SUPPLEMENTAL REPORT ON MILITARY COMMISSIONS FOR THE TRIAL OF TERRORISTS

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This report was prepared by Richard T. Franch of Chicago, Illinois for the International Committee of the American College of Trial Lawyers. The report has been updated with case citing through November 22, 2005

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SUPPLEMENTAL REPORT ON MILITARY COMMISSIONS FOR THE TRIAL OF TERRORISTS[1]

Introduction

In March 2003, the College published its Report on Military Commissions for the Trial of Terrorists. The Commissions were established in the wake of the terrorist attacks that occurred on September 11, 2001. In the over two years since the College's report was published, there has been a raft of federal court litigation challenging the Commissions and the detention of the alleged terrorists. However, no Commission trials have occurred. Since 9/11, about 750 noncitizens have been detained at the Guantanamo Naval Base in Cuba ("GTMO"). As of now, there are about 500 detainees at GTMO; about 175 detainees have been released and about 65 have been transferred to other countries.[2]

This supplemental report summarizes the principal events that have occurred with respect to the Commissions and the detention of terrorists since the College issued its Report in March 2003. A caveat: Developments in this area occur regularly, so by the time this is published, new developments may have occurred.

The Supreme Court's Trilogy

On June 28, 2004, the Supreme Court of the United States handed down three decisions in habeas cases filed by alleged enemy combatants.

- *Rumsfeld v. Padilla,* 542 U.S. 426, 124 S.Ct. 2711 (2004). Padilla, an alleged "dirty bomber," is a United States citizen who was arrested at Chicago's O'Hare International Airport. He was initially imprisoned in New York, then was transferred to the Naval Base in Charleston, South Carolina. Padilla filed his habeas petition in the Southern District of New York. In a 5-4 decision, the Supreme Court held that the Southern District of New York did not have jurisdiction because Padilla's custodian was not located within that district. In his dissenting opinion, Justice Stevens stated that jurisdiction should not be defeated by Padilla's transfer from New York to Charleston.

- *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686 (2004). Rasul involved habeas petitions filed by two Australian citizens and twelve Kuwaiti citizens seized in Afghanistan as members of al Qaeda who allegedly aided the 9/11 terrorist attacks. They are imprisoned at GTMO. The Supreme Court held that the United States courts have jurisdiction to consider habeas challenges to their detention.

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[1] The author of this report is Richard T. Franch of Chicago, Illinois, a member of the International Committee of The American College of Trial Lawyers, which sponsored this report.

[2] Pakistan, Morocco, France, Russia, Saudi Arabia, Spain, Sweden, Kuwait, Australia, Great Britain and Belgium. Detainee Transfer Announced, www.defenselink.mil/releases/2005/nr20051001-4826.html.

In a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined, Justice Scalia stated that the majority's holding that the habeas statute extends to aliens detained outside the United States "is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, *Johnson v. Eisentrager,* 339 U.S. 763 (1950)." 542 U.S. at 488, 124 S.Ct. at 2701.[3] As discussed below, the lower courts have disagreed about whether, in *Rasul*, the Supreme Court held that alien detainees seized outside the United States have a constitutional right to due process.

- *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633 (2004). Hamdi, a citizen of the United States, was an alleged member of the Taliban. He was arrested in Afghanistan, transferred initially to GTMO, then to brigs in the United States (first, Norfolk, Virginia, and later, Charleston, South Carolina). A plurality of the Supreme Court stated that, in the narrow circumstances alleged in this case, due process entitles a citizen held in the United States as an enemy combatant to a meaningful opportunity to contest the factual basis for the detention before a neutral decisionmaker. The plurality held that Congress' passage of the resolution known as the Authorization for the Use of Military Force ("AUMF"[4]) satisfied the requirement of the Non-Detention Act, 18 U.S.C. § 4001(a), that the imprisonment or detention of a U.S. citizen by the United States must be pursuant to an act of Congress. In a separate opinion of Justice Souter, concurred in by Justice Ginsburg, Justice Souter disagreed with the plurality. In his opinion, Justice Souter stated: "Because I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the Force Resolution [AUMF], I would not reach any question of what process he may be due in litigating disputed issues in a [habeas] proceeding . . . ." 542 U.S. at 553, 124 S. Ct. at 2660. While dissenting from the plurality's conclusion that Hamdi's detention was authorized by an act of Congress as required by Section 4001(a), Justice Souter joined in "the terms of the plurality's remand [that] will allow Hamdi to offer evidence that he is not an enemy combatant . . . ." *Id.* Justices Scalia, Stevens and Thomas dissented. Justice Scalia, whose opinion was joined in by Justice Stevens, stated that: "[T]he Executive lacks indefinite wartime detention authority over *citizens* . . . . Absent suspension of the writ, a *citizen* held where the courts are open is entitled either to a criminal trial or to a judicial decree requiring his release." 542 U.S. at 568, 572 124 S. Ct. at 2668, 2670. (Emphasis added.) As for the AUMF, Justice Scalia stated: "This is not remotely a Congressional suspension of the

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[3] *Eisentrager* involved habeas petitions filed in the District of Columbia by German nationals who were captured in China for engaging in military activity against the United States after the surrender of Germany but before the surrender of Japan. They were tried and convicted by a U.S. Military Commission in Nanking, China, and then repatriated to Germany to serve their sentences. The Supreme Court (three Justices dissenting) affirmed the dismissal of their habeas petitions, stating: "Nothing in the text of the Constitution [or any statute] extends [the] right" to a writ of habeas corpus to "an alien enemy who, at no relevant time and in no stage of his captivity, has been within [the] territorial jurisdiction" of the United States. 339 U.S. at 768.

[4] The AUMF, which was passed by Congress a week after 9/11, authorized the President to "use all necessary and appropriate force against those nations, organizations and persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224.

writ, and no one claims that it is." 542 U.S. at 574, 124 S. Ct. at 2671. In his dissent, Justice Thomas disagreed with all of the other Justices. The government had argued that the Non-Detention Act did not apply because this was a military wartime detention and, in any event, the AUMF authorized Hamdi's detention. Agreeing with the government, Justice Thomas stated: "[Hamdi's] detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail . . . . [T]he Government's detention of Hamdi as an enemy combatant does not violate the Constitution . . . ." 542 U.S. at 579, 594, 124 S. Ct. at 2674, 2683.

On November 15, 2005, by a vote of 84-14, the U.S. Senate passed legislation that would significantly impact these decisions. The legislation amends 28 U.S.C. § 2241 (the habeas act) to provide, in substance, that:

- The courts do not have jurisdiction to consider habeas corpus petitions filed by aliens detained at GTMO.

- The D.C. Court of Appeals has exclusive jurisdiction to determine whether an alien detained at GTMO is properly designated as an enemy combatant and to review the validity of any final decision rendered by a Military Commission. The court's review is limited to whether the alien enemy combatant was afforded procedures consistent with Department of Defense ("DoD") procedures and with the Constitution and laws of the United States.

S. Amdt. 2524 to S. Amdt. 2515 to S. 1042 (National Defense Authorization Act for Fiscal Year 2006), 109th Cong. (2005), 151 Cong. Rec. S12771-72 (daily ed. Nov. 14, 2005), Cong. Rec. Daily Digest D1207 (Nov. 15, 2005). This legislation, if finally made law, should generate some interesting litigation.

Combatant Status Review Tribunal

On July 7, 2004, in the wake of the Supreme Court's decisions (particularly *Rasul*), the DoD issued an Order Establishing Combatant Status Review Tribunal ("CSRT"). *Combatant Status Review Tribunal Order Issued*, www.defenselink.mil/releases/2004/nr20040707-0992.html.[5] The Order only applies to foreign nationals held by the DoD as enemy combatants at GTMO. The CSRT is intended to provide a detainee with an administrative proceeding to review whether the detainee is properly classified as an enemy combatant. The detainee is to be assigned a "personal representative"

[5] On July 30, 2004, the DoD issued CSRT Implementation Guidance. *Combatant Status Tribunal Implementation Guidance Issued*, www.defenselink.mil/releases/2004nr20040730-1072.html. In addition to the CSRT, the DoD has "establishe[d] the administrative review board (ARB) which will annually conduct necessary proceedings to make an assessment of whether there is continued reason to believe that the enemy combatant poses a threat to the United States or its allies, or whether there are other factors bearing upon the continued need for detention, including the enemy combatant's intelligence value in the Global War on Terror . . . . The ARB process is separate from and will occur after the one-time only combatant status review tribunals that are currently being conducted at [GTMO] . . . ." *Administrative Review Implementation Directive Issued*, www.defenselink.mil/releases/2004/nr20040915-1253.html.

to assist the detainee in the review process; the representative is to be a military officer. *Order* ¶ c. The CSRT is to be composed of "three neutral commissioned officers of the U.S. Armed Forces" who had no prior involvement with the detainee. *Order* ¶ e. "The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal . . . . The Tribunal is not bound by the rules of evidence such as would apply in a court of law." *Order* ¶ g (8), (9).

The CSRT has been considered in litigation filed by detainees in the District Court for the District of Columbia:

- *O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004). This case involved an eighteen-year old Canadian citizen who was captured in Afghanistan when he was fifteen and held at GTMO since his capture. The CSRT concluded that O.K. was properly classified as an enemy combatant. The court (District Judge Bates) was asked to order an independent evaluation of O.K.'s mental competency. The court denied the request because no criminal charges were pending against O.K. Thus, the court concluded, there was no proceeding to which a determination of mental competence was relevant.

- *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). Hamdan, a foreign national, was captured in Afghanistan and is detained at GTMO. He was charged with war crimes and designated for trial by Military Commission. Hamdan argued that he was entitled to prisoner-of-war ("POW") status under the Third Geneva Convention, 6 U.S.T. 3316, 74 U.N.T.S. 135, but that the government had not convened a competent tribunal to determine whether he was entitled to that status. Among other things, the government argued that the Third Geneva Convention did not apply because members of al Qaeda, such as Hamdan, "do not carry arms openly and operate under the laws and customs of war." *Id.* at 161. The government also pointed out that the CSRT found that Hamdan has the status of an enemy combatant. *Id.* The court (District Judge Robertson) stated that it was unnecessary for it to decide whether GTMO detainees had constitutionality protected rights, an issue which this court said the Supreme Court did "little to clarify" in *Rasul*. *Id.* at 173 n.19. The court held that until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried only by court-martial under the Uniform Code of Military Justice ("UCMJ") and that his trial before a Military Commission under its existing rules would be unlawful. *Id.* at 173-94.

- *Khalid v. Bush*, 355 F. Supp. 311 (D.D.C. 2005). This case involved habeas petitioners who are foreign nationals captured outside of Afghanistan (*i.e.*, in Bosnia and Pakistan, where the United States is not in armed conflict with "enemy combatants"). They are detained at GTMO. They have not been charged with war crimes; their status is being reviewed by the CSRT. The court (District Judge Leon), dismissing the habeas petitions, held that non-resident aliens captured and detained outside the United States have no cognizable constitutional rights. *Id.* at 320, *et seq*. The court said: "The President's ability to make the

decisions necessary to effectively prosecute a Congressionally authorized armed conflict must be interpreted expansively." *Id.* at 318. Because the Congressional authorization (*i.e.*, the AUMF) did not "place geographic limits on the President's authority to wage this war against terrorists," the court said that it was "of no legal significance" that petitioners were not captured on battlefields where the United States was in armed conflict. *Id.* at 319-20. The court also stated: "[E]ven assuming, arguendo, that the petitioners do possess constitutional rights, which they do not, the Court notes that the CSRTs provide each petitioner with much of the same process afforded by Article 5 of the Geneva Conventions." *Id.* at 324 n.16.

- *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005). A few days after the court's decision in *Khalid*, a sister court (District Judge Green) reached a different result. The petitioners are non-U.S. citizens captured in Afghanistan and elsewhere (*e.g.*, Gambia, Thailand). They are being held as enemy combatants at GTMO; they have not been charged with war crimes. Thus, according to the government, the CSRT is the procedural vehicle which they must pursue to challenge their detentions (*i.e.*, because they have not been charged with any crimes, a trial by Military Commission or otherwise is not available to these detainees). The government argued that, in *Rasul*, the Supreme Court did not hold that the GTMO detainees have constitutional rights. *Id.* at *52-53. This court disagreed, stating: "[I]t is difficult to imagine that the Justices would have remarked that the petitions 'unquestionably describe custody in violation of the Constitution or laws or treaties of the United States' unless they considered petitioners to be within a territory in which constitutional rights are guaranteed." *Id.* at *59. The court held: "[T]he petitioners have stated valid claims under the *Fifth Amendment* and . . . the CSRT procedures are unconstitutional for failing to comport with the requirements of due process. Additionally, the Court holds that Taliban fighters who have not been specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal have also stated valid claims under the Third Geneva Convention." *Id.* at *114-15 (italics in original). The court stayed enforcement of the proceedings before it, certifying its ruling for interlocutory appeal. *In re Guantanamo Detainee Cases*, No. 02-CV-0299, *etc.*, 2005 U.S. Dist. LEXIS 5295 (D.D.C. Feb. 3, 2005).

Thus, the D.C. district courts disagreed about whether the GTMO detainees have constitutionally protected rights, whether they have POW status, and whether the Commissions or the CSRTs provide the protections to which the detainees may be entitled. These cases were appealed to the D.C. Court of Appeals, which, on July 15, 2005, handed down its decision in *Hamdan*.

Hamdan

The D.C. Court of Appeals (Circuit Judges Randolph and Roberts,[6] and Senior Circuit Judge

[6] Then Circuit Judge Roberts is now Chief Justice of the Supreme Court.

Williams) reversed the district court's decision in *Hamdan*. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). In its decision, the court ruled on seven issues:

- The court rejected the government's argument that the district court should have abstained from exercising jurisdiction over Hamdan's habeas corpus petition. *Id.* at 36-37.

- The court rejected Hamdan's argument that the President violated the separation of powers inherent in the Constitution when he established the Military Commissions, stating that Congress authorized the Commissions through the AUMF and two statutes.[7] *Id.* at 37-38.

- The court rejected Hamdan's argument that Hamdan had the right to seek judicial enforcement of the Third Geneva Convention. Citing *Eisentrager*, the court stated that such international agreements do not create rights that may be enforced in a lawsuit brought by a private person. *Id.* at 38-40.

- The majority said that even if Hamdan had the right to seek judicial enforcement of the Third Geneva Convention, his claim would fail because he does not fit its definition of a POW and because the Convention does not apply to al Qaeda and its members. *Id.* at 40. The majority stated: "Needless to say, al Qaeda is not a state and it was not a 'High Contracting Party [to the Convention].' . . . . Even if al Qaeda could be considered a Power, which we doubt, no one claims that al Qaeda has accepted and applied the provisions of the Convention." *Id.* at 41. The majority went on to state that Common Article 3 of the Convention, which also covers civil wars, did not apply here because the President's "reasonable view [that the United States' conflict with al Qaeda is separate from its conflict with the Taliban which is engaged in a civil war in Afghanistan] must . . . prevail." *Id.* at 42. The majority accepted the President's position that the conflict with al Qaeda is part of the war against terrorism, which is not a civil conflict, but rather a conflict that is international in scope. *Id.* at 41-42. Judge Williams did not concur in this part of the opinion, but concurred in all other aspects of it. *Id.* at 44.

