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*U.S. House of Representatives*

Washington, DC 20515-6035

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March 26, 2007

### MEMORANDUM FOR HASC MEMBERS

**RE:** Full Committee Hearings Regarding the Strengths and Weaknesses of the Military Commissions Act of 2006 and the Future of the Detention and Interrogation Facilities at the U.S. Naval Station, Guantanamo Bay, Cuba

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On Wednesday, March 28, 2007, at 9:30 AM and on Thursday, March 29, 2007, at 10:00 AM in Room 2118 Rayburn, the full committee will meet in open session to receive testimony from Administration and non-government witnesses concerning the Military Commissions Act and the continued use of Guantanamo Bay, Cuba, as a location for detention and interrogation of detainees.

Should you need additional information, please contact Paul L. Oostburg Sanz (x. 5-5416) on the committee staff. The biographies and written testimonies of witnesses will be provided under separate cover.

### WITNESSES

Wednesday, March 28, 2007

**Mr. Daniel J. Dell'Orto**

Principal Deputy General Counsel

Office of the General Counsel, Department of Defense

**Colonel Dwight H. Sullivan, USMCR**

Chief Defense Counsel

Office of Military Commissions, Department of Defense

Thursday, March 29, 2007

**Mr. William H. Taft IV**

Of Counsel, Fried, Frank, Harris, Shriver & Jacobson, L.L.P.  
Former Legal Advisor, Department of State, 2001-2005  
Former Deputy Secretary of Defense, 1984-1989

**Mr. Patrick F. Philbin**

Former Associate Deputy Attorney General, 2003-2005  
United States Department of Justice

**Mr. Neal Katyal**

Professor of Law, Georgetown Law School  
Georgetown University

**Ms. Elisa Massimino**

Director of the Washington, D.C. Office  
Human Rights First

## **BACKGROUND AND ISSUES**

### **MILITARY COMMISSIONS ACT OF 2006**

Signed into law on October 17, 2006, the Military Commissions Act of 2006 (P.L. 109-366)<sup>1</sup> was the response by 109<sup>th</sup> Congress to the Supreme Court's decision in Hamdan v. Rumsfeld and an elaboration on the Detainee Treatment Act of 2005.

#### *Detainee Treatment Act and Hamdan v. Rumsfeld*

In Rasul v. Bush, 542 U.S. 466 (2004), the Supreme Court held that U.S. courts have jurisdiction pursuant to 28 U.S.C. § 2241 to adjudicate legal challenges which had been brought by detainees who were being held at the U.S. Naval Station in Guantanamo Bay, Cuba. A number of *habeas corpus* petitions were subsequently filed in the District Court for the District of Columbia.<sup>2</sup> In response, the 109<sup>th</sup> Congress passed the Detainee Treatment Act of 2005 (DTA), revoking federal court jurisdiction over some habeas claims and creating jurisdiction in the D.C. Circuit Court to hear the appeals of the final decisions of military commissions which were established pursuant to President Bush's

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<sup>1</sup> The Military Commission Act was initially introduced in the House as H.R. 6054 on September 12, 2006, by then Chairman Duncan Hunter and passed the House Armed Services Committee, after a mark-up, the following day. A similar version which included language that had been proposed by the Senate was introduced on September 25, 2006, and was passed out of the House on September 27, 2006. Eventually, the Senate version, S. 3930, passed both Chambers and was signed into law.

<sup>2</sup> A writ of habeas corpus challenges the legal propriety of detention. It is the procedure by which a federal court inquires into a petitioner's detention or imprisonment.

Military Commissions Order No. 1 (M.C.O. 1).<sup>3</sup> The Supreme Court in Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006), rejected the argument that the DTA had divested it of jurisdