. 831, 868–73 (2003) (discussing the scope of the *Quarles* public safety exception to *Miranda*).

164. *Compare* Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2580 (codified at 10 U.S.C. § 948r(c)(2)(A) (Supp. III 2009)) (allowing admission of evidence in an active military commission that was obtained "at the point of capture or during closely related combat engagement"), *with* New York v. Quarles, 467 U.S. 649, 659 n.8 (1984) (recognizing an exception to *Miranda* that involves an objectively reasonable need to protect the public safety from an immediate harm).

165. Jeffrey S. Becker, Comment, *A Legal War on Terrorism: Extending* New York v. Quarles *and the Departure from Combatant Designation*, 53 DEPAUL L. REV. 831, 869 (2003).

166. *See Quarles*, 467 U.S. at 653 n.3 (analogizing with the "exigent-circumstances exception to the warrant requirement," the Court concluded that circumstances exist where aspects of *Miranda* are inapplicable); Jeffrey S. Becker, Comment, *A Legal War on Terrorism: Extending* New York v. Quarles *and the Departure from Combatant Designation*, 53 DEPAUL L. REV. 831, 868–73 (2003) (discussing the possible extensions of *Quarles* and the public safety exception).

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trial; however, the reasons why particular information should not be disclosed are not always obvious to those who have not worked in the intelligence community. The American Bar Association sponsored a workshop in July 2009 composed of attorneys, academics, and intelligence professionals, at which they drafted a report explaining the exact concerns that prompt the need to carefully apply legal procedures to safeguard this information.[167] The most commonly cited concern is the need to protect intelligence sources and methods because we definitely do not want to provide the enemy with a playbook that details how we are obtaining intelligence on their plans and capabilities.[168] In addition, the disclosure of information provided by a foreign government can pose a major obstacle to future cooperation between the United States and that government.[169] Informants also frequently provide intelligence on the condition that they will remain anonymous, and most countries are not likely to hand over their intelligence agents and sources to a U.S. court.[170] Of course, some information may have been obtained by the U.S. after covert, nonconsensual entry into a nation-state that will subsequently be needed as an ally.

The difficulty in handling intelligence can be even more complex than indicated by the above list of concerns. As the ABA report stated, "it is not always clear at the outset which intelligence information will be valuable in the future."[171] Added to this is the "mosaic" problem, which can make one piece of information that appears fairly innocuous to the layman extremely important in the grand scheme of intelligence analysis.[172]

> The significance of one item of information may frequently depend upon knowledge of many other items of information. What

167. ABA STANDING COMM. ON LAW & NAT'L SEC., DUE PROCESS & TERRORISM SERIES, TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES & LESSONS LEARNED (July 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/law_national_security/trying_terrorist_report.authcheckdam.pdf.

168. *Id.* at 15.

169. *Id.* at 16.

170. *Id.*

171. *Id.* at 15.

172. ABA STANDING COMM. ON LAW & NAT'L SEC., DUE PROCESS & TERRORISM SERIES, TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES & LESSONS LEARNED, 15 (July 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/law_national_security/trying_terrorist_report.authcheckdam.pdf.

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may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.[173]

This need to protect intelligence information can run head on into the prosecutor's desire to introduce highly inculpatory evidence at trial as well as into the Government's obligation to provide discovery of arguably exculpatory information under *Brady v. Maryland*[174] and facts that may cast doubt on the credibility of Government witnesses as required by *Giglio v. United States*.[175] The solution to this problem in federal civilian courts has been utilization of the Classified Information Procedures Act (CIPA).[176] The statute was originally designed to prevent "greymail" by defendants associated with the intelligence community, but is also applicable to all cases where the government is in possession of or seeks to introduce potentially relevant classified information.[177] In short form, CIPA requires the defendant to advise the court beforehand if he intends to introduce classified information and allows the Government to meet with the court ex parte before trial to review classified information that may be material or subject to rules of discovery.[178] During this in camera meeting, the trial court first determines whether the information is discoverable under applicable rules and if it is relevant and helpful to the defense.[179] If the trial court determines that the information should be disclosed under the rules or that the Government will introduce it, the court must then decide whether it can be redacted, altered, or

173. United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972).

174. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

175. *See* Giglio v. United States, 405 U.S. 150, 154 (1972) (internal quotation marks omitted) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)) (providing that the nondisclosure of evidence affecting the credibility of a witness, whose testimony "may well be determinative of guilt or innocence" against an accused, justifies a new trial).

176. Classified Information Procedures Act, Pub. L. No. 96-456, § 4, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3, §§ 1–16 (2006)).

177. *See supra* Part VIII(D) (discussing trying terrorists in Article III courts).

178. *See* Classified Information Procedures Act, 18 U.S.C. app. 3, §§ 5–6 (2006) (discussing the notice a defendant must give before the disclosure of classified information and the procedure for cases involving such information).

179. *Id.* app. 3, § 6.

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summarized in a manner that will protect the sources and methods used to obtain the information, as well as the classified information itself.[180]

The MCA provisions for handling classified information are specifically based on CIPA.[181] Attorney General Holder has testified that the differences in procedure between the two statutes are picayune, obscure, and trivial.[182] A detailed review of the two statutes in an article published in the *Washington Independent* suggests that when CIPA and the case law interpreting that civilian statute are placed alongside the Classified Information Procedures contained in the MCA, there is virtually no meaningful difference.[183] The article notes, for example, that the MCA includes standards that guide the military courts in ordering disclosure to the defense and admission at trial but, aside from being common sense trial rules, these standards are "drawn from [civilian] case law addressing classified evidence issues."[184]

Despite this similarity, opponents have attacked the MCA classified information rules as a violation of due process because:

> Upon the request of the government, the judge may exclude both the defendant and his lawyer from the process in which the government argues to the judge that classified information should be withheld. The defendant may also be prevented from seeing portions of the government's legal filings regarding why the evidence cannot be disclosed and from participation in the

180. *Id.* app. 3, §§ 4–8; *see also* United States v. Rahman, 870 F. Supp. 47, 47 (S.D.N.Y. 1994) (providing an outstanding example of a methodical application of CIPA where the Government moved ex parte "to bar disclosure of allegedly classified information").

181. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2592 (codified at 10 U.S.C. § 949p–4(a)(2)). Attorney General Holder has noted that the MCA is based on CIPA. *See* Spencer Ackerman, *You Make the Call! Are Classified Info Rules Different for Civilian Courts and Military Commissions?*, WASH. INDEPENDENT (Apr. 14, 2010, 10:41 AM), http://washingtonindependent.com/82165/you-make-the-call-are-classified-info-rules-different-for-civilian-courts-and-military-commissions (noting Attorney General Holder's view that military commission rules for handling classified information are based on CIPA, and describing the similarities and differences between CIPA and MCA). Upon comparing the statutes, the very close similarity between CIPA and section 949p of the Uniform Code of Military Justice is obvious.

182. Spencer Ackerman, *You Make the Call! Are Classified Info Rules Different for Civilian Courts and Military Commissions?*, WASH. INDEP. (Apr. 14, 2010, 10:41 AM), http://washingtonindependent.com/82165/you-make-the-call-are-classified-info-rules-different-for-civilian-courts-and-military-commissions.

183. *Id.*

184. *Id.*

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discussion between the government's attorney and the judge.[185]

In reading such statements, one wonders whether those attacking military commissions have read either CIPA or the case law that has long established the key principles to be applied in interpreting the civilian statute. Section 4 of CIPA explicitly provides that the Government may make an ex parte request for an in camera review of both the classified information at issue and any arguments regarding its discovery.[186] According to the Senate Judiciary Committee's Report, the phrase "ex parte" was added to the section because "some judges have been reluctant to use their authority [to conduct such hearings] under the [previous] rule . . . ."[187] The House Report noted that "since the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules."[188] Civilian appellate courts have rejected defendants' assertions that they should participate in pretrial determinations of the discovery of classified information.[189] As the Ninth Circuit stated in *United States v. Sarkissian*,[190] "The clear language of [CIPA] and its legislative history foreclose [the] contention" that the Government is not authorized to litigate ex parte and in camera review of the discoverability of classified information.[191]

Opponents of the MCA may also be concerned with the Act's suggestion that, even after initial ex parte discovery decisions have

185. *Analysis of Proposed Rules for Military Commissions Trials*, HUMAN RIGHTS FIRST, 4, http://www.humanrightsfirst.org/wp-content/uploads/pdf/07125-usls-hrf-rcm-analysis.pdf (last visited Feb. 13, 2011).

186. *See* Classified Information Procedures Act, 18 U.S.C. app. 3, § 4 (2006) ("The court may permit the [Government] to make a request for such authorization in the form of a written statement to be inspected by the court alone.").

187. S. REP. NO. 96-823, at 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4299–300.

188. United States v. Mejia, 448 F.3d 436, 457 (D.C. Cir. 2006) (quoting H.R. REP. NO. 96-831, pt. 1, at 27 n.22 (1980)).

189. *See Mejia*, 448 F.3d at 457–58 (noting that § 4 of CIPA permits the Government to request a protective order that will "be inspected *by the court alone*," and "finding no support for the defendants' claim of the right to participation or access in CIPA" (internal quotation marks omitted) (quoting 18 U.S.C. app. 3, § 4)); United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998) ("In a case involving classified documents, however, *ex parte*, *in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use in order to decide the relevancy of the information.").

190. United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988).

191. *Id.* at 965.

been made, further discovery hearings may be held in camera or in a closed courtroom.[192] This, once again, has a parallel in CIPA and civilian case law. Citing both the Supreme Court's authorization to use closed courtrooms in special circumstances in *Waller v. Georgia* [193] and § 6 of CIPA, the trial court in *United States v. Abu Marzook*[194] noted:

> It is undisputed that Israel provided the substance of the testimony of the ISA agents to the United States with the expectation that it would be held in confidence. Given that Israel considers the true identities of the ISA agents and the substance of their testimony classified, American authorities have certified it as classified. Indeed, the government's submissions leave no doubt that the government has met its burden of showing that the testimony of the ISA agents will be classified. Furthermore, Assistant Attorney General Alice Fischer has certified pursuant to Section 6(a) of CIPA that a public proceeding may result in the disclosure of classified information, and has requested an *in camera* proceeding. Accordingly, the Court grants the government's request to close the hearing to the public when these agents testify because the Court finds that the agents' anticipated testimony falls within CIPA's scope. Defendant Salah and his counsel, as well as counsel for Co-Defendant Ashqar, may be present during this time. The Court will only permit those with the appropriate security clearance to remain in the courtroom during this testimony.[195]

There will very likely be major differences in how classified information is reviewed and disclosed in civilian trials versus military trials. These differences, however, will not be due to a substantial variation in the rules. The distinction is much more likely to be caused by the attitude of a military judge attuned to protecting sensitive sources and methods, as opposed to a civilian judge who has no experience and may be less understanding of the tremendous damage that can be caused by the disclosure of certain items of classified information.

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192. Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2613 (codified as amended at 10 U.S.C. § 949d(f)(3) (2006 & Supp. III 2009)) ("A claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.").

193. Waller v. Georgia, 467 U.S. 39 (1984).

194. United States v. Abu Marzook, 412 F. Supp. 2d 913 (N.D. Ill. 2006) (citations omitted).

195. *Id.* at 919 (citations and footnotes omitted).

E. *Search and Seizure*

Military commissions have also been repeatedly condemned because § 949a states that evidence "shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization."[196] Critics maintain this means that "evidence collected in violation of the Fourth Amendment search and seizure protections may be admitted,"[197] and does not reflect any interest of the military justice system "in preventing the admission of evidence obtained through unlawful searches or seizures."[198]

These complaints once again appear to reflect an ignorance of long-established U.S. domestic law. The courts have repeatedly held that if a search is conducted by foreign authorities, the Fourth Amendment does not apply.[199] There is nothing our courts could do to ensure that foreign officials would abide by our Constitution—even if we felt such protection was required.[200] If a search is conducted or directed by U.S. authorities against "alien unprivileged enemy belligerent[s]," who are the only persons currently subject to U.S. military commission jurisdiction,[201] then

196. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2581 (codified at 10 U.S.C. § 949a(b)(3)(A)).

197. *Due Process*, BILL OF RIGHTS DEFENSE COMMITTEE (May 15, 2009, 4:55 PM), http://www.bordc.org/threats/process.php.

198. *Analysis of Proposed Rules for Military Commissions Trials*, HUMAN RIGHTS FIRST, 5, http://www.humanrightsfirst.org/wp-content/uploads/pdf/07125-usls-hrf-rcm-analysis.pdf (last visited May 12, 2011); *see also* Shannon Bream, *Civilian Courts vs. Military Commissions*, FOXNEWS.COM (Feb. 15, 2010, 3:46 PM), http://liveshots.blogs.foxnews.com/2010/02/15/civilian-courts-vs-military-commissions ("You need a warrant to get most evidence into a civilian court, but the same principle does not hold in a military setting.").

199. *See* United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971) (holding that the Fourth Amendment was not applicable where "the challenged searches occurred in a foreign country [and] were conducted by foreign law enforcement officials"); Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968) ("Neither the Fourth Amendment of the United States Constitution nor the exclusionary rule of evidence . . . is applicable to the acts of foreign officials."); Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967) (holding that the Fourth Amendment is not "directed at [foreign] officials and no prophylactic purpose is served by applying an exclusionary rule" to evidence obtained by foreign officials).

200. *See Stonehill*, 405 F.2d at 743 (explaining that the Fourth Amendment does not apply to the acts of foreign officials because "there is nothing our courts can do that will require foreign officers to abide by our Constitution").

201. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2576 (codified at 10 U.S.C. § 948c (Supp. III 2009)).

the well-recognized Supreme Court decision in *United States v. Verdugo-Urquidez*,[202] which held that aliens do not have Fourth Amendment rights overseas, controls.[203] In that case, the Court based its decision on "the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorial[it]y."[204] In addition, U.S. magistrates have not been empowered to issue extraterritorial warrants and, in the eyes of a foreign government, a U.S. warrant would be a nullity or, in the words of the Court, "a dead letter."[205] Finally, in the Court's opinion, such a rule "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."[206]

Even if military commission rules were expanded to include U.S. citizens, it is not likely that warrants would be required for all searches outside the United States. As the Second Circuit noted in *In re Terrorist Bombings of U.S. Embassies in East Africa*,[207] warrants are unnecessary in foreign searches because: (1) there is a "complete absence of any precedent in our history for doing so"; (2) the United States should not condition surveillance on the approval of foreign officials; (3) a U.S. warrant lacks authority overseas; and (4) there is no legal mechanism for obtaining a U.S. warrant on foreign soil.[208] Accordingly, domestic searches against U.S. citizens must only be "reasonable" as determined by balancing the invasion of privacy versus the degree to which the search is needed to protect legitimate governmental interests.[209] The very recent extension of the Foreign Intelligence Surveillance Act (FISA)[210] to govern wire interceptions of U.S. citizens

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202. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

203. *Id.* at 274–75 (holding that "the Fourth Amendment has no application" to a search conducted on a "citizen and resident of Mexico").

204. *Id.*

205. *Id.*

206. *Id.*

207. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 157 (2d Cir. 2008).

208. *Id.* at 172.

209. *Id.*; *see also* United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (noting that in order to determine whether a "joint venture" search was reasonable, the court "must first consult the law of the relevant foreign countries" (citing United States v. Peterson, 812 F.2d 486, 491 (9th Cir. 1987))).

210. Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, 124 Stat. 2654 (2010).

overseas reflects an attempt to ensure that all searches of U.S. citizens are reasonable—even if they are not required to comply with traditional domestic warrant requirements.[211]

There is simply no requirement that foreign searches of aliens who currently might be subject to military commissions must be conducted pursuant to a warrant or other authority—court opinions hold exactly the opposite.[212] Section 949a of the MCA, which states that evidence secured in foreign searches should not be excluded because of failure to obtain a warrant, is therefore completely consistent with the Fourth Amendment.

F. *Military Judges and Juries*

Those who truly understand the law should have no concern that the military commission rules somehow deny due process. It is clear from the above analysis that the MCA rules are actually consistent with civilian rules and comply with traditional notions of due process.[213] It is likely that the true fear of knowledgeable MCA opponents is the fear of military judges and juries. As an experienced government attorney, the author readily acknowledges the preference of trying a case before a military commission rather than a civilian court because: (1) as previously noted, civilian judges appear reluctant to admit certain categories of evidence, even when that evidence is actually admissible under civilian rules; (2) civilian judges often have neither national

211. *See In re:* Sealed Case, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) (per curiam) ("[W]e think the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close. We, therefore, believe firmly . . . that FISA as amended is constitutional . . . ."); Peter Eisler, *Senate OKs Surveillance Revamp: FISA Bill Will Protect Telecoms*, USA TODAY July 10, 2008, at 7A, *available at* 2008 WLNR 12902879 ("The bill will give a secret court the power to supervise the administration's warrantless surveillance program, which was launched after 9/11 to hunt terrorists.").