- The court stated that even if it is mistaken about the conclusion that Common Article 3 of the Convention does not cover Hamdan, the court should abstain from testing the Military Commissions against the requirement in Common Article 3(1)(d) that sentences must be pronounced by a regularly constituted court which affords all judicial guarantees recognized as indispensable by civilized peoples. The court said: "If Hamdan were convicted [by a Military Commission], and if Common Article 3 covered him, he could contest his conviction in federal court after he exhausted his military remedies." *Id.* at 42.

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[7] 10 U.S.C. § 821 (court-martial jurisdiction does not deprive military commissions of concurrent jurisdiction), and 10 U.S.C. § 836(a) (Congressional authorization to President to establish procedures for military commissions).

- The court held that the Military Commissions do not have to comply with all of the requirements of the UCMJ, which the court stated "imposes only minimal restrictions upon the form and function of military commissions . . . ." *Id.* at 43. The court noted that Hamdan did not claim that the Commissions violated any of the pertinent provisions of the UCMJ. *Id.*

- The court held that the Military Commissions are "competent tribunals" within the meaning of the Army regulation that implements international law, including the Third Geneva Convention. *Id.*

On November 7, 2005, the Supreme Court granted Hamdan's petition for a writ of certiorari. *Hamdan v. Rumsfeld*, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184).[8] There is, of course, the possibility that while Hamdan's case is pending before the Supreme Court, there will be other (perhaps conflicting) decisions in the cases yet to be decided by the lower courts.

Padilla

Padilla refiled his habeas case in the District of South Carolina. In February 2005, the district court granted Padilla's motion for summary judgment. *Padilla v. Hanft*, No. 2:04-2221-26AJ, 2005 U.S. Dist. LEXIS 2921 (D.S.C. Feb. 28, 2005). The court stated: "The sole question before the Court today is whether the President of the United States . . . is authorized to detain an United States Citizen as an enemy combatant under the unique circumstances presented here." *Id.* *1. The court answered the question "no." The court distinguished *Hamdi* on the ground that while Hamdi, like Padilla, is a U.S. citizen, Hamdi was arrested in Afghanistan, whereas Padilla was arrested in the United States -- Hamdi's was a "battlefield capture" on foreign soil, whereas Padilla's was a "domestic arrest." *Id.* *19-21. The court pointed out that there are several criminal offenses for which Padilla may be charged. It concluded: "Simply stated, this is a law enforcement matter, not a military matter." *Id.* at *36. The court held that because Congress has not suspended the Privilege of the Writ of Habeas Corpus (which the court observed neither the President nor the courts may do), Padilla's writ must be granted and he must be released from custody in 45 days. *Id.* at *40.

The government appealed to the Fourth Circuit, which reversed. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). After pointing out that Padilla is a U.S. citizen who was trained by al Qaeda for jihad in Afghanistan, where he was armed and present after the operations by U.S. forces in Afghanistan began, the Fourth Circuit (Circuit Judges Luttig, Michael and Traxler) stated:

- "As the AUMF authorized Hamdi's detention by the President, so also does it authorize Padilla's detention . . . . Padilla unquestionably qualifies as an 'enemy combatant' as that term was defined for purposes of the controlling opinion in Hamdi." *Id.* at 391.

[8] Chief Justice Roberts took no part in the consideration or decision of Hamdan's petition.

- "Because the United States remains engaged in the conflict with al Qaeda in Afghanistan, Padilla's detention has not exceeded in duration that authorized by the AUMF." *Id.* at 392 n.3.

- The court rejected Padilla's argument that he could not be classified as an enemy combatant because, unlike Hamdi, he was captured in the United States: ". . . Padilla poses the same threat of returning to the battlefield as Hamdi posed . . . ." *Id.* at 393.

- "As to the fact that Padilla can be [criminally] prosecuted, the availability of criminal process does not distinguish him from Hamdi . . . . [C]riminal prosecution may well not achieve the very purpose for which detention is authorized in the first place -- the prevention of return to the field of battle. Equally important, in many instances criminal prosecution would impede the Executive in its efforts to gather intelligence from the detainee . . . ." *Id.* at 394-95.

