

**THE U.S. MILITARY COMMISSIONS:  
LOOKING FORWARD**

**LAW AND POLICY  
WORKSHOP**

*Co-sponsored by the American Bar Association Standing  
Committee on Law and National Security and The George  
Washington University Law School*

**Report – May 2018**

## **American Bar Association Standing Committee on Law and National Security**

The bipartisan and nonpartisan membership of the Standing Committee on Law and National Security is committed to educating the Bar and the public on national security law. The Committee conducts studies, sponsors programs and conferences, and administers working groups on law and national security-related issues. Activities assist policymakers, educate lawyers, the media and the public, and enable the Committee to make recommendations to the ABA. It is assisted by an Advisory Committee, Counselors to the Committee, and liaisons from ABA entities. For more information, visit [www.abanet.org/natsecurity](http://www.abanet.org/natsecurity).

*The “Military Commissions Workshop and Report” was not for attribution. The views contained herein do not necessarily reflect the views of each participant or the official policy of their respective agencies, private sector organizations, the United States Government, the American Bar Association, or the Standing Committee on Law and National Security.*

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## **Military Commissions Workshop and Report**

On December 7, 2017, the ABA Standing Committee on Law and National Security and the George Washington University Law School convened a one-day workshop on the U.S. military commissions at U.S. Naval Station, Guantanamo Bay. The purpose of the workshop was to provide a forum for expert discussion of issues that face the U.S. military commissions. The workshop consisted of four sessions, which addressed:

- (1) An overview of the military commissions at Guantanamo;
- (2) Legal questions related to existing detainees not charged before the commissions;
- (3) Legal issues that could arise if new detainees were brought to Guantanamo; and,
- (4) The implications for the commissions posed by a new authorization to use military force.

The purpose of the Workshop was to produce a non-partisan report to inform policymakers, commentators, and the public on possible paths forward in the interest of U.S. national security, law and justice.

Ground rules and caveats: The Workshop was invitation only. Participants operated under the Chatham House Rule, that is, without attribution. In addition, where an individual is or was affiliated with a public or private institution, such as a department or law firm, it was understood that all comments were offered in a personal capacity and did not necessarily reflect the views of the parent institution. This is true of the Report as well. Indeed, in reviewing the report participants were not asked to concur in the text of the report, but rather to confirm that it accurately conveys the gist of the Workshop discussion. Each participant may not only deny association with any statement or conclusion; they might plausibly do so. Finally, the Workshop did not seek nor drive to consensus, but where there was agreement, the Report so indicates.

In closing, the principal Rapporteurs and conveners would like to thank each member of the Workshop for their participation and for the commitment to public policy and public service it represents. Thank you.

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## **EXECUTIVE SUMMARY**

### **BACKGROUND IN BRIEF**

In the aftermath of 9/11, President George W. Bush issued a Military Order directing the Secretary of Defense to establish military commissions to try noncitizens who were, or are, members of al Qaida, engaged in acts of international terrorism, or harbored or aided persons who engage in such acts. Congress subsequently authorized commissions in the Military Commissions Acts of 2006 and 2009. (A commission is a form of military tribunal and is distinct from and operates independently from the U.S. military justice system.)

Forty-one detainees\* are currently held at U.S. Naval Station, Guantanamo Bay. Five of these detainees are eligible for transfer. Ten of the detainees have proceedings pending before the military commissions at Guantanamo, are in sentencing, or have been sentenced and are appealing. (Appendix A). Twenty-six detainees are not currently designated by the Periodic Review Board as eligible for transfer and do not have charges pending before the commissions. Since its inception, the military commissions process has resulted in 8 convictions pursuant to pleas. (Appendix B). No contested commission trials have become final. On January 30, 2018, President Trump issued an Executive Order titled *Protecting America Through Lawful Detention of Terrorists*. The Order states, “the United States may transport additional detainees to U.S. Naval Station Guantanamo Bay when lawful and necessary to protect the Nation.” As of May 1, 2018, no additional detainees are known to have been brought to Guantanamo.

### **CONCLUSIONS & RECOMMENDATIONS**

#### **1. COMMISSIONS GENERALLY - REFORM OR REPEAL**

- The military commissions process faces significant political, diplomatic, and legal challenges.
  - Some members of the Workshop believe the military commission system was a worthwhile endeavor when it was established. Some members also believe the concept of military commissions, as found in military law and historical practice, should be preserved as a future option for expeditious battlefield trials in-theater.
  - Other members of the Workshop believe that commissions were, from the outset, an unnecessary diversion from the well-tested Article III courts and military justice system.
- All Workshop participants believe that whatever their original intent and design, the military commissions at Guantanamo are not working as intended. They should either be reformed or terminated in the interest of U.S. national security and justice for the families

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\* The Workshop discussion occurred before the transfer of Ahmed al-Darbi to Saudi Arabia, on May 2, 2018. Carol Rosenberg, *U.S. Releases Guantanamo Convict to Saudi Arabia in First Transfer of Trump Era*, MIAMI HERALD, Updated May 2, 2018, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article208718319.html>.

of victims of terrorism. Reforms could include legislation and/or Executive Branch rules and policies. Several members noted that reforms, while needed, could add delay and potentially yield additional issues to challenge – thereby suggesting that termination would be preferable to reform.

2. **OPTIONS FOR IMPROVING MILITARY COMMISSIONS** Workshop participants recommend active *consideration* of the following options, *among others* cited in the report:

- Expand and/or clarify the role of the commissions Convening Authority using the authority and role of convening authorities within the U.S. military justice system as a model.
- Change and expand the eligibility rules for trial judges and change the current judicial pay and tenure structure to allow civilian and military judges with diverse experience to hear commission cases on a dedicated basis.
- Mitigate or minimize procedural and appellate delay by removing the death penalty as a sentencing option.
- Enhance or eliminate the role of the Court of Military Commissions Review. This is a part-time court, with judges paid by the hour, that hears cases of first impression, interlocutory appeals, and emergency writs without settled law. A standing court could more expeditiously process these appeals. Direct appeal to the D.C. Circuit would more rapidly result in settled law and precedent.
- Review the classification and declassification procedures (which are necessary, but slow) for efficacy.
- Provide improved, “clean” facilities for secure attorney-client communications.
- Establish a central website and clearinghouse for commission filings and information to enhance transparency, public knowledge, and confidence in the commission’s proceedings.

3. **ALTERNATIVES TO COMMISSIONS** Workshop participants recommend active *consideration* of alternatives to military commissions.

- In principle, the Executive Branch should maintain flexibility by keeping all options on the table for the prosecution of terrorism-related offenses. These options, depending on applicable law, could include prosecution:
  - In-theater before commissions or courts-martial;
  - By host-government courts;
  - By third-country courts;
  - Before hybrid domestic-international courts;
  - Within the U.S. military justice system; and,



- Before Article III federal courts.
- Most participants believe that U.S. national security and justice would be better served by trying terrorism cases in Article III courts, instead of before commissions as they are currently constituted.
- Many participants recommended that remote plea-bargaining before Article III judges via videoconference is an option that should be considered for Guantanamo detainees.
- Regardless of view, there was consensus that the prohibition on transferring Guantanamo detainees to the United States should be repealed to afford the Executive Branch flexibility in addressing terrorism cases. Further,
  - There are no legal impediments or consequences to lifting the prohibition.
  - If this were to happen, decisions to transfer detainees to the continental United States should be made on a case-by-case basis, based on individual circumstances, and subject to the availability of appropriate facilities.

#### 4. NEW ENTRANTS

- Most participants agree that bringing new entrants, such as ISIS members, into the existing commissions system at Guantanamo Bay would compound existing challenges, such as those involving prosecutorial and appellate delay, cost, and both public and international credibility.
- It would also bring potential additional challenges, such as litigation addressed to detention authority under the existing *2001 Authorization for Use of Military Force [AUMF]*, the scope of the *2009 Military Commissions Act (MCA)*, the co-mingling of detainees, and/or the exact crimes with which the detainees are charged.

#### 5. THE “END OF CONFLICT” AND A NEW AUMF

- The Executive Branch should consider defining the “end of conflict” with respect to some or all the conflicts during which detainees have been transferred and held at Guantanamo. In doing so, the U.S. could define the discourse on the nature of conflict and how the operations of *jus post bellum* should be carried out. Such definition could also encourage and facilitate the plea process, enhance commissions credibility, and minimize the risk of inconsistent or adverse judicial or congressional determinations defining the “end of conflict.”
- Until and unless there is a declared “end of conflict,” the Periodic Review Board process for detainees should continue.

- Most participants agreed that a new AUMF would mitigate against litigation challenging the President's authority to detain new persons. However, participants could not agree on whether a new AUMF should include express detention authority and/or a sunset clause.

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## **LAW AND POLICY WORKSHOP**

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### **Report**

## **Background and History of the Military Commissions**

### **Introduction**

This Workshop, co-sponsored by the American Bar Association Standing Committee on Law and National Security and the George Washington University Law School, convened 24 experts on December 7, 2017 to discuss key issues facing the operation of the U.S. military commissions at Guantanamo Bay. The purpose of the Workshop was to explore a range of legal and policy options related to the operation of military commissions, including discussion of whether additional legislation might be needed, or whether modifications to existing rules would be beneficial. In particular,

- The first session provided an overview of issues related to the operation of the commissions, including a discussion of the commissions' efficacy to date and potential reforms to commission proceedings;
- The second session addressed legal and policy questions related to existing detainees at U.S. Naval Station, Guantanamo Bay who have not been charged before the commissions;
- The third session focused on legal and policy issues that could arise if new detainees were brought to Guantanamo Bay as potential new entrants into the military commissions system;
- The fourth session considered the implications for the commissions posed by any new potential authorization to use military force.

The discussion was not-for-attribution in order to provide a candid, frank discussion. This report summarizes the key points made during the Workshop. The conveners did not seek to establish consensus among participants, but where consensus or near consensus was reached, it is noted in the report.

## **Background**

President George W. Bush initially authorized the establishment of the U.S. military commissions at Guantanamo Bay in a military order issued in November 2001. This Order provided for trial by military commissions of noncitizens for offenses and pursuant to rules later issued by the Secretary of Defense that differed from those used in courts-martial.<sup>1</sup> The Order further gave the commissions jurisdiction to try “any and all offenses triable by military commission,” interpreted by the Bush administration to include some offenses that were not clearly established violations of the laws of war, such as providing “material support” to terrorists, conspiracy, and solicitation.

## **Historical Practice**

Prior to 2001, the United States used military commissions episodically, most notably during the Civil War and World War II. President Lincoln made extensive use of such military trials during the Civil War. In the U.S. Supreme Court’s 1866 decision in *Ex parte Milligan*, the Court concluded that certain military commission trials of civilians violated the terms of the 1863 Habeas Act, and a Court majority concluded that Congress was powerless to authorize military commissions to try citizens who were not part of enemy forces in circumstances like those existing in Indiana, where civil courts were open and available.<sup>2</sup> A year before this case was decided, in June 1865, a military commission appointed by President Andrew Johnson tried and convicted eight civilians accused of conspiring with John Wilkes Booth in the assassination of Abraham Lincoln.<sup>3</sup> During World War II, eight German saboteurs were captured in the United States<sup>4</sup> and tried and convicted in a military commission established following a proclamation by President Roosevelt.<sup>5</sup> Reviewing this case, the U.S. Supreme Court subsequently concluded in *Ex parte Quirin* that Congress had in the Articles of War “authorized” the trial of offenses against the law of war before military commissions.<sup>6</sup>

## **Supreme Court Review**

The legality of the U.S. military commissions at Guantanamo Bay faced a fundamental legal challenge in 2006, when an early defendant in the commissions, Salim Hamdan, sought habeas corpus in federal court.<sup>7</sup> In *Hamdan v. Rumsfeld*, the U.S. Supreme Court invalidated the commissions, concluding that they violated the Uniform Code of Military Justice and the Geneva Conventions’ Common Article 3, which requires that tribunals adjudicating the status of detainees must be “regularly constituted courts.”<sup>8</sup> Congress responded several months later by enacting the Military Commissions Act (MCA) of 2006 to provide a statutory basis for the commissions.<sup>9</sup> The MCA, significantly updated by legislation in 2009, created a new Article I Court of Military Commission Review (CMCR) and a new set of procedural and evidentiary rules to govern commission proceedings.<sup>10</sup> The MCA also identified 32 specific substantive offenses that could be tried by the commissions, including the domestic offenses, and it authorized trial for those offenses for any noncitizen who “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.”<sup>11</sup>

## Current Commissions Cases\*

Currently there are eight active cases before the U.S. military commissions at Guantanamo Bay. These cases include proceedings against five alleged perpetrators of the September 11, 2001 attacks (Khalid Sheik Mohammed, Walid bin Attash, Ramzi bin al Shibh, Mustafa Ahmad al Hawsawi, and Ammar al Baluchi), a case against Abd al Hadi al-Iraqi, charged for multiple offenses related to a series of attacks in Afghanistan and Pakistan between 2003 and 2004, and a case against Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri, who is charged with a series of offenses related to his alleged role in the attempted attack on the USS The Sullivans in January 2000 and the USS Cole in October, 2000. In two cases, against Majid Shoukat Kahn and Ahmed Mohammed Haza al Darbi, respectively, the defendants have pleaded guilty and agreed to delay sentencing in order to cooperate with the government.<sup>12</sup> In addition, in June of 2017 military commission prosecutors charged a high-profile detainee known as Hambali, currently held at Guantanamo Bay, with two deadly terrorist bombings in Indonesia in 2002 and 2003.<sup>13</sup> Before the case may proceed, the Convening Authority for the military commissions must decide whether to approve the charges and determine whether prosecutors may seek the death penalty.<sup>14</sup>

None of the currently-active cases have yet proceeded to trial, and fundamental legal issues related to the operation of the commissions remain unresolved. One of the biggest open questions is whether domestic crimes that do not clearly qualify as war crimes under the international law of armed conflict, such as conspiracy, solicitation, and material support for terrorism, can be the basis for prosecution in the military commissions. The D.C. Circuit has concluded that the U.S. Constitution's Ex Post Facto Clause (assuming it applies to Guantanamo detainees) prohibits military commission trials for material support and solicitation offenses based on conduct prior to 2006, when the MCA explicitly authorized military commission trials for such crimes.<sup>15</sup> But the overarching question of whether commissions may try offenses that are not international war crimes, even for conduct that post-dates the MCA, remains unsettled.<sup>16</sup> As Judge Brett Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit recently put it,

The question [whether conspiracy may be tried by the commissions] implicates an important part of the U.S. Government war strategy. And other cases in the pipeline require a clear answer to the question. This case unfortunately has been pending in this Court for *more than five years*. It is long past time for us to resolve the issue squarely and definitively.<sup>17</sup>

Another significant unresolved legal issue is whether acts that took place prior to September 11, 2001, such as the bombing of the USS Cole in 2000 at issue in the *Al-Nashiri* case, can be tried before the commissions.<sup>18</sup>

Significant legal questions also remain unanswered related to the procedure and operation of the commissions. For example, the scope of U.S. constitutional provisions that apply to the

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proceedings remains unsettled, although the MCA has provided greater clarity via statute. The MCA authorizes the Secretary of Defense to promulgate regulations to further prescribe military commission procedures.<sup>19</sup> Several complicated procedural and evidentiary issues have been raised in the military commissions, many of which concern the admissibility of evidence obtained through coercion. Although the 2001 Military Order and 2006 MCA were somewhat lenient in admitting evidence obtained through coercion, much more so than civilian courts, the 2009 MCA brought many of the commission evidentiary rules into closer alignment with the Federal Rules of Evidence.<sup>20</sup> Litigation continues over these reforms.<sup>21</sup> In addition, litigation over the appointments of judges to the CMCR is currently before the U.S. Supreme Court.<sup>22</sup>

## **Session 1:**

### **An Overview of the Military Commissions at Guantanamo Bay**

This session provided an overview of the legal and policy issues facing the commissions. At the outset, participants noted that significant issues are unresolved, such as the types of crimes that may be tried, the extent of constitutional protection for the accused in military commissions, and issues related to the structure and operation of military commissions. Participants first discussed the efficacy of the commissions, distinguished them from other types of military commissions, and then turned to consider some potential reforms of military commissions procedures.

#### **Discussion of the Efficacy of, and Ongoing Need for, U.S. Military Commissions at Guantanamo Bay**

Participants first addressed the continuing utility of the U.S. military commissions at Guantanamo Bay. Multiple participants emphasized that, at the outset of any conversation about the commissions, it would be important to note the commissions' poor track record as compared to Article III courts in trying terrorism cases. One participant observed, for example, that after sixteen years, most outside observers would agree that the U.S. military commissions at Guantanamo Bay have thus far been a failure. This participant highlighted the fact that the case involving September 11, 2001 attacks on the United States still has not gone to trial, and observed that justice delayed is justice denied. Another participant noted that, one of the things the last sixteen years has demonstrated is the mistake of creating essentially a new system of justice. This participant suggested that, in general, it may be better to modify an existing system rather than to establish a new one, and that the U.S. military commissions system at Guantanamo Bay is essentially a failed effort.

Participants discussed the purpose of establishing the commissions and debated whether the commissions were still necessary. One participant asked what space the commissions now occupy that Article III courts do not. In response, another participant noted that a central rationale for creating the U.S. military commissions at Guantanamo Bay was to establish a forum for trial in which the exclusionary rule established in *Miranda v. Arizona*<sup>23</sup> and procedural and evidentiary rules limiting hearsay, (e.g., *Crawford v. Washington*),<sup>24</sup> --both applicable in Article III courts and in courts-martial--would not apply. Another participant commented that, even apart from these issues, the commissions were established partly for political reasons, and partly in order to provide protection for classified information. Some participants suggested that many of these reasons for establishing military commissions were still relevant.

Yet a large number of participants questioned the continuing need for the U.S. military commissions at Guantanamo Bay, in view of the relative success that Article III courts now have in adjudicating terrorism cases. One participant noted that the purpose the commissions were created to serve, to provide fair yet expeditious justice, has not in fact been served. Another

participant noted that the U.S. military commissions at Guantanamo Bay are tending to look more and more like Article III courts, and therefore one rationale for using them, as compared to Article III courts, has virtually disappeared. Another participant observed that the U.S. military commissions are actually more saddled with procedural questions and challenges than the federal courts, and that prosecutors are better off going to federal courts if they want to convict someone. This participant emphasized that the government has successfully prosecuted numerous terrorism cases in federal courts, in contrast to the handful of cases prosecuted before the commissions. Along these lines, several participants pointed to the fact that the U.S. military commissions at Guantanamo Bay are in fact *more limited* in their ability to address terrorism cases, as compared to Article III courts because they

- Are burdened by the fact that every writ and issue essentially presents a case of first impression;
- Are not standing courts and do not continuously and solely work on commission cases;
- Must cope with the fact that, in the absence of settled law, every issue is subject to litigation and appeal in the commissions context, unlike most law and procedure in Article III courts (and within the military justice system), which is settled;
- Are slow;
- Are restricted in the crimes they can consider;
- May cost significantly more per defendant; and,
- Are burdened by funding restrictions.

As a consequence, nearly all agreed that, if possible to do so, justice would be better served by trying terrorism cases in Article III courts as opposed to the U.S. military commissions at Guantanamo Bay. This would require repeal or amendment of existing law prohibiting the transfer of Guantanamo detainees to the continental United States (CONUS)<sup>25</sup>; and it would require a policy and political will to do so.

No one argued in favor of the current iteration of the commissions; however, a few participants argued that the commission concept should be preserved. For example, one participant argued that the Executive Branch should in principle have maximum flexibility. Another emphasized that, as a practical matter, the initial concerns about the limitations of Article III courts that prompted the establishment of U.S. military commissions at Guantanamo Bay (such as hearsay restrictions, the exclusionary rule established in *Miranda v. Arizona*, and risks of exposing of classified information), might still be applicable in some cases that would make military commission trials the only available option.

- **The military commissions, in their current form, suffer from extensive legal and procedural challenges. Most participants agreed that justice may be better served in**



**Article III courts instead, or at the very least, significant reforms should be introduced.**

### **Other Types of Military Commissions**

Participants also discussed whether other types of military commissions, separate from those now established at Guantanamo Bay under the MCA, could be a useful venue for some category of terrorism trials. A handful of participants noted that stripped-down, expeditious commissions, convened on the battlefield, have a long history in U.S. practice. One participant emphasized that Article 21 military commissions, such as the commissions used in *Ex parte Quirin*, are still legally available and should not be overlooked as an option in some situations. This participant noted that history has put us in the strange position in which military commissions are now defined by the MCA, and the operation of the U.S. military commissions at Guantanamo Bay, but that military commissions should not be limited to this form. This participant further noted that Article 21 commissions, if convened on the battlefield, would not be as procedurally constrained or costly as the current U.S. military commissions at Guantanamo Bay. Another participant disagreed that the Article 21 commissions would still be legally available. Yet another participant noted that stripped-down battlefield military commissions (as compared to the current form of the U.S. military commissions at Guantanamo Bay) might be useful in some contexts. A number of participants agreed that such commissions might be appropriate for

- Expeditious trials on the battlefield;
  - Trials of military professionals;
  - War crimes trials; and
  - Espionage cases.
- **A small group of participants emphasized that military commissions other than the U.S. military commissions at Guantanamo Bay could be a useful option for trying terrorism cases in some circumstances.**

### **Potential Reforms to Improve Functioning of Existing U.S. Military Commissions at Guantanamo Bay**

Discussion then turned to the question of how the existing military commissions at Guantanamo Bay might be improved through statutory or rule-based reforms. One participant noted that the 2007 and 2009 amendments to the MCA contained significant and important reforms to the procedures for the military commissions but that it would be worth considering additional reforms that could improve their functioning. Specific reforms discussed included the rules for judges, the availability of interlocutory appeals, reforms to the Court of Military Commission Review (CMCR), transparency and classification issues, attorney-client confidentiality, the scope of substantive crimes, and evidentiary issues.

## *Trial Judges and Appellate Judges*

Potential reforms discussed:

- Expanding the eligibility rules for commission trial judges;
- Providing express tenure for trial and CMCR appellate judges;
- Requiring trial judges to work exclusively on commission trials without assignment of additional duties or UCMJ responsibilities; and
- Changing the payment system for CMCR judges.

Participants discussed the question of whether current rules for military commissions judges should be revised. Issues raised included eligibility, tenure [see below], and the payment system for CMCR judges. To be eligible to serve as trial judges on the U.S. military commissions, candidates must be active-duty military.<sup>26</sup> Military judges serve without tenure and are eligible for and subject to UCMJ trial assignments at the same time that they are assigned to commissions duties. In the case of CMCR judges, compensation is provided on an hourly basis, and CMCR judges are considered part-time, hourly employees. Thus, the CMCR is not a standing court. It is a virtual court that only convenes as needed and by the hour.

A number of participants suggested that expanding the eligibility requirements for commissions trial judges beyond active duty military judges could be beneficial and should be considered. One participant asked whether, due to current restrictions, the applicable pool of judges with the background and experience to address the kinds of questions before the commissions might be too limited. This participant asked whether the MCA should be revised to provide for a wider range of judges to serve, such as more judges with experience adjudicating cases involving the death penalty, for example. In particular, this participant asked whether it might be useful to expand the pool to include civilian judges. A number of participants asserted that it would be beneficial to do so. In this vein, one participant commented that civilian federal and state judges could provide valuable expertise that would be useful. They might also receive greater deference on appeal to the D.C. Circuit. Another participant noted that there might be some civilian judges who are reservists who might actually be eligible under current rules, and who should be sought out.<sup>27</sup>

A few participants raised questions about whether expanding the pool of eligible judges would be useful. For example, one participant noted that even most civilian judges would not be equipped to handle these kinds of cases, as they are complex, political, unusual, and the death penalty is often on the table. As a result, this participant observed, the career of the average civilian judge is not good preparation – it would require a truly extraordinary judge to be able to handle these types of detainee cases well. (It should be noted that, another participant strongly disagreed, asking whether a state court judge with 40 years of experience would really be unequipped to handle detainee litigation). Other participants noted that any change to eligibility rules for judges would likely prompt litigation within the military commissions, further complicating existing

cases. And other participants emphasized that the key issue is ensuring that judges are viewed as independent and impartial.

- **A significant number of participants asserted that expanding the eligibility rules for judges could be beneficial and should be considered.**
- **Another group of participants disagreed, questioning whether it would benefit the functioning of the commissions.**

A few participants also raised other issues related to the rules governing military commissions judges. One participant, for example, noted that CMCR judges are paid by the hour. This participant commented that you are not an independent judge if you have to bill by the hour, and necessarily treat service as a judge as a part-time job to be performed as needed. You cannot expect a “court” to expeditiously hear and resolve writ appeals if the first act of the court is to try and locate its judges and determine their availability to hear the writ. It also drives the CMCR to resolve matters in writing without oral argument. Oral argument sharpens arguments, adds to the parties’ perception of having their day in court, and contributes to public confidence in the proceedings through public observation of the arguments. Another participant agreed.

- **A number of participants suggested that the pay structure for judges should be reviewed. Most participants were not aware that CMCR judges were considered part-time, hourly employees.**

Another participant raised the issue of judges’ tenure. Virtually all western military justice systems that rely on military officers as judges provide for a system of tenure measured in years. This improves the expertise of the judges leading to fewer credible issues to appeal and fewer plain errors. It also enhances public confidence in the judges and courts; tenure contributes to the perception of impartiality and independence. In the case of U.S. military commission judges at Guantanamo Bay, it could also speed the pace of trials, if trial judges were assigned exclusively to hear commission cases. Tenure would invest trial judges in seeing the trial process through from start to finish.

### *Availability of Interlocutory Appeals to the U.S. Court of Appeals for the D.C. Circuit and the Role of the Court of Military Commissions Review*

Potential reforms discussed:

- Expanding the scope of interlocutory appeal of legal questions before the commissions to the D.C. Circuit
- Reevaluating the role of the Court of Military Commissions Review

Participants also discussed the availability of interlocutory appeals to the U.S. Court of Appeals for the D.C. Circuit and the role of the Court of Military Commissions Review (CMCR). One participant argued, in particular, that reforms to allow for more direct interlocutory review by the D.C. Circuit would be beneficial. Such interlocutory review would enable important legal

questions—such as the question of whether actions prior to the September 11, 2001 attacks can be adjudicated in the commissions—to be decided more expeditiously. A few other participants agreed. Under present circumstances, writ appeals are subject to two levels of appeal, and thus two levels of briefing cycle, deliberation and opinion. Further, until the D.C. Circuit decides a matter and does so definitively, the law of “the circuit” is not settled, and both the commissions and CMCR proceed subject to later reversal. Yet another participant questioned whether interlocutory review might actually add time to the cases and be counterproductive.

- **A handful of participants took the position that expanded interlocutory appeals would be useful.**
- **At least one participant disagreed.**

A few participants questioned the role of the CMCR and its efficacy. For example, one participant observed that the CMCR adds to the length of military commission proceedings – it takes an incredibly long time (for example spending 5 years on *Hamdan* and *al Bahlul* respectively), and then gets reversed by the D.C. Circuit on the plain error standard. This participant urged that the purpose of the CMCR, and its rules, should be re-evaluated. Yet another participant observed other aspects of the CMCR should be evaluated to ensure that it is more regular and independent.

- **A handful of participants questioned the role of the CMCR in light of its part-time structure and duplicative role of the D.C. Circuit. It adds an additional layer of appeal and of time, without adding an additional layer of resolution or credibility.**

### *Transparency and Classification Issues*

Potential reforms discussed:

- Reviewing classified information related to the commissions proceedings to determine whether some portion of that information might be declassified
- Revisiting procedures for accessing classified information

Participants also grappled with issues related to the classification of material relevant to commission proceedings. As one participant noted, the availability of procedures to protect classified information served as a central rationale for the commissions. A number of participants suggested that over-classification of information was part of the drag on the commission proceedings, and efforts should be made to review the classification of information related to the commissions and how that information can be accessed. For example, one participant commented that delay and litigation resulting from over-classification are core reasons why the commissions haven’t worked as intended. Another participant commented, in particular, that information about the treatment of detainees already in the public domain should be considered for declassification. And another participant suggested that the rules for accessing classified information should be reviewed.

- **A significant number of participants agreed that the classification of information before the commissions should be reviewed periodically to determine whether it could be declassified and that declassification processes should be expedited.**
- **All participants agreed that the commissions process would be more credible and transparent if there were a functional accessible website where litigants as well as members of the public media could access all unclassified documents, filings, press statements, and opinions related to commissions on a timely basis.**

### *Attorney-Client Communications*

Potential reforms discussed:

- Establishing “clean” facilities for attorney-client communications\*

One participant referred to the recent memo of the Convening Authority regarding the contempt proceedings against General Baker.<sup>28</sup> The memo identified the need for a “clean facility” in which lawyers can speak with their clients without concern that they might be overheard. A large number of participants commented that the establishment of such a clean facility would be beneficial. One participant observed, however, that even the establishment of a clean facility for such communications would not solve the problem, because many detainees and their lawyers simply wouldn’t believe it.

- **A large number of participants agreed that establishing a “clean” facility for attorney-client communications would be beneficial.**
- **At least one participant questioned whether establishing such a facility would be effective.**

### *The Role of the Convening Authority*

Potential reforms discussed:

- Expanding the role of the Convening Authority

Participants also discussed the scope of the authority of the military commissions Convening Authority. Several participants emphasized that, in the U.S. military justice system, the convening authority (CA) is given authority and responsibility, and thus accountability, over military justice. This authority includes the ability to investigate, to charge, and to convene courts-

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\* Subsequent to the Workshop, media reports indicate the Executive Branch contracted to provide a “detainee legal meeting site” for “low-value detainees” to meet with their lawyers. Carol Rosenberg, *Guantanamo Plan for Eavesdrop-Proof Legal Meeting Site Has a ‘Listening Room’* MIAMI HERALD, Updated Dec. 20, 2017, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article190789044.html>.

martial. The CA is also responsible for ensuring access to fair and equal discovery by both sides and ultimately responsible for ensuring that the system is just, timely, and provides for good order and discipline. While the role of the military justice CA has been controversial in recent years, this controversy has largely focused on the authority of CAs to dismiss and commute findings of guilt and sentences after adjudication by courts-martial. Participants noted that, in contrast, the military commissions convening authority is a CA in title only. He or she does not have authority over the prosecution, the defense, or the budgetary process related to commissions. As a result, outside of the Secretary of Defense, there is no official charged with and responsible for the success or failure of the commission process – its ability and credibility in providing a just forum in which to adjudicate allegations brought before commissions.

A number of participants suggested that the scope of authority for the military commissions CA should be expanded to include more functions. One person noted that, under the current system, no one can make certain key decisions and the military commissions CA should have more power to make these decisions. Another participant commented that the relatively limited role of the military commissions CA has led to many delays within the military commissions system. Another participant reiterated that the scope of the military commissions CA for the U.S. military commissions at Guantanamo Bay is significantly more circumscribed than that of the military justice CA, who controls who may be called as witnesses, the use of attorneys, the security of premises for any proceedings, logistics related to the proceedings, pre-trial detention issues, and pre-referral discovery. This participant suggested that the CA for the U.S. military commissions at Guantanamo Bay should be accorded more powers along these lines.

Yet other participants disagreed that the UCMJ model was the right one, and identified concerns related to expanding the scope of authority for the military commissions CA. For example, one participant noted that the purpose of the CA in UCMJ cases is different because it is focused primarily on good order and discipline within the U.S. military – a different set of values than at the U.S. military commissions at Guantanamo Bay. Another participant commented that broadening the scope of the CA's power could be viewed as problematic under international human rights law (though perhaps not under international humanitarian law), because it might be viewed as insufficiently independent and impartial. This participant observed that under a human rights framework, to qualify as independent, a function must be outside the chain of command.

- **A group of participants suggested that the scope of the Convening Authority's role should be expanded.**
- **Another group of participants disagreed.**

### *Evidentiary Rules*

Potential reforms discussed:

- Further revisions of the hearsay and fruit-of-the-poisonous-tree rules to mirror rules as applied in Article III courts

A number of participants discussed evidentiary-standard rules as applied in the military commissions, in particular the fruit-of-the-poisonous-tree rule and the admissibility of hearsay. Participants debated whether these rules should be the same in Article III courts and military commissions.

Multiple participants raised questions about the scope of the fruit-of-the-poisonous tree rule as it applies in the military commissions. For example, one participant asked whether the applicable rule, as applied to coerced confessions, would be based on the Constitution or statute. This participant noted that in a court martial, the rule would be based on the Constitution. Another participant expressed concern about the discrepancy between expectations (in academia and overseas) as to how this rule should be enforced and actual practice. In general, there was some uncertainty about whether the rule in practice in the commissions will differ materially from how it is applied in Article III courts.

With respect to hearsay, a number of participants observed that the broader rules for the admissibility of hearsay in the commissions was a significant feature of the commission proceedings. One participant noted that the prosecution's case-in-chief in the *Al-Nashiri* case might depend heavily on the ability to introduce hearsay statements. Another participant argued in contrast that the hearsay rules in the commissions and Article III courts should be identical, and that one should not do in Guantanamo what one could not do in Manhattan.

- **Participants debated whether the hearsay rule and fruit-of-the poisonous tree rule applicable in commissions should be further modified to track the rules applicable in Article III courts.**

### *Sentencing Issues*

Potential reforms discussed:

- Removing the death penalty as a sentencing option

Participants also debated sentencing issues related to the commissions, in particular the question of whether the death penalty should be taken off the table. One participant noted that the availability of a sentence of death puts added strain on the legitimacy of the commissions; several European and Middle Eastern allies have in some cases refused to transfer detainees to the United States without a promise that they will not be sent to Guantanamo Bay, based in part on the possibility that a conviction by military commission could result in a death sentence. A number of participants observed that the availability of the death penalty was part of the reason for the length of military commission proceedings and suggested that, if the death penalty were not available,

the proceedings might function more smoothly. Other participants questioned whether removing the death penalty would be politically possible, even assuming it would be desirable.

- **A number of participants argued that the death penalty should be taken off the table in order to improve the functioning of the commissions and reduce procedural challenges and delays.**
- **A few participants disagreed, with some noting that removing the death penalty would not be feasible.**



## Session 2:

# Options Related to Detainees Who Are Outside the Commissions Process and Not Currently Designated for Transfer

### Background\*

There are currently forty-one detainees being held at Guantanamo Bay.<sup>29</sup> Of that number, five are eligible for transfer.<sup>30</sup> Ten detainees have been charged before the commissions at various stages,<sup>31</sup> and seven of these ten are still awaiting trial.<sup>32</sup> The remaining twenty-six detainees are not currently designated by the Periodic Review Board (PRB) as eligible for transfer and do not have charges pending before the commissions.<sup>33</sup> They remain subject to the PRB process.

Whereas the Obama Administration sought to curtail the Guantanamo population and eventually close the base for detention purposes, President Trump announced an intent to retain and potentially revitalize Guantanamo as a detention facility. On January 30, 2018, President Trump issued an Executive Order titled *Protecting America Through Lawful Detention of Terrorists*.<sup>34</sup> The Order revoked section 3 of the previous Executive Order of January 22, 2009,<sup>35</sup> ordering the closure of Guantanamo Bay detention facilities. The 2018 Order states, “the United States may transport additional detainees to U.S. Naval Station Guantanamo Bay when lawful and necessary to protect the Nation.”<sup>36</sup>

### Overview

The purpose of this session therefore was to identify potential options regarding the current twenty-six detainees who are not currently in the military commissions system or eligible for transfer pursuant to PRB determinations. These options included:

- Article III remote video plea bargains;
- Third-country transfer;
- Transfer to the continental United States (CONUS);
- Continued, long-term detention; and
- Periodic Review Board process changes.