212. *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 157, 172 (2d Cir. 2008) (rejecting "the view that the normal course is to obtain a warrant for overseas searches involving U.S. citizens"); *In re:* Sealed Case, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) (per curiam) (concluding FISA comes close to the Fourth Amendment warrant standards, and, even if it does not, the surveillances authorized under the Act are reasonable); United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (holding that a "joint venture" search in a foreign country was in compliance with that country's law, and, therefore, did not violate the Fourth Amendment).

213. *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (concluding that properly authorized and established military tribunals could satisfy the Court's due process concerns).

security nor military experience, and thus fail to appreciate the government's insistence on protecting specific items of classified information;[214] and (3) rogue or irrational jurors are more likely to be encountered in civilian juries, where members are randomly selected and can be subject to quick and perfunctory follow-up voir dire, as opposed to military juries where panel members are military officers who are chosen because of an established record and reputation for good judgment.[215] For the same reasons, defense attorneys, whose duty is to free their clients or obtain the lightest possible sentences, would probably prefer a civilian judge and jury. However, as will be noted subsequently in a review of the trial of Salim Hamdan, such a preference for civilian trials may be misguided.[216]

Despite the differences between military and civilian judges and juries, the fact that military commissions rely upon military officers to fill these key roles in no way means that defendants are denied a fair trial. As previously noted, there are no known statistics suggesting that innocent defendants are convicted by military trials more often than by civilian trials.[217] This is in large part because of the professionalism of military judges and juries.[218]

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214. *See* Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals As Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. INT'L CRIM. JUST. 43, 54 (2009) (discussing the inability of expert testimony delivered to the ears of civilian jurors to properly explain military concepts and operating procedures).

215. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2576 (codified at 10 U.S.C. § 948i (Supp. III 2009)).

216. *See* Richard v. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals As Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. INT'L CRIM. JUST. 43, 55 (2009) (comparing the trial of a suspected terrorist with the trial of a civilian military contractor, and concluding that the military commission would look upon the defendant's case with a more sympathetic eye than a detached civilian jury (citing Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 411 (2006))).

217. *See supra* Part VIII (discussing the laws established by Congress and their implication on due process).

218. *See* Military Commissions Act of 2006, Pub. L. No. 109–366, § 3, 120 Stat. 2600, 2603–04 (codified as amended at 10 U.S.C. §§ 948i–948j (2006 & Supp. III 2009)) (discussing the qualifications for people serving on a military commission and the requirements of a judge serving on a military commission); Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals As Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. INT'L CRIM. JUST. 43, 47–49 (2009) (concluding that military officers are uniquely qualified to serve as jurists because of their "internal sense of justice and fairness").

Military judges are assigned to the Office of the Judge Advocate General, which must certify they are qualified for duty as a judge.[219] Certification requires that the judge has attained the rank of Lieutenant Colonel, served as lead counsel in five or more major trials, and successfully completed a military judge course.[220] This certification stands in stark contrast with civilian federal judges who are neither required to have completed judicial training nor to have extensive experience as a trial lawyer, but instead are traditionally selected by presidential appointment, with the concurrence of the nominee's senator.[221] In *Weiss v. United States*,[222] the Supreme Court rejected a significant due process challenge levied against military judges for serving fixed terms instead of serving life tenure.[223] The Court first noted the historical "absence of a fundamental fairness problem" with military judges[224] and further explained that military judges are insulated from command influence by military regulations,[225] their assignment to the JAG office (which has no interest in the outcome of specific cases),[226] and the ability to appeal cases to the Court of Military Appeals.[227] This insulation is further reinforced

219. *See* 10 U.S.C. § 826(c) (2006) (requiring judges to be certified as qualified for duty); DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 8-2 (Nov. 16, 2005) (requiring certification from the Judge Advocate General before a judge is qualified to sit on a military commission or a special court martial).

220. *See* U.S. COAST GUARD, MILITARY JUSTICE MANUAL, COMMANDANT INSTRUCTION NO. M5810.1D, CERTIFICATION AND DESIGNATION OF MILITARY JUDGES 6.D.1.b (2000), *available at* http://www.uscg.mil/legal/MJ/MJMBreakout/Chap6.pdf (enumerating the factors considered in the selection of military judges).

221. *See* Susan H. Stephan, *Blowing the Whistle on Justice As Sport: 100 Years of Playing a Non-Zero Sum Game*, 30 HAMLINE L. REV. 587, 596–97 (2007) (expressing concern over the political pressures associated with judicial appointment in the federal judiciary); *see also* Stephen Burbank, *Politics, Privilege and Power, The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24, 27 (2002) (stressing the need to avoid an overly-politicized federal judiciary).