On October 25, 2005, Padilla filed a petition for a writ of certiorari with the Supreme Court. *Padilla v. Hanft*, 74 U.S.L.W. 3275 (U.S. Oct. 25, 2005) (No. 05-533). On November 22, 2005, however, the Department of Justice announced the indictment of Padilla, and others, for providing and conspiring to provide material support to terrorists and conspiring to murder individuals who are overseas. *See Prepared Remarks of Attorney General Alberto R. Gonzales at the Press Conference Regarding the Indictment of Jose Padilla*, http://www.usdoj.gov/ag/speeches/2005/ag_speech_051122.html. This indictment may moot Padilla's petition to the Supreme Court.

As all of the post-9/11 litigation wends its way through the courts, no Commission trials have taken place and hundreds of the "enemy combatants" remain incarcerated. On July 18, 2005, the DoD announced that once the mandate issued in *Hamdan*, it would reconvene the Commission proceedings against Hamdan and two other detainees, as well as continue to prepare charges against eight other detainees. *Military Commissions to Resume*, www.defenselink.mil/releases/2005/nr20050718-4063.html.

On August 31, 2005, the DoD announced changes to the Military Commission procedures, stating: "The principle effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury." *Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures*, www.defenselink.mil/releases/2005/nr20050831-4608.html. The changes also provide that: (1) the accused shall be present at trial except when necessary to protect classified information and the presiding officer has concluded that admission of such information would not prejudice a fair trial; (2) the presiding officer must exclude information from trial if the accused would be denied a full and fair trial from lack of access to the information; and (3) the accused's defense counsel will have access to information admitted at trial to which the accused is denied access. *Id.*

Thereafter, the Commission proceedings were reinitiated against David M. Hicks, an Australian citizen captured in Afghanistan by the U.S. military with the assistance of the Northern Alliance and Coalition forces. However, on November 14, 2005, a district court (District Judge

Kollar-Kotelly) enjoined the commission proceedings against Hicks "pending the issuance of a final and ultimate decision by the Supreme Court" in *Hamdan*. *Hicks v. Bush*, No. 02-299 (CKK), 2005 U.S. Dist. LEXIS 27646, * 27-28 (D.D.C. Nov. 14, 2005).

Torture

On December 30, 2004, the Department of Justice ("DoJ") issued a memorandum that superseded an August 2002 memorandum about the use of torture. The December 30 memorandum stated:

> Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT"); customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.

Memorandum For James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, www.usdoj.gov/olc/dregmemo.pdf (citations omitted.][9]

On May 6, 2005, the Department of State submitted the Second Periodic Report of the United States of America to the Committee Against Torture.[10] The Report stated:

> The United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to commit torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government.
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> [A]lthough there have been allegations of serious abuse of detainees at Guantanamo Bay, the United States has not found evidence

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[9] Section 2340A provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." Section 2340(1) defines "torture" as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." In its memorandum, the DoJ set forth its understanding of the meaning of the terms (*e.g.*, "severe") in Section 2340(1).

[10] The Report can be found at www.state.gov/g/drl/rls/45738.htm. The Committee Against Torture was established by the United Nations to monitor compliance with the Convention Against Torture and Other Cruel or Degrading Treatment or Punishment, to which the United States is a party.

> substantiating such claims. Instead, it has identified 10 substantiated incidents of misconduct at Guantanamo . . . . [These] substantiated abuses and the subsequent punishment of those responsible at Guantanamo Bay demonstrates that misconduct will not be tolerated.

Id. at 3, 49-50.

In June 2005, TIME magazine published excerpts from a logbook of the interrogation of Mohamed al Kahtani, a detainee who the DoD believes was supposed to be the 20th hijacker in the 9/11 attacks. A. Zagorin, M. Duffy, *Inside the Interrogation of Detainee 063*, TIME, June 20, 2005, at 26-33. The logbook documents lengthy interrogation sessions (as long as 18 hours), refusing bathroom breaks, sleep deprivation, sexual humiliation and the like (these kinds of interrogation methods have sometimes been referred to as "torture lite").