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\* The Workshop discussion occurred before the transfer of Ahmed al-Darbi to Saudi Arabia, on May 2, 2018. Carol Rosenberg, *U.S. Releases Guantanamo Convict to Saudi Arabia in First Transfer of Trump Era*, MIAMI HERALD, Updated May 2, 2018, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article208718319.html>.

The participants recognized that these options might apply to future detainees as well as current detainees.

The session started with an overview of the issues presented along with the suggestion that the group's focus should be on the 26 detainees who are not currently in the military commissions system or eligible for transfer. Many of these individuals are in legal limbo. Some of them likely did not commit acts that would fall under the criminal jurisdiction of Title 18. Thus, one question is whether and where these detainees could be transferred, if at all. Another question presented is whether some of these detainees could plead guilty to offenses resulting in their release from detention. This led to discussion of the pros and cons of videoconference plea bargaining in the video presence of judges located in CONUS. Transfer issues were discussed at length as well. This included the ability to transfer individuals from Guantanamo Bay to foreign countries,<sup>37</sup> as well as to the United States.<sup>38</sup> Lastly, the session addressed the problem of long-term continued detention caused in part by an inability to define in law or policy when hostilities would end.

### **Article III Plea Adjudication via Remote Videoconference**

The Workshop participants considered a proposal for remote video conference plea bargaining in Article III courts. There was consensus that this option offered a promising path forward.

This option would allow Guantanamo Bay detainees to plead to offenses in Article III Courts by remote videoconference. In theory, the Article III context would provide credibility to the proceedings and their results. Pleas would occur in a context where judges are practiced, and case law and standards are settled, eliminating the necessity and delay of appellate litigation over threshold questions of plea acceptance. Legislation authorizing such a mechanism was originally proposed in the Senate/House version of the National Defense Authorization Act (NDAA) for Fiscal year 2017; however, it was ultimately not included. Some participants noted that as a policy and political matter, some Members of Congress viewed this proposal as a mechanism to “close Guantanamo” as a detention facility.

Participants did not identify any structural impediments to proceeding on this basis, including those that might be found in the Federal Rules of Criminal Procedure or in the U.S. Constitution, notwithstanding Rule 11 of the Federal Rules of Civil Procedure.<sup>39</sup> Although Rule 11 of the Federal Rules of Criminal Procedure requires the court to address the defendant personally in open court, it does not explicitly require that the defendant be physically present. However, some participants had not considered the proposal before the Workshop and noted that, elsewhere, others had made constitutional and other objections to the videoconference plea proposal. Virtually all participants agreed there were two potential substantive concerns, one for judges and the other for policymakers.

- (1) Could a detainee knowingly and voluntarily plead to an offense?
- (2) If a detainee did plead to an offense and was not subject to further adjudicated confinement, what would, could, or should then happen to the detainee?

## *Knowing, Voluntary, and Intelligent Pleas by Guantanamo Detainees*

In federal district court, state court, and under the Uniform Code of Military Justice, a plea must be knowing, voluntary, and intelligent. One role of the trial judge in accepting a plea is to determine that each of these plea requirements is satisfied, generally through engaging in a plea colloquy with the defendant. Given military grade differentials and potential for command pressure that may be brought to bear on a military defendant to plead guilty, the U.S. military plea colloquy is robust, requiring not only a judicial determination that the plea is voluntary, knowing, and intelligent, but that the defendant is admitting sufficient facts on the record to satisfy each element of the underlying offense(s) and knows that he or she is doing so.

To some participants, the prospect of lifetime detention without adjudication seemed an inherently coercive backdrop for a voluntary plea. Several participants expressed skepticism that a Guantanamo detainee could voluntarily plead guilty at all or do so knowingly. These participants noted that detainees might conclude they had little other option to try and avoid the possibility of permanent detention at Guantanamo. Further, it might be hard to determine that a plea was knowing without a detainee also knowing whether he might otherwise ever be released from detention through other modalities of status or conduct adjudication.

Other members noted that criminal guilty pleas often occur in inherently coercive contexts where prosecutorial authorities hold out the prospect of additional charges and prolonged confinement in the absence of a plea. Judges know this, and it is one reason why trial judges in federal, state, and courts-martial review pleas with care. Indeed, courts routinely accept guilty pleas including sentences to life without the possibility of parole where defendants are seeking to avoid a potential sentence of death during the penalty phase of a trial.

- **Participants generally agreed that the introduction of remote videoconference as the plea forum would not change the underlying legal inquiry; however, it might make some judges more hesitant to accept a plea as knowing and voluntary in the absence of direct interaction with the defendant including the observation of demeanor evidence. This concern would be mitigated by having Article III judges travel to Guantanamo.**
- **All participants agreed that pleas, including remote pleas, would prompt litigation along with appellate scrutiny, raising the potential that pleas might be overturned after the fact.**

### *Are There Crimes to Which Uncharged Detainees Could Plead?*

Workshop participants proceeded from the understanding that some of the twenty-six of the remaining detainees are not currently subject to military commissions jurisdiction likely because they did not commit jurisdictionally eligible offenses. Thus, there is the possibility that even if a detainee was prepared to plead guilty to something, it might not fall within Article III criminal jurisdiction under Title 18. All participants further noted that while a defendant can waive many rights pursuant to a plea agreement, including for example, the right to trial, heretofore, appellate courts will not allow a defendant to waive jurisdiction or plead to an act that does not

satisfy the elements of an offense, for the purpose of accomplishing some other goal like being released from prison or protecting a family member. Participants agreed that any further consideration of this option for the “remaining detainees” would require careful consideration as to whether these detainees might lawfully plead guilty to Article III offenses including war crimes offenses under 18 U.S.C. 2441.

- **Participants noted a problem, whereby detainees may be completely willing to plead guilty, yet they are pleading to crimes not covered under Title 18.**

### *Can a Defendant Knowingly and Voluntarily Plead Guilty Without Knowing if They Will Ever Be Released?*

In U.S. federal, state, and U.S. military courts a defendant must generally be aware of and understand the consequences of pleading guilty before a judge will determine that that plea is knowing, voluntary, and intelligent. However, appellate courts are divided over whether this requirement only applies to the direct criminal consequences of pleading guilty, such as criminal incarceration, or extends to the so-called collateral consequences of pleading, such as sexual offender registration, voting restrictions, deportation, and gun ownership. All courts agree that whatever the collateral consequence, if advised by counsel, or if raised during a plea colloquy, a defendant must receive accurate information as to the consequences to knowingly plead guilty where those consequences are material to a defendant’s decision to plead.

Some participants asked, and others expressed skepticism, as to whether it was possible to voluntarily, knowingly, and intelligently plead guilty when defendants would likely not know when, if ever, they might otherwise be released from Guantanamo or if they would be released at all if they pled guilty and were sentenced to time served. One participant noted that it is circular to take a plea of guilty and be subject to indefinite detention, or not take the plea and still be subject to indefinite detention.

Other participants suggested that a plea might still be viewed as knowing, provided the person pleading guilty was accurately informed regarding the potential consequence, or lack of consequence, of pleading guilty, *i.e.*, that they might still be detained indefinitely for security reasons.

One participant noted that Section 412 of the PATRIOT Act allows for renewable civil detention. While this is not meant to be indefinite, it might result in detention for the duration of hostilities.<sup>40</sup> Another participant noted that the detention system for criminal aliens starts with their detention, and then they can plead guilty. Regardless of their plea, they are detained pending deportation. On this topic, the Supreme Court has established a six-month window for release but caveats that window until the threat posed is “no longer foreseeable.” This inevitably lasts longer than the six-month window and can take years to sort out. (*See Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) (distinguishing *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

- **Some participants were skeptical as to whether a defendant can enter a voluntary, knowing, and intelligent guilty plea, when they do not otherwise know when, if ever, they might otherwise be released from Guantanamo.**

## **Third Country Transfer**

Under current law, the United States Government is prohibited from spending appropriated funds to transfer detainees held at Guantanamo into the United States.<sup>41</sup> As a result, detainees must either be held at Guantanamo, released, or transferred and detained or monitored in a third country. A Periodic Review Board (PRB), as the name suggests, periodically reviews detainee files to determine if individual detainees might be released or transferred consistent with U.S. security. This process has continued in the current administration. Third country transfer was pursued by the Obama and Bush administrations; thus, a continuation of this policy would offer policy continuity; however, it also suggests that the remaining detainees may be particularly difficult to transfer. In addition, were the U.S. courts to definitively rule that the United States could no longer detain uncharged detainees at Guantanamo and the NDAA restriction remained in place, third party transfer may be the only secure option.

### *What Nation Would Accept the Current Detainees?*

Participants identified the following factors as relevant to whether the U.S. Government or a third country would accept the transfer of a detainee:

- Any national, ethnic, or other links between the detainee and the country in question;
- The threat, if any, the transfer would present to the country in question;
- Collateral incentives, if any, offered by the United States;
- The ability, and track record, of the country to monitor transferred detainees;
- The intelligence relationship, if any, between the country and the U.S.;
- The adherence of the country to applicable LOAC and human rights norms with respect to prior detainees; and
- The political climate in the country as well as in the United States to be seen cooperating on such matters.

In general, the participants agreed that it was the potential loss of security control that presented the overarching policy challenge for U.S. decision-makers.

## **Transfer to the United States**

As noted, under current law contained in the NDAA, detainees at Guantanamo may not be transferred into the United States. Participants considered two questions: (1) Should this restriction be repealed; and, (2) what issues might arise or be addressed by doing so? There was immediate consensus on four points.

First, the prohibition on CONUS transfer should be repealed. The restriction limits Executive branch options for adjudicating detainee cases and for addressing foreign policy concerns about Guantanamo.

Second, participants identified no legal impediment or consequence to lifting the prohibition. That is, the transfer of a detainee into CONUS might affect their legal circumstances, but repeal of the law alone would not do so.

Third, were the prohibition repealed, some participants believed the detainees should be transferred en masse to CONUS, other participants believed any decision to transfer detainees to CONUS should be made on a case-by-case basis based on individual circumstances. For example, an aging detainee population may require additional and specialized medical care not available at Guantanamo. One detainee is over seventy-years old. In addition, the prospect of transfer to CONUS might prove a factor in facilitating plea bargains.

Finally, all the participants agreed that, where appropriate, detainees could be confined as securely in CONUS as they could be at Guantanamo. Here reference was made to the U.S. Bureau of Prisons facility in Florence, Colorado, where Zacarias Moussaoui, among others, is currently confined.

- **Participants agreed that the prohibition on CONUS transfer should be repealed, and there are no significant legal impediments to lifting that prohibition. Furthermore appropriate and secure CONUS facilities are available.**

### **Continued, Long-Term Detention**

In the absence of viable options, or policy decisions to exercise viable options, the Workshop participants agreed that the default result would be continued, long-term detention at Guantanamo Bay. However, the participants identified multiple issues with this result.

#### *Is Continued Long-Term Detention Sustainable?*

The participants agreed on three threshold points.

First, the ability to hold detainees long term is likely not sustainable without additional legal clarity for doing so. By sustainable, the participants meant both as a matter of law and as a matter of policy pressure and impact. However, the participants did not necessarily agree, and did not seek to find agreement, on the underlying reasons for this conclusion. Participants noted, among other things, that:

- To the extent detention is based on the AUMF, or some combination of the AUMF, Commander-in-Chief authority, Supreme Court case law, and the Third Geneva Convention, that authority was now stale.

- Under human rights law, persons may not be detained indefinitely without just cause and without opportunity to adjudicate their detention before a neutral, impartial, and independent judicial authority.
- Under the law of armed conflict, combatants and other belligerents could be detained until the end of hostilities; however, as multiple commentators have pointed out in multiple ways, determining just when a conflict between the United States and an evolving/changing non-state actor ceased to exist was a difficult question of fact and law. There would be no armistice or peace treaty.
- Regardless of the legal basis for holding detainees, allies and like-minded countries might disagree with the U.S. basis and express their disagreement not only through diplomatic and legal channels, but also by limiting intelligence sharing or restricting the basis on which persons might be rendered or extradited to the United States.

Second, an inability or unwillingness to clarify the legal basis for holding detainees outside the context of criminal adjudication might impact, and potentially undermine, the ability to otherwise address the status of the twenty-six uncharged detainees. As noted above, for example, a court might be less inclined to accept a plea as voluntary and knowing in a context where the person pleading guilty otherwise faces the prospect of indefinite detention without adjudication or knowledge of when, if ever, such detention would end.

Third, clarity might come in the form of criminal adjudication and sentencing. It might come in the form of domestic law, such as AUMF repeal, amendment or replacement. It might come in the form of definitive and generally binding court rulings. And, it might come in the form of a binding policy decision as to the duration or cessation of hostilities relevant to persons detained at Guantanamo. Although unlikely, that means the Congress, the Courts, as well as the Executive Branch could all play a determinative role in the future of the detainees in question.

- **The ability to hold detainees long term is likely not sustainable without additional legal clarity for doing so, and that lack of legal clarity may have a negative impact on the current status of the remaining twenty-six uncharged detainees going forward.**

### *Who Decides?*

The third question raised by participants was who, or what institution, should decide when a predicate conflict was over for the purpose of detention. Here there was no general agreement on a specific answer, although participants clearly favored an affirmative rather than default process of decision making. They also recognized that in the absence of legal clarity, courts might play a greater role than anticipated or wanted by the Executive Branch. The following points were also made.

Because the law is ambiguous, one speaker concluded, this issue will need to be treated as a policy question, answered by policymakers. So long as the U.S. Government takes the position that it is currently engaged in a non-international armed conflict with Al Qaeda, policy will be the primary determinant. Furthermore, as that same member noted, the courts are not likely to second-

guess executive determinations that the conflict is ongoing. While courts have questioned the nature of the detention, and its associated processes, the courts will likely give strong deference to the Executive to determine the extent of the ongoing conflict.

How the questions are framed matters. If the issue that policy-makers are faced with involves the capacity for Al Qaeda to strike the United States, which has been greatly diminished, then the harm may not exist. If, however, the perspective involves Al Qaeda's *desire* to direct and cause harm to United States, then that harm may never truly go away. This latter perspective implies an ongoing authority to detain individuals.

One member noted that the criticism of closing Guantanamo was that "closing the facility" was the focus of the discussion, as opposed to "defining the end of the conflict." That speaker stated that we are clearly at that stage right now.

The Executive Branch could effectively alter the discourse on the nature of conflict, and especially how the operations of *jus post bellum* should be carried out. The Executive Branch could do so by leading discussions with Congress, so that the AUMF for Al Qaeda can be removed, while an AUMF for ISIS and associated forces is introduced. This could potentially increase the current legal authority and would allow the U.S. to shape the global discourse to describe how these conflicts can evolve into other conflicts.

- **The Executive Branch should consider defining the "end of conflict" with respect to some or all the conflicts during which detainees have been transferred and held at Guantanamo. In doing so, the U.S. could define the discourse on the nature of conflict and how the operations of *jus post bellum* should be carried out.**

## **Periodic Review Board Process Changes**

Regardless of perspective on the underlying legal authority to detain persons at Guantanamo, participants agreed that a continuing process of ongoing detainee review should continue. This was essential to the credibility of continued indefinite detention and, as the Court determined in *Hamdi*, is legally required. In addition, individual participants suggested that the Executive Branch consider the following actions to address criticisms of indefinite detention:

- More frequent reviews, at least every six months, and more transparent reviews for detainees not subject to military commission jurisdiction;
- That the PRB further clarifies on a case-by-case basis the legal authority for detaining specific persons and the anticipated duration of that authority as well as identifying relevant facts or circumstances that would change the duration of that authority; and
- That at some stage, depending on how long a detainee is held at Guantanamo without being charged or tried for criminal conduct, the burden of persuasion should shift to the Government to explain or demonstrate the legal basis and factual necessity for continued detention.



- **The Periodic Review Board Process could be enhanced by Executive Branch action, but at the very least, the continuing process of ongoing detainee review should continue.**

## Session 3:

# Legal and Policy Issues Related to Bringing New Entrants Not Currently Detained at Guantanamo Bay into the Military Commissions System

### Overview

In this session, participants discussed the legal and policy issues that could arise if new entrants not currently detained at Guantanamo Bay were brought into the current U.S. military commissions system. All but one of the participants agreed that bringing new participants into the existing system would, in general, not be a good idea and would result in significant legal and policy challenges. Participants also compared and contrasted the existing military commissions with a range of alternative adjudication options for potential entrants including Article III courts, in-theater military commissions, courts-martial, foreign prosecutions, and hybrid foreign-international prosecutions.

- **Most participants agreed that bringing new entrants into the existing military commissions system at Guantanamo Bay would be a bad idea and would present significant legal and policy challenges.**

### Should New Entrants Not Currently Detained at Guantanamo Bay Be Brought into the Existing Military Commissions System?

Nearly all participants agreed that new entrants not currently detained at Guantanamo Bay should not be brought into the existing U.S. military commissions system. One participant disagreed, emphasizing that it is important to preserve a range of options for the Executive Branch. This participant noted, however, that the existing military commissions would be a least-best option. The legal and policy concerns raised by participants related to such new entrants included:

- The scope of the 2001 Authorization for the Use of Military Force;
- The scope of the 2009 Military Commissions Act;
- Restrictions on the transfer of detainees housed at Guantanamo Bay;
- Litigation risks related to uncertainty about crimes that may be charged in military commissions;
- Litigation risks related to co-mingling of new entrants with existing entrants;
- The slow pace of proceedings and the absence of concluded proceedings;

- International concerns about legitimacy of military commissions; and,
  - Costs.
- **Nearly all participants agreed that new entrants, not currently detained at Guantanamo Bay, should not be brought into the existing U.S. military commissions system.**

### *Scope of the 2001 Authorization for the Use of Military Force*

A number of participants noted that new entrants from ISIS or other terrorist groups or conflicts not currently housed at Guantanamo Bay would put pressure on the interpretation of the 2001 Authorization for the Use of Military Force (AUMF).<sup>42</sup> To be brought into the existing military commissions system, such entrants would need to be detained at Guantanamo Bay. Yet, as these participants observed, it is unclear whether the 2001 AUMF provides the authority for the United States to detain such persons. Although the U.S. Supreme Court has interpreted the 2001 AUMF as authorizing military detention,<sup>43</sup> these participants observed that the 2001 AUMF does not specifically refer to ISIS or a variety of other terrorist groups. They concluded that, without a new AUMF, the authority to detain new entrants into the military commissions from ISIS or other groups not mentioned in the AUMF would be uncertain and subject to challenge.

A few participants argued, by contrast, that the AUMF could plausibly encompass ISIS and other groups, and still others argued that in any event the Executive Branch does not need an AUMF in order to place individuals in military detention. These participants maintained that the authority for such detention derives from the Commander-in Chief Clause of Article II of the U.S. Constitution.<sup>44</sup> They took the position that the AUMF is merely an additional tool for the Executive Branch. Thus, the question is whether the Executive would operate in the context of *Youngstown* category I or category II, and depending on one's view about the War Powers Resolution, potentially category III.<sup>45</sup> Many of the panelists agreed, however, that a new AUMF would provide useful additional authority for any new categories of entrants.

- **Most participants agreed that introducing new entrants would raise legal questions about whether the existing 2001 AUMF provides sufficient authority to detain such persons.**
- **A few participants argued that authority to detain such persons also derives from the U.S. Constitution's Commander-in-Chief Clause, and therefore that the AUMF is not necessary.**

### *Scope of the 2009 Military Commissions Act*

Participants agreed that the Military Commissions Act (MCA) would by its own terms permit prosecution within the military commissions of individuals from groups or conflicts not currently represented at Guantanamo Bay. One participant emphasized that the MCA permits prosecution of "alien unprivileged enemy belligerent[s]" and defines such persons as individuals, in addition to members of Al Qaeda, who have engaged in hostilities against the United States or

its partners or who have purposefully and materially supported such hostilities.<sup>46</sup> As this participant put it, the language of the statute is clear on this point, but the statutory language referring to “hostilities” implies that the individual must be a participant in an armed conflict and would not encompass individuals engaging in acts of terrorism outside of the armed conflict.

- **Participants agreed that the MCA itself would not limit new entrants from new groups or conflicts as long as they were alien unprivileged enemy belligerents as defined by the MCA.**

### *Restrictions on Transfer Options for New Entrants Brought to Guantanamo Bay*

A number of participants highlighted the problem that any new entrants brought to Guantanamo Bay would face statutory restrictions on transfer, either to the United States<sup>47</sup> or to third countries.<sup>48</sup> These participants noted that such restrictions would tie Executive Branch hands by limiting other disposition options.

Participants emphasized that, under the current restrictions prohibiting transfers to the United States, any new entrants brought to Guantanamo Bay could not subsequently be sent to the United States for trial in an Article III court, even if it proved useful to do so in a particular case. Several participants noted that Congress should remove these restrictions, as addressed in Session 2.

With respect to transfers to third countries, several participants observed that although statutory limitations can be surmounted, in practice it has proved difficult to reach agreements with such countries to enable transfer. (*See* Session 2).

- **Many participants agreed that the statutory restrictions on transfer of detainees housed at Guantanamo Bay constituted a negative element of the current military commissions system.**

### *Litigation Risks Related to Uncertainty About Crimes that May Be Charged Within Military Commissions*

Multiple participants raised concerns regarding the uncertainty related to the crimes that may be charged within military commissions. These participants pointed to the fact that the federal courts have not yet made clear whether crimes such as conspiracy, which is not recognized as a crime under the international law of war even though it is identified in the MCA as a crime within the jurisdiction of military commissions, can be tried in military commissions. This uncertainty, they observed, brings significant risks to prosecuting any new entrants who would be charged with conspiracy based crimes. At a minimum, such new entrants would pose significant litigation risks and delay. Another panelist emphasized that, in assessing any new entrants to the system, the focus should be on the crime with which they are charged.

Other participants were less concerned about these risks. A few participants, for example, suggested that the theater in which any potential entrants were captured (i.e., the battlefield), would likely be the key factor that would determine whether any potential new entrants could lawfully

be tried within the military commissions. These participants noted that, apart from the legal uncertainty surrounding certain crimes, there were many crimes within the jurisdiction of the military commissions that clearly constitute war crimes, and they argued that the Executive Branch should have the benefit of multiple options.

- **Multiple participants argued that the military commissions were not a good prosecution option for new entrants because the commissions suffer from ongoing legal uncertainties about the crimes that may be prosecuted there.**
- **Other participants were less concerned about this uncertainty.**

### *Litigation Risks Related to Co-Mingling of New Entrants with Existing Entrants*

A few participants expressed concern about the potential for litigation if new entrants from different conflicts were introduced into the population at Guantanamo Bay and charged in the commissions. In particular, these participants suggested that such entrants might prompt litigation within existing military commission proceedings over whether existing defendants are being treated appropriately in comparison to new entrants. One participant noted that substantial litigation on this issue would be almost inevitable, to the extent new entrants were treated differently from existing defendants/detainees.

- **A few participants raised the concern that new entrants would prompt litigation related to co-mingling of different categories of detainees.**

### *Slow Pace of Proceedings and the Absence of Concluded Proceedings*

Many participants emphasized that the slow pace of military commission proceedings would make them a poor venue for new entrants. These participants emphasized that, even apart from the legal concerns, as a policy matter, these proceedings have not offered a pathway to justice. As one participant put it, the current system is litigation-heavy and bogged down. Another panelist observed that, even for those charged in the military commissions system, detainees brought to Guantanamo Bay are introduced into a legal limbo that does not offer much finality for them or the wider U.S. public in the aftermath of the September 11, 2001 attacks. New entrants from new conflicts or episodes would lead to new lines of litigation further delaying the commissions process.

- **Many participants argued that the slow pace of military commission proceedings would make them a poor venue for new entrants.**

### *International Concerns About Legitimacy of Military Commissions*

Several participants emphasized the diplomatic risks for the United States of bringing new entrants not currently housed at Guantanamo Bay into the military commissions system. For example, one participant emphasized that the international community, including key U.S. allies,

views military detention and the military commissions system at Guantanamo Bay in a negative light. New entrants into the system would likely exacerbate these concerns to a great degree.

- **Several participants argued that introducing new entrants into the military commissions system would carry significant diplomatic risks for the United States. Moreover, foreign nations might restrict transfers to United States custody and limit information sharing.**

### *Costs*

Several participants noted that the costs of operating the military commissions are high in comparison to other options. They pointed out that the costs associated with constant litigation and the facility itself make the current military commissions system far from ideal for new entrants.

- **Several participants flagged the relatively high cost of the military commissions as a reason to be concerned about bringing new entrants into the system.**

### **How do the Military Commissions at Guantanamo Bay Compare/Contrast with Other Potential Venues for New Entrants?**

Participants weighed the advantages and disadvantages of a variety of prosecution options for individuals engaged in hostilities against the United States and compared/contrasted them with the military commissions at Guantanamo Bay, including

- Article III courts;
- In-theater military commissions;
- Courts martial;
- Host country or other foreign courts; and,
- Hybrid domestic-international courts.

### *Article III Courts*

Many participants reiterated similar points to those raised in session one, that Article III courts would generally be preferable to the military commissions at Guantanamo Bay as a U.S. prosecution option. In particular, multiple participants emphasized that, because the federal crime of material support for terrorism could encompass a wide range of conduct, and the ability of the military commissions to prosecute material support for terrorism remains at best uncertain even for acts committed after the MCA was enacted, Article III courts would have clearer jurisdiction in many cases. They also emphasized the greater legitimacy of these courts in the eyes of the

world. A participant also noted that Article III courts have successfully implemented procedures such as those in the Classified Information Procedures Act (CIPA),<sup>49</sup> to protect the interests of the government while ensuring that justice is done as transparently as possible. In contrast to the commissions, Article III law in this area is settled and practiced and thus need not result in step-by-step litigation and appeal.

A few participants noted that Article III courts may not be an available or appropriate venue in some cases. For example, one participant observed that Article III courts may lack jurisdiction over some categories of war crimes, such as perfidy, and so would be unavailable in some cases. And even where the Article III courts might have jurisdiction, such as when the alleged acts could fall within the scope of the crime of material support for terrorism, this participant suggested that prosecuting battlefield conduct in this way could undermine the laws of war. A participant suggested that the jurisdiction of Article III courts could be expanded through the War Crimes Act<sup>50</sup> to include all war crimes within the jurisdiction of the military commissions under the MCA.<sup>51</sup> Such expansion would provide an Article III venue for war crimes prosecutions for privileged enemy belligerents, who are currently excluded from prosecution with in the military commissions at Guantanamo Bay under the MCA.

A participant also observed that Article III courts cannot address a large volume of cases that might arise on the battlefield. When it was pointed out that the U.S. military commissions at Guantanamo Bay have not been able to handle even a small volume of cases, this participant agreed, but suggested that other options such as military commissions in theater might be preferable to Article III courts, in cases in which the United States chose to prosecute.

- **Many participants argued that Article III courts would generally be a better U.S. prosecution option than the current military commissions for potential new entrants not currently detained at Guantanamo Bay.**
- **A few participants argued that Article III courts might lack jurisdiction in some cases and would in any event be inferior to prosecution by the United States in-theater in some situations.**

### *In-Theater Military Commissions*

A few participants argued that in-theater military commissions might provide an important venue in some cases. For example, some participants acknowledged in theory the benefits of such military commissions, such as the ability to try individuals on or near the battlefield, where the witnesses and evidence are present, by members of the military familiar with the substantive applicable law of war crimes. One participant explained that in a war crimes case such as a prosecution for a proportionality violation, military service members would have a better understanding of both the offense and its defenses. As that participant put it, this venue offers the benefit of military process and military structure, without the problems associated with the Guantanamo military commissions.

Yet many participants who supported the use of in-theater commissions in theory to try low-level offenders did not advocate their use for senior leaders of groups engaged in hostilities

against the United States who have committed serious crimes. In particular, these participants emphasized that any crimes carrying the death penalty should be tried by Article III courts. As one participant put it, military commissions lack the credibility to deal with life-or-death issues. Another participant raised the practical issue of what should be done with an individual convicted of a crime in theater in a military commission.

- **A few participants argued that in-theater military commissions could be a good U.S. prosecution option.**
- **Many participants agreed in theory but did not think such commissions should be used for leaders or for serious crimes, in particular those involving the death penalty.**
- **Some participants questioned where such persons could be detained, if convicted, and argued that the lack of viable detention options would limit this prosecution pathway.**

### *Courts-Martial*

A few participants observed that, subject to the jurisdictional limits of UCMJ Article 2(13),<sup>52</sup> courts-martial could provide another venue for U.S. prosecutions. One participant noted that the Uniform Code of Military Justice would permit (though not require) jurisdiction in general-courts martial for crimes in violation of the law of war.<sup>53</sup> This participant concluded, therefore, that the general court-martial is an existing alternative disposition option for certain enemy belligerents alleged to have committed pre-capture war crimes. Unlike commissions and to a lesser extent Article III courts, the UCMJ system has addressed war crimes on an ongoing basis and has a settled body of law and practice on which to draw. However, one participant suggested that use of this option could unintentionally confer “POW status” on such individuals in light of Article 84 of the Geneva Convention Relative to the Treatment of Prisoners of War.<sup>54</sup>

- **A few participants argued that general courts martial should be considered as a U.S. prosecution option.**

### *Host-Country or Other Foreign Trials*

Most participants agreed that trials within the court system of countries hosting U.S. troops, such as Iraq, are generally the best first-line option except in the most serious cases involving core U.S. interests and equities. There was near consensus that it is beneficial for the United States to encourage trial by the host country, when appropriate, rather than assuming that the United States should exercise concurrent jurisdiction. One participant suggested, for example, that in general the Iraqi Government should have the first chance to criminally prosecute ISIS fighters who are either Iraqi nationals or third-country nationals captured in Iraq, and potentially for ISIS fighters captured elsewhere and brought to Iraq. The use of sensitive, U.S.-sourced evidence could be problematic in context as well. Another participant noted that due process could be a problem in such trials in Iraq or elsewhere. In response, another participant noted that the United States and/or



other countries could support host nations to strengthen their judicial systems to increase human rights and due process protections for those accused.

Participants also very briefly touched on the possibility that trials could be held in other countries, for example, the country of nationality of the particular potential defendant, if that country was willing to do so and had the capacity to do so.

- **Most participants agreed that criminal trials in host countries should be the first-line option for prosecution, except in the most serious cases involving core U.S. interests and equities.**

### *Hybrid Domestic-International Courts*

A few participants suggested that hybrid domestic-international courts should be considered as an option. These courts are generally comprised of both domestic and international judges and have been used in Kosovo and Cambodia, among other places. These participants noted that there have now been many examples of such courts, which can take a variety of forms but which often involve international assistance to, and some form of participation in, trials in or near countries where the offenses have taken place. These participants argued that such courts could provide a venue for trials of not just war crimes but other atrocities such as crimes against humanity or genocide. These participants emphasized that prosecutions for atrocity crimes such as crimes against humanity could better capture the magnitude of the offenses committed than terrorism prosecutions could. In addition, they noted that in particular for defendants implicated in mass atrocities, such courts can provide accountability in a way that is often perceived as more legitimate in the eyes of the world, and among victims, than a purely domestic trial when a local court system is overwhelmed or lacks the capacity to try such cases.

Several participants identified obstacles to establishing hybrid courts, and to the prosecution individuals such as ISIS in hybrid courts. For example, one problem cited was the issue of sharing U.S. classified information with the hybrid court. Another issue raised was the potential that the host country might resist or restrict international participation in its justice system or the establishment of a new hybrid court.

- **A few participants argued that hybrid domestic-international prosecutions should be considered for individuals implicated in mass atrocities such as crimes against humanity or genocide.**
- **Several participants identified obstacles to such hybrid prosecutions, including issues of composition and evidence sharing.**

## Session 4:

### Issues Related to Authorizations to Use Military Force

#### Overview

This session addressed the potential interpretation of applicable congressional authorizations for the use of military force (AUMFs) if the Executive Branch were to bring charges against new categories of persons in the U.S. military commissions. Any person tried before the commissions at Guantanamo Bay would necessarily be detained there, and AUMFs have been interpreted to encompass the authority to detain. Participants thus considered whether and how courts might review the 2001 AUMF<sup>55</sup> (or the 2002 AUMF,<sup>56</sup> if applicable), if new categories of persons such as ISIS members were brought to Guantanamo Bay as potential entrants into the U.S. military commissions system. In addition, this session considered the implications for the U.S. military commissions of any new AUMF.

- **Participants agreed that bringing new categories of entrants into the U.S. military commissions at Guantanamo Bay, such as ISIS members, would lead to judicial review of the scope of the 2001 AUMF.**
- **Participants also agreed that the enactment of a new AUMF to address groups such as ISIS would be beneficial, even as they noted that a new AUMF could bring litigation risks.**

#### If There Is Not a New AUMF

Participants first considered legal and policy issues that could arise if there is no new AUMF and if new categories of detainees, such as ISIS members, were brought to Guantanamo Bay as potential entrants into the U.S. military commissions system. Specifically, participants discussed:

- The likelihood and scope of judicial review of applicable AUMFs
- The question of whether Article II of the U.S. Constitution would provide sufficient military detention authority in such cases

#### *Judicial Review of Authority to Detain Under Applicable AUMFs*

Many participants emphasized that new categories of entrants into the U.S. military commissions system would lead to judicial review of the scope of applicable AUMFs. In particular, if ISIS members were brought to Guantanamo Bay, participants agreed that the courts would likely review the scope of Executive Branch detention authority under the 2001 AUMF, assuming the Executive Branch were to rely on the 2001 AUMF for its authority to detain. (Some participants noted that the Executive Branch might rely on the 2002 AUMF for detention authority

in some cases.) Participants did not agree how the courts would decide that question, with some suggesting that the courts would likely defer to the asserted view of the Executive Branch that the 2001 AUMF encompasses the authority to detain ISIS members. As one participant noted, the courts have been hesitant to delve into which groups are part of the armed conflicts referenced in the 2001 AUMF. Others suggested that the courts might not conclude that the 2001 AUMF includes the authority to detain ISIS members or, alternatively, might agree that it does include such authority but adopt a more limited reading of the 2001 AUMF than the Executive Branch. Several participants suggested that the courts were much more likely to adopt a limited reading of the 2001 AUMF in a case involving a detained U.S. citizen, such as in *ACLU v. Mattis*.<sup>57</sup>

- **Participants agreed that bringing new categories of detainees to Guantanamo Bay as potential entrants into the U.S. military commissions system would likely prompt judicial review of the scope of Executive Branch detention authority under the 2001 AUMF.**
- **Participants did not agree on how the courts would likely determine the scope of that authority.**

### *Article II Authority*

Participants did not agree on whether Article II of the U.S. Constitution would alone provide sufficient authority to detain new categories of entrants brought into the U.S. military commissions system. Several participants observed that the Executive Branch has at times relied on Article II, in addition to the 2001 AUMF, in articulating the scope of its military detention authority. Multiple participants also noted that the scope of Executive Branch military detention authority under Article II authority is at best uncertain, and that reliance on such authority for new categories of detainees at Guantanamo Bay could prompt judicial review of that question.

- **Participants disagreed on whether Article II of the U.S. Constitution would provide sufficient authority, apart from any AUMF, to detain new categories of entrants into the U.S. military commissions system.**

### **If There Is a New AUMF\***

Most participants agreed that a new AUMF would be beneficial, although they did not agree on what the content of such an AUMF should be, and many participants expressed concerns that a new AUMF could bring significant litigation risks from detainees at Guantanamo Bay, including participants in the U.S. military commissions system. Specifically, participants discussed

- The value of a new AUMF

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\* The Workshop discussion occurred before the introduction of a new proposed AUMF, co-sponsored by Senators Bob Corker and Tim Kaine, and thus, does not address the specific text of that draft bill. *See* S.J. Res. 59, 115<sup>th</sup> Cong. (2018) (Other co-sponsors include Sen. Christopher Coons, Sen. Jeff Flake, and Sen. Todd Young).

- Whether a new AUMF should contain explicit detention authority
- Whether a new AUMF should contain a sunset clause
- The litigation risks of a new AUMF

### *Value of New AUMF*

Most participants agreed that it would be valuable for Congress to enact a new AUMF providing more explicit authority for hostilities against ISIS and potentially other terrorist groups. Several participants articulated the view that the Executive Branch interpretation of the 2001 AUMF to include ISIS simply does not make sense. As one participant put it, the Executive Branch view that the AUMF covers ISIS is, at best, a big stretch. As another noted, no one thought the 2001 AUMF would be used in this way. These participants contended that a new AUMF would provide important clarity that the legislative branch has authorized hostilities against ISIS and other groups. Indeed, one participant argued that a new AUMF is democratically necessary.

Several participants disagreed, however. One observed that a new AUMF is not required for the United States to engage in hostilities with ISIS or to pursue military commission trials, and suggested that there really is no downside of not having one. This participant observed that the authority to conduct military commission trials is predicated on the existence of an armed conflict, and that an AUMF is irrelevant to that authority. Several other participants articulated concerns that a new AUMF could be overly expansive, and could risk drawing U.S. personnel further into a global, protracted conflict.

In response, those in favor of a new AUMF argued that even an overbroad AUMF would be preferable to the situation we are in now, and indeed one participant asserted that it is “ridiculous” not to have one. Overall, most participants agreed that, because the scope and nature of the conflict has changed, a new AUMF would, or could, provide more express authority for the current conflict against ISIS and other terrorist groups.

- **A majority of participants expressed the view that a new AUMF would provide more certain legal authority for the current conflict.**

### *Explicit Detention Authority*

Participants grappled with, but did not agree on, the question of whether a new AUMF should include an explicit authority to detain. Citing Justice O’Connor’s plurality opinion in *Hamdi v. United States*,<sup>58</sup> several participants emphasized that an authorization to use military force encompasses an authority to detain even if the text of the authorization does not mention detention authority. Multiple participants observed that, although an AUMF might contain an implicit authority to detain, the authority to target is distinct from the authority to detain. Indeed, participants agreed that detention authority under any AUMF is not necessarily coterminous with the authority to target individuals.

Participants were divided on the question of whether a new AUMF, if enacted, should include explicit detention authority. Multiple participants argued that an explicit detention authority would be beneficial for a variety of reasons. Some participants emphasized the need to limit detention authority. Several participants noted that the courts have interpreted the detention authority in the 2001 AUMF so broadly with respect to time frame that it has essentially become congressional authorization of indefinite detention. Multiple participants argued for explicit detention authority in any new AUMF because it would help provide clarity for courts regarding the distinction between detention and targeting authorities. They noted that courts often interpret the scope of an AUMF in a detention context, and can struggle to delimit the distinction between detention and targeting. As one participant put it, detention is the tail that wags the dog. Building on this point, another participant suggested that, in a detention case, a court might broadly interpret an AUMF that did not explicitly address detention, and that interpretation might then be used to permit broader targeting authority than appropriate. For that reason, this participant argued, an explicit detention authority would be essential.

Many participants opposed inclusion of an explicit detention authority in any new AUMF, however, for a variety of reasons. Some argued that including an explicit detention authority was unnecessary and could needlessly impede an already difficult legislative process to enact a new AUMF. A number of participants also emphasized that an explicit detention authority in a new AUMF could raise questions about the continuing authority to detain under the 2001 AUMF. Moreover, participants noted that such questions likely would lead to litigation by those detained under the authority of the 2001 AUMF. In response, some participants suggested that this risk could be mitigated with a special provision that would address current detainees, but noted that any such provision would need to be very carefully worded.

- **There was consensus that the authority to detain is distinct from the authority to target.**
- **Participants were divided on the question of whether a new AUMF should include explicit detention authority.**

### *Sunset Clause*

Participants also discussed the advantages and disadvantages of including a sunset clause in any new AUMF. Several panelists strongly argued in favor of such a clause. As one put it, a sunset clause is important if for no other reason than to prevent the situation we are in now, in which an AUMF can be interpreted to permit a virtually unending conflict. A few panelists emphasized that a sunset provision need not be a sudden cliff marking the strict end of a conflict. Rather, such a clause can function as a wind-up provision that defines the beginning of an eventual withdrawal from conflict. Such a sunset serves essentially as a countdown to sunset, permitting a smoother transition than an abrupt halt. Several participants also noted that a sunset on targeting authority need not interfere with detention.

Multiple panelists, however, strongly opposed sunset provisions. They noted that appropriations can become extremely messy when sunset clauses are in play. In addition, they

emphasized that sunset clauses can, paradoxically, lead to congressional inaction: if the legislative branch sees a deadline down the road, it may be less likely to act on current issues.

- **Participants were divided on the question of whether a new AUMF should include a sunset clause.**

### *Risk of Litigation*

Many participants emphasized that a new AUMF would bring litigation risks of various kinds. Some panelists noted that, if a new AUMF were to mention new entities such as ISIS, current detainees who are members of Al Qaeda or other groups named in the 2001 AUMF may assert a variety of legal arguments challenging the basis for their detention. For example, they may use the existence of a new AUMF to make end-of-conflict arguments or otherwise challenge the continued basis for their detention under the earlier AUMF. As one participant noted, the enactment of a new AUMF for ISIS could raise questions about whether the basis for armed conflict detention of some earlier categories of detainees has begun to “unravel,” in the words of the *Hamdi* plurality opinion.<sup>59</sup> Several participants suggested that the enactment of a new AUMF could provoke new types of treatment claims by existing detainees. Participants also noted that a new AUMF would likely prompt litigation over the MCA in light of the new AUMF. As one participant observed, there has been cross-fertilization in the interpretation of the MCA and the 2001 AUMF, and if the 2001 AUMF were to be superseded, for example, it could lead to re-litigation of these issues.

- **Participants highlighted the litigation risks that a new AUMF could bring.**

## Appendix A

### **Detainees with Active Cases Before the Military Commissions**

<b>Name</b>	<b>Citizenship</b>	<b>Arrived</b>	<b>Charged</b>	<b>Case Status</b>
Ali Hamza al Bahlul	Yemen	01/11/02	11/03/08	Appealing Sentence
Ahmed al-Darbi*	Saudi	03/23/03	02/20/14	Sentencing
Majid Khan	Pakistan	09/04/06	02/29/12	Sentencing
Khalid Sheik Mohammed	Pakistan	09/04/06	05/05/12	Active Prosecution
Walid bin Attash	Yemen	09/04/06	05/05/12	Active Prosecution
Ramzi bin al Shibh	Yemen	09/04/06	05/05/12	Active Prosecution
Ammar al Baluchi	Pakistan	09/04/06	05/05/12	Active Prosecution
Mustafa al Hawsawi	Saudi	09/04/06	05/05/12	Active Prosecution
Abd al Rahim al-Nashiri	Saudi	09/04/06	11/09/11	Active Prosecution
Abd al Hadi al-Iraqi	Iraq	04/27/07	06/18/14	Active Prosecution

\* The Workshop discussion occurred before the transfer of Ahmed al-Darbi to Saudi Arabia, on May 2, 2018. Carol Rosenberg, *U.S. Releases Guantanamo Convict to Saudi Arabia in First Transfer of Trump Era*, MIAMI HERALD, Updated May 2, 2018, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article208718319.html>.

## Appendix B

### Convictions Before the Military Commissions Pursuant to Pleas

<b>Name</b>	<b>Citizenship</b>	<b>Disposition</b>
David M. Hicks	Australia	Conviction was set aside, charges dismissed, and his sentence was vacated in 2015.
Ibrahim Ahmed Mahmoud al Qosi	Sudan	Plea bargain returned him to Sudan on July 10, 2012.
Omar Ahmed Khadr	Canada	Plea bargain returned him to Canada, released on bail to Canada on May 7, 2015.
Noor Uthman Muhammed	Sudan	Plea bargain returned him to Sudan in December 2013. Conviction was canceled on January 9, 2015.
Salim Hamdan	Yemen	Successfully appealed case to Supreme Court of the United States in August 2008, currently free in Yemen.
Ali Hamza al Bahlul	Yemen	Conviction was vacated by a civilian court, however an appeals court reinstated his conspiracy conviction.
Majid Khan	Pakistan	Plea bargain in February 2012, but sentencing is being postponed while giving testimony.
Ahmed al-Darbi	Saudi Arabia	Plea in February 2014, sentenced to 13 years in prison on October 13, 2017.



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<sup>1</sup> Military Order of November 13, 2001: *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. § 918 (2001), superseded by Exec. Order No. 13,425, 72 Fed. Reg. 7737 (Feb. 20, 2007). In a contemporaneous Office of Legal Counsel (OLC) opinion, the U.S. Department of Justice argued that the President possesses inherent authority under the Constitution to establish military commissions to try and punish those captured in connection with the September 11 attacks or in connection with U.S. military operations in response to those attacks. *Legality of the Use of Military Commissions to Try Terrorists*, 25 Op. O.L.C. 238 (Nov. 6, 2001).

<sup>2</sup> *Ex parte Milligan*, 71 U.S. 2 (1866). Four justices disagreed about Congress's authority. In their view, the legislature would have broader authority to establish commissions, even to try citizens, if it found that civilian courts were "wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators." *Id.* at 140-41 (Chase, C.J., concurring).

<sup>3</sup> Concerning the propriety of this military commission, Attorney General James Speed wrote that "Congress may prescribe how all such tribunals are to be constituted," but if it fails to do so "they must be constituted according to the laws and usages of civilized warfare." James Speed, *Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President*, 11 Op. Att'y Gen. 297, 298 (Washington, D.C., 1865). According to the attorney general, "secret active public enemies" like John Wilkes Booth and his associates "may be tried, and tried lawfully, [even] when and where the civil courts are open and transacting the usual business," but only for offenses against the laws of war. *Id.* at 315-16.

<sup>4</sup> The eight German marines, trained in the techniques of military and industrial sabotage, were put ashore by submarines on beaches in New York and Florida just six months after the beginning of World War II, in the midst of a U-boat offensive off the U.S. coasts. They carried plans for a two-year campaign to blow up railroads, bridges, factories, and other defense targets inside the United States. They were soon captured. *See Ex parte Quirin*, 317 U.S. 1, 20-22 (1942).

<sup>5</sup> On July 2, 1942, President Roosevelt, acting "by virtue of the authority vested in me by the Constitution and statutes of the United States," issued a proclamation declaring that alien enemies who entered the United States and were charged with "sabotage, espionage, hostile or warlike acts, or violations of the law of war" could be tried by military tribunals. Proclamation No. 2561: *Denying Certain Enemies Access to the Courts*, 7 Fed. Reg. 5101 (July 7, 1942), <http://cdn.loc.gov/service/ll/fedreg/fr007/fr007132/fr007132.pdf>. The same day he created a military commission to try the eight Germans "for offenses against the law of war," and he appointed seven generals as judges, two prosecutors (the attorney general and judge advocate general), and two colonels as defense counsel, all subordinates of the President. *Appointment of a Military Commission*, 7 Fed. Reg. 5101, 5103 (July 7, 1942), <http://cdn.loc.gov/service/ll/fedreg/fr007/fr007132/fr007132.pdf>.

<sup>6</sup> *Quirin*, *supra* note 4, at 27-28. The Court found statutory authority for the relevant commissions in what was then Article 15 of the Articles of War. *Id.* (noting that Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals"). Article 15 is now codified in the Uniform Code of Military Justice, 10 U.S.C. § 821 (2012).