222. Weiss v. United States, 510 U.S. 163 (1994).

223. *Id.* at 165–66.

224. *Id.* at 179 (internal quotation marks omitted) (quoting United States v. Graf, 35 M.J. 450, 462 (C.M.A. 1992)).

225. *Id.* at 180 (citing 10 U.S.C. § 826 (1988)) (stressing that the military has provisions in place to prevent officers from exercising authority for the purpose of curtailing judicial discretion).

226. *Id.* (stating that the supervision of the Judge Advocate General, as opposed to the officer's authority, ensures judicial independence).

227. *Weiss*, 510 U.S. at 181 (pointing out that the entire military judicial process is reviewed by the Court of Military Appeals—a civilian panel of judges serving for fixed terms).

in military commissions by § 948j(f), which forbids the convening authority from preparing any report on fitness of a judge that relates to his performance in a military commission.[228]

The military jury panel for courts-martial and military commissions must consist of officers who the Convening Authority believes to be "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[229] Despite the complaints of critics, the MCA and Manual for Courts-Martial contain numerous provisions to ensure there is no command influence.[230] As summarized by Richard Mayer in his detailed article on military juries:

> MCA section 949(b) and RMC [Rule for Military Commissions] 104 generally protect the independence of court martial personnel. RMC 104(a)(1) prohibits the convening authority from taking adverse action against any of the court personnel (military judge, panel members and military counsel) based on the findings or sentence in a commission. RMC 104 (a)(2) contains the broader prohibition against anyone coercing or influencing the independent discretion of personnel within the military commissions process without legal authorization. RMC 104(b) further prohibits members from being evaluated based upon their service as a panel member.[231]

The defense attorney is given an opportunity to strike for cause any panel member who has not been selected in accordance with the statutory criteria.[232] In addition, a juror may be struck "in the interest of having the military commission free from substantial doubt as to legality, fairness and impartiality."[233]

Meyer goes on to note the many attributes of military officers that contribute to fair and just jury panels.[234] The members of the

228. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2604 (codified as amended at 10 U.S.C. § 948j(f) (2006 & Supp. III 2009)).

229. 120 Stat. at 2603–04 (codified as amended at 10 U.S.C. § 948i(b)).

230. *See id.* (describing the qualifications necessary to serve on military commissions); *Weiss*, 510 U.S. at 180–81 (outlining the numerous safeguards in place to ensure that military judges serve the interest of justice).

231. Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals As Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. INT'L CRIM. JUST. 43, 51–52 (2009).

232. MANUAL FOR MILITARY COMMISSIONS II-104–08, R. 912(b) (2010).

233. *Id.* R. 912(f)(1)(N).

234. Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals As Triers of Fact in Some Humanitarian Law*

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military commission panel that tried Osama Bin Laden's driver Salim Hamdan, for example, all had undergraduate degrees and "their average level of education was at the graduate level."[235] The fact that the lowest ranking member was a major probably means that they all were commanders with quasi-judicial responsibilities in their units, and that they were endowed "with legal powers and responsibilities [that] provide[d] them ample opportunity to hone their decision-making skills."[236] Referring to military panels generally, Meyer points out that "the US military officer pledges and routinely risks his life to protect the law."[237] This allows the officer "to avoid the pitfall of becoming a martinet for a political leader since they are required to answer to a higher legal authority."[238] Furthermore, "[t]he military officer can sympathetically look beyond the accused's status as an enemy" and "is more likely to understand the mitigating and extenuating circumstances that actual combat brings to the trial."[239]

The military commission trial of Hamdan in many ways tested the basic premise that military juries are unbiased and extremely fair. He was not convicted of the most serious conspiracy charge and was given a relatively moderate sentence of sixty-six months.[240] Meyer notes:

> "Media talking heads [had] previously predicted a rubber stamp conviction and life sentence by what they predicted would be an obviously biased military panel.... Instead, the verdict and sentence were the products of the law and evidence presented to the panel, nothing more. Politics, vengeance, bias, and prejudice were left out of the jury room: exactly as justice requires."[241]

Tribunals, 7 J. INT'L CRIM. JUST. 43, 45–53 (2009).

235. *Id.* at 46.

236. *Id.* at 47.

237. *Id.* at 50.

238. *Id.* at 54.

239. Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals As Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. INT'L CRIM. JUST. 43, 54 (2009).