In response to this TIME article, the DoD issued a memorandum which stated: "The interrogation of Kahtani [detainee 063] has enabled the Department of Defense to gain a clear picture of Kahtani's strong connection to al Qaida leadership to include Osama Bin Laden." *Guantanamo Provides Valuable Intelligence Information*, www.defenselink.mil/releases/2005/nr20050612-3661.html. In its release, the DoD stated:

> The Department of Defense remains committed to the unequivocal standard of humane treatment for all detainees, and Kahtani's interrogation plan was guided by the strict standard. The very fact that an interrogation log exists is evidence his interrogation proceeded according to a very detailed plan, which was conducted by trained professionals in a controlled environment, with active supervision and oversight.
>
> When there have been credible allegations of abuse they are investigated aggressively and individuals are held accountable for their actions.

Id.[11]

The efficacy of torture to obtain useful information has been questioned. *See*, *e.g.*, J. Lelyveld, *Interrogating Ourselves*, N.Y. TIMES MAGAZINE, June 12, 2005, at 40. ("Only occasionally did I hear examples cited of what might be termed, if you can stomach neutral language, the efficacy of torture.").

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[11] Vice President Dick Cheney is reported as saying "that prisoners at the detention camp in Guantanamo Bay, Cuba had everything they could possibly want and were well fed and well treated as they lived in the 'tropics.'" *Cheney Says Detainees Are Well Treated*, www.nytimes.com/2005/06/24/politics/24cheney.html. There is a report that military doctors at GTMO have aided interrogators in conducting and refining psychologically coercive methods of interrogating detainees. N. Lewis, *Interrogators Cite Doctors Aid at Guantanamo Prison Camp*, www.nytimes.com/2005/06/24/politics/24gitmo.html.

The Israel Supreme Court has held that certain interrogation methods used by the Israeli General Security Service were unauthorized (for example, shaking, compelled extended crouching, the "Shabach" position, which involves cuffing a suspect to a chair in a distorted position that may cause pain). The Court stated:

> This decision opened with a description of the difficult reality in which Israel finds herself. We conclude this judgment by revisiting that harsh realty. [T]he destiny of a democracy [is that] it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.
>
> This having been said, there are those who argue that Israel's security problems are too numerous, and require the authorization of physical means. Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The debate must occur there. It is there that the required legislation may be passed, provided, of course, that the law "befit[s] the values of the State of Israel, is enacted for a proper purpose, and [infringes the suspect's liberty] to an extent no greater than required." *See* article 8 of the Basic Law: Human Dignity and Liberty.

Public Committee Against Torture in Israel v. The State of Israel, HCJ 5100/94 at ¶ 39 (Sept. 6, 1999).[12]

Rendition

"Rendition" is the transfer of detainees to a foreign country. The United States has transferred detainees to countries that do not share its concept of due process and that may be more tolerant of the use of torture.

Abdah v. Bush, No. 04-1254 (HHK), 2005 U.S. Dist. LEXIS 4942 (D.D.C. March 29, 2005), is a habeas action filed by thirteen Yemeni nationals detained at GTMO. Petitioners were arrested in Pakistan by Pakistani police, who turned them over to the United States military. Petitioners alleged

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[12] This decision and other related decisions and materials are compiled in *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm.

that the DoD is planning their transfer from GTMO to foreign countries where they will be tortured or will be indefinitely imprisoned without due process of law. The government denied these allegations. The court (Judge Kennedy) did not reach the issue of whether the petitioners' fear of torture was a basis for relief. The court, however, held that petitioners stated a claim for relief because their transfer from GTMO to another country would deprive the court of jurisdiction to determine the merits of their habeas petitions. The court granted injunctive relief, requiring the government to provide petitioners' counsel and the court with 30-days' notice prior to their removal from GTMO.