<sup>7</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Hamdan had been referred to a military commission at U.S. Naval Station, Guantanamo Bay in 2004 and charged with one count of conspiracy to commit various offenses based on his role as Al Qaeda leader Osama bin Laden's driver and bodyguard. He argued in a habeas corpus petition that the military commission process would not afford him a fair opportunity to contest his designation as an enemy combatant. *Id.* at 567. When the government claimed that Congress had authorized military commissions in the Uniform Code of Military Justice (UCMJ), Hamdan responded that the commissions fell short of UCMJ and international law requirements. *Id.*

<sup>8</sup> *Id.* at 622-35.

<sup>9</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at chapter 47A of title 10, U.S. Code, 10 U.S.C. §§ 948-949 (2006)).

<sup>10</sup> Military Commissions Act of 2009, Pub. L. No. 111-84 (codified as amended at chapter 47A of title 10, U.S. Code, 10 U.S.C. §§ 948-950t (2009)) [hereinafter "2009 MCA"].

<sup>11</sup> 2009 MCA, 10 U.S. C. § 948a (7); *see also id.* § 950t.

<sup>12</sup> Offer for Pretrial Agreement, *United States v. Majid Shoukat Khan* at 1, 4 (signed Feb. 13, 2012, approved by Convening Authority, Feb. 15, 2012, modification approved by Convening Authority Nov. 20, 2015); Offer for

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Pretrial Agreement, *United States v. Ahmed Mohammed Haza al Darbi*, at 1, 4 (signed Dec. 20, 2013, approved by Convening Authority, Feb. 5, 2014).

<sup>13</sup> See Charlie Savage, *Guantanamo Detainee May Get Military Trial Over Bombings in Indonesia*, N.Y. TIMES, June 26, 2017, <https://www.nytimes.com/2017/06/26/us/politics/guantanamo-detainee-hambali-indonesia-bombings.html>.

<sup>14</sup> *Id.*

<sup>15</sup> *Al Bahlul v. United States (Al Bahlul I)*, 767 F.3d 1, 29-31 (D.C. Cir. 2014) (en banc). That case involves Al Bahlul, a propagandist for Al Qaeda, who was convicted by a military commission of three domestic offenses, two of which were overturned on appeal. In *Al Bahlul I*, in addition to determining that the Ex Post Facto Clause invalidated the solicitation and material support charges for conduct pre-dating the MCA, six of the seven sitting judges held that it was not plain error under the Ex Post Facto Clause for the commissions to try inchoate conspiracy, based on stronger historical precedents for military commission trials of the conspiracy offense. *Id.* at 27.

<sup>16</sup> The continuing *Al Bahlul* litigation focuses on Al Bahlul's conviction for conspiracy. An appeal of a panel decision in the D.C. Circuit in 2015 that would have vacated Al Bahlul's conviction, *Al Bahlul v. United States (Al Bahlul II)*, 792 F.3d 1 (D.C. Cir. 2015), produced another en banc ruling by the D.C. Circuit in 2016 reversing the panel and affirming Al Bahlul's conspiracy conviction. *Al Bahlul v. United States (Al Bahlul III)*, 840 F.3d 757 (D.C. Cir. 2016) (en banc). No one rationale commanded a majority, leaving the overarching constitutional question – whether commissions may try offenses that are not international war crimes, even for conduct that post-dated the MCA – unresolved and setting no precedent beyond Al Bahlul's case. A petition for certiorari was filed in March 2017 and denied on October 10, 2017. *Al Bahlul v. United States*, 138 S. Ct. 313 (2017).

<sup>17</sup> *Al Bahlul III* 840 F.3d at 760, n.1.

<sup>18</sup> Al-Nashiri is charged with several offenses, including involvement in the 2000 bombing of the USS *Cole* and the 2002 bombing of French supertanker *M/V Limburg*. Captured in 2002, he was held for a time in CIA “black sites,” and charged by a military commission in 2011. He has challenged the jurisdiction of the military commissions, arguing that the actions he is charged with did not occur in the context of hostilities. Thus, Al-Nashiri, like Al Bahlul, has argued that he has not committed offenses recognized as international war crimes at the time of their commission. In essence, Al-Nashiri argues that the United States was not engaged in an armed conflict with Al Qaeda in October 2000 and that the French were not at war with Al Qaeda in 2002. To date, the lower courts have invoked abstention, where civilian courts leave challenges to military trials to military courts in the first instance, and have thus declined to answer his jurisdictional challenge. See *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 354 (2017).

<sup>19</sup> See, e.g., 2009 MCA, 10 U.S.C. §§ 948j-1.

<sup>20</sup> See, e.g., *id.* § 948r.

<sup>21</sup> See *Jawad v. Gates*, 832 F.3d 364 (D.C. Cir. 2016) (affirming dismissal of complaint of torture by federal officials for lack of jurisdiction), *cert. denied*, 137 S. Ct. 2115 (2017); see also *In re Khadr*, 823 F.3d 92 (D.C. Cir. 2016) (denying detainee petition for writ of mandamus ordering judge's disqualification).

<sup>22</sup> *United States v. Dalmazzi*, 138 S. Ct. 53 (2017) (granting petition for certiorari); *United States v. Cox*, 138 S. Ct. 53 (2017) (granting petition for certiorari); *United States v. Ortiz*, 138 S. Ct. 54 (2017) (granting petition for certiorari).

<sup>23</sup> 384 U.S. 436 (1966).

<sup>24</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>25</sup> National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1033 (2017) [hereinafter “2018 NDAA”]. The Department of Defense cannot “transfer, release, or assist in the transfer or release to [...] the United States” any non-citizen detainee held at Guantanamo Bay on or after January 20, 2009. *Id.*

<sup>26</sup> 2009 MCA, 10 U.S.C. § 948i(a). “Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission under this chapter, including commissioned officers of the reserve components of the armed forces on active duty, commissioned officers of the National Guard on active duty in Federal service, or retired commissioned officers recalled to active duty.” *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Memorandum from Harvey Rishikof, Director, Office of Military Commissions, on behalf of the Convening Authority, to BGen. John G. Baker, Chief Defense Counsel (Nov. 21, 2017).

<sup>29</sup> See Carol Rosenberg, *Guantanamo: By the Numbers*, MIAMI HERALD, (updated Feb. 7, 2018), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2163210.html>.

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<sup>30</sup> See Carol Rosenberg, *Guantanamo Periodic Review Guide*, MIAMI HERALD, (updated Mar. 23, 2018), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article68333292.html>. Detainees eligible for transfer are Abdul Latif Nasser, Sufiyan Barhoumi, Ridah Bin Saleh al Yazidi, Muideen Adeen al Sattar, and Tawfiq al Bihani.

<sup>31</sup> *Id.* Detainees who have been charged before the military commissions are Ali Hamza al Bahlul, Ahmed Haza al Darbi, Majid Khan, Khalid Sheik Mohammed, Walid bin Attash, Ramzi bin al Shibh, Ammar al Baluchi, Mustafa al Hawsawi, Abd al Rahim al Nashiri, Abd al Hadi al Iraqi.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Detainees deemed not eligible for transfer by the Periodic Review Board are Uthman Adbsul Rahim Mohammed Uthman, Moath al Alwi, Mohammed al Qahtani, Khalid Ahmad Qasim, Suhayl Abdul Anam al Sharabi, Ghassan al Sharbi, Abdul Razak Ali, Ismael Ali Faraj al Bakush, Hani Saleh Rashid Abdullah, Omar Mohammed Ali al-Rammah, Saifullah Paracha, Sanad Ali Yislam al Kazimi, Hassan bin Attash, Abddu Ali al Hajj Sharqawi, Abdul Rahim Gulam Rabbani, Mohammed Ahmed Rabbani, Abdulsalam al Hela, Haroon al Afghani, Zayn al Abdeen al Hussein, Mustafa Abu Faraj al libi, Riduan “Hambali” Isomuddin, Mohd Farik Bin Amin, Mohammed Bashir bin Lap, Hassan Guleed, Abdul Malik, Muhammed Rahim al Afghani.

<sup>34</sup> Exec. Order No. 13823, 83 Fed. Reg. 4831 (Jan. 30, 2018).

<sup>35</sup> Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

<sup>36</sup> Exec. Order No. 13823 at §2(c).

<sup>37</sup> See 2018 NDAA §§ 1035-1036. Section 1035 of the 2018 NDAA bars the transfer of any detainee to Libya, Somalia, Syria, or Yemen. *Id.* at § 1035(1)-(4). Section 1306 of the 2018 NDAA prohibits closing or relinquishing U.S. control of Guantanamo Bay. *Id.* at § 1306. For transfers to countries not barred by Section 1035 of the 2018 NDAA, the Secretary of Defense is prohibited from transferring detainees to any foreign country without first certifying that the transfer is in U.S. national security interests. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1034(b)(1), 129 Stat. 726, 969-71 (2015) (codified at 10 U.S.C. § 801 note (2016)) [hereinafter “2016 NDAA”]. Prior to transfer, the Secretary must also certify that the recipient country is not a state sponsor of terrorism, maintains control over each detention facility in which the detainee will be held, has agreed to take steps to “substantially mitigate” any risk the detainee might post to U.S. and allied interests, and has agreed to share information with the United States relating to the detainee. *Id.* at § 1034(b)(2). For any detainee who was transferred to a third country after September 11, 2001, but subsequently reengaged in terrorism, the Secretary of Defense must certify that he has both considered the circumstances and determined that the new, prospective transfer will nevertheless “substantially mitigate” the threat of recidivism with regard to that detainee. *Id.* at § 1034(b)(3). Finally, the Secretary’s certification must include an intelligence assessment detailing the capacity, willingness, and past practices of the recipient country. *Id.* at § 1034(b)(4). Upon making the aforementioned certification, the Secretary must submit a report to the appropriate committees of Congress. *Id.* at § 1034(e)(1)-(3).

<sup>38</sup> See 2018 NDAA §§ 1033-1034. Section 1033 of the 2018 NDAA prohibits appropriated funds from being be used “to transfer, release, or assist in the transfer or release to [...] the United States” any non-citizen detainees held at Guantanamo Bay on or after January 20, 2009. *Id.* at § 1033. Section 1034 of the 2018 NDAA similarly prohibits the use of appropriated funds for building facilities in the United States to hold transferred detainees. *Id.* at § 1034.

<sup>39</sup> FED. R. CRIM. PROC. 11 (2017).

<sup>40</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT ACT”), Pub. L. No. 107-56, § 412, 115 Stat. 272 (codified at 8 U.S.C. § 1226a) (2001).

<sup>41</sup> 2018 NDAA § 1033.

<sup>42</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note) (2001).

<sup>43</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004).

<sup>44</sup> U.S. CONST. art. II. § 2 cl. 1.

<sup>45</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-56 (1952) (Jackson, J., concurring); see also Joint Resolution Concerning the War Powers of Congress and the President, Pub. L. No. 93-148, 87 Stat 555 (1973).

<sup>46</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 948a(7), 948c (2009), (codified as amended at 10 U.S.C. 47A §§ 948a(7), 948c (2009)).

<sup>47</sup> 2018 NDAA §§ 1033-1034.

<sup>48</sup> 2018 NDAA §§ 1035-1036.

<sup>49</sup> Classified Information Procedures Act, Pub. L. 96-456, 94 Stat. 2025 (codified as amended at 18 U.S.C. Appendix III (2012)).

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<sup>50</sup> War Crimes Act of 1996, Pub. L. No. 104-192, § 2401, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441 (2006)).

<sup>51</sup> 2009 MCA, 10 U.S.C. § 950t.

<sup>52</sup> Uniform Code of Military Justice, 10 U.S.C. § 802-(13) (2012).

<sup>53</sup> *Id.* § 818.

<sup>54</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, Art. 84.

<sup>55</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

<sup>56</sup> Authorization for Use of Military Force Against Iraq Resolution 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

<sup>57</sup> *American Civil Liberties Union Foundation v. Gen. James N. Mattis (Sec. of Defense)*, No. 1:17-cv-02069-TSC, Memorandum Opinion (D.D.C. Dec. 23, 2017).

<sup>58</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-19 (2004).

<sup>59</sup> *See id.* at 521. Specifically, the Court noted,

Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.

*Id.*