240. *Bin Laden's Former Driver Sent from Guantanamo Bay to Yemen*, ASSOCIATED PRESS, Nov. 26, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/ article/2008/11/25/AR2008112503057.html.

241. Richard V. Meyer, *Following Historical Precedent: An Argument for the Continued Use of Military Professionals As Triers of Fact in Some Humanitarian Law Tribunals*, 7 J. INT'L CRIM. JUST. 43, 45 (2009) (footnotes omitted).

IX. CONCLUSION

Congress recognized, after al-Qaeda's attacks on our financial and military centers, that the United States was at war with a new foreign enemy and thus quickly passed the AUMF, which authorized the President to use all necessary and appropriate military force against both those who committed these attacks and against those who would harbor such individuals. The Supreme Court recognized in *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld* that detention and trial of enemy combatants are fundamental incidents of war encompassed in the AUMF. President Bush, the Republican Congress in 2006, and the Democratic Congress in 2009 concluded that the belligerents in this new war should be tried for violations of the laws of war by military commissions. Congress set forth detailed rules for these trials. Despite criticism from those on the left who do not recognize we are at war with al-Qaeda and from those criminal defense attorneys who naturally desire procedures that are favorable to their clients, analysis of the guidelines established by Congress clearly demonstrates that they fully comply with traditional American notions of due process.

One of the fundamental reasons for military commissions was that Congress and the President after 9/11 recognized that we were dealing with a true foreign enemy that, because of its ideology and effort to obtain modern weapons, is potentially far more dangerous and potentially more destructive than any army we had encountered in the past. Our traditions of justice require that suspected jihadist combatants have a fair trial before being punished for violations of the laws of war. But it would be extremely difficult to ensure that many of these highly dangerous defendants could be convicted when the evidence seized, including interrogations conducted on a battlefield, cannot meet all the evidentiary requirements imposed by civilian courts in the trial of ordinary criminals. Thus, pursuant to the military commission rules, and fully consistent with due process, Congress has determined that reliable hearsay that can help the jury determine the truth should be deemed admissible, rather than suppressed because of failure to qualify for a technical exception, as routinely occurs in civilian courts. Soldiers should not be required to leave the battlefield to comply with overly formal chain of custody requirements that have evolved over time in the civilian system. The jury should not be prevented from hearing highly probative and reliable statements

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made by the defendant during interrogations because the enemy soldier was not advised of his rights to remain silent and immediately obtain a free attorney. Juries should be composed of officers selected by statute because they are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament, thus reducing the potential for rogue, irrational jurors too often found in civilian cases. Finally, in accordance with military commission standards, the disclosure of classified information to the defendant should be reviewed and decided by a high-ranking military judge with extensive trial experience and an ability to truly understand the life and death significance of classified information, while ensuring the defendant's rights to a fair trial. These rules are just and they can work. The trials should therefore proceed in the forum that Congress, as the representative of the American people, has created.

X. EPILOGUE

Upon completion of this Article and just weeks before publication, the United States completed its search for the world's most wanted person. On May 2, 2011, an American Navy SEAL team shot and killed Osama bin Laden, the mastermind behind the 9/11 terrorist attacks.[242] President Obama victoriously announced, "Justice is done."[243] This proclamation would not have been possible without the opportunity to interrogate military detainees without the restrictions of the Federal civilian court system.[244] For this reason and those numerous reasons discussed in this Article, military tribunals are the best forum for trying enemy combatants who engage in acts of terrorism against the United States.

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242. Brian Ross, *Osama Bin Laden Killed by Navy SEALs in Firefight*, ABC NEWS (May 2, 2011), http://abcnews.go.com/Blotter/osama-bin-laden-killed-navy-seals-firefight/story?id =13505792.

243. Peter Blake et al., *Bin Laden Is Dead, Obama Says*, N.Y. TIMES, May 2, 2010, at A1, *available at* http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?hp.

244. *See* Brian Ross et al., *Osama Bin Laden: Navy SEALS Operation Details of Raid that Killed 9/11 Al Qaeda Leader*, ABC NEWS (May 2, 2011), *available at* http://abcnews.go.com/Blotter/khalid-sheikh-muhammad-capture-osama-bin-laden-courier/story?id=13506413 ("Guantanamo detainees identified the courier who had worked with both [Khalid Sheikh Mohammed] and [Abu Faraj al Libi] as someone who was probably trusted by Bin Laden.").

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