Several other D.C. district courts have considered similar petitions for injunctive relief. On April 21, 2005, the court (Judge Bates) denied petitioners' motion for injunctive relief, stating that petitioners "do not identify a single legal provision that prohibits or even limits the transfer of wartime detainees to other countries." *Al-Anazi v. Bush*, No. 05-0345 (JDB), 2005 U.S. Dist. LEXIS 6803, *16 (D.D.C. April 21, 2005). The Court observed: "Generally, other judges have ordered some form of the requested 30-days' notice, either by granting the motion for preliminary injunction [citations omitted], by including the 30-days' notice as a condition of granting respondents' motion to stay the case [citation omitted], or by requiring the 30-days' notice pursuant to the All Writs Act [citation omitted]." *Id.* at *11. The Court stated: "The Court emphasizes that it reaches this result today based on the record with which it is presented -- there is no evidence that DOD is transferring Guantanamo detainees to foreign countries for an illicit purpose, and quite a bit of evidence to the contrary . . . ." *Id.* at *24.[13]

Moussaoui

Zacarias Moussaoui allegedly trained at an al Qaeda camp in Afghanistan. He arrived in the United States in early 2001, thereafter taking flight lessons in Norman, Oklahoma. He was arrested for immigration violations in August 2001. After the 9/11 attacks, he was indicted for conspiring to commit acts of terrorism and related offenses. Moussaoui sought access to witnesses designated as enemy combatants, which access the government refused on national security grounds. In September 2004, the Fourth Circuit held that the witnesses' testimony was material to Moussaoui's defense. *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (2005). The district court had imposed sanctions upon the government for refusing to produce the witnesses, dismissing the death notice and excluding certain evidence. The Fourth Circuit, however, reversed these sanctions, holding that Moussaoui's rights could be protected by "substitutions" -- that is, court monitored summaries of deposition testimony given by these witnesses. *Id.* at 482.[14]

On remand, Moussaoui pleaded guilty. He denied he was to be involved in the 9/11 attacks. Rather, he claims that he was instructed by Osama bin Laden to engage in later attacks, in particular upon the White House. Moussaoui's conviction is the first conviction stemming from the 9/11

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[13] An Italian judge has ordered the arrest of 13 Central Intelligence Agency officers and operatives on charges of kidnapping an Egyptian cleric who led a militant mosque in Milan and flying him to Egypt for questioning that may have involved torture. According to a New York Times report, since 9/11, the United States has used "renditions — abducting terror suspects from foreign countries and transporting them for questioning to third countries, some of which are known to use torture." S. Grey, D. Van Natta, Jr., *In Italy, Anger at U.S. Tactics Colors Spy Case*, N.Y. Times, June 26, 2005, at 1, 4.

[14] Circuit Judge Gregory dissented to the extent the court's decision reversed the sanction of striking the death notice. *Id.* at 489.

attacks. J. Markon, *Moussaoui Pleads Guilty In Terror Plot*, www.washingtonpost.com/ac2/wp-dyn/A9271-2005Apr22.

Conclusion

The 9/11 attacks have intensified the debate over difficult questions, such as:

- What are the rights of foreign national "enemy combatants"?
- To what extent should the rights of foreign national "enemy combatants" depend upon whether their conduct or capture occurred within the United States or on foreign soil.
- Should foreign national "enemy combatants" unaffiliated with any recognized government be entitled to POW status (especially considering that "reciprocity" policies may not be relevant when dealing with organizations like al Qaeda)?
- To what extent should the rights of U.S. citizen "enemy combatants" depend upon whether their conduct or capture occurred within the United States or on foreign soil?
- When does interrogation constitute torture, is torture efficacious and, in any event, should it ever be tolerated?
- What are the sources from which principles of basic "human rights" that the United States should protect emanate (including, but perhaps not limited to, the Constitution, statutes, precedents, treaties and conventions)?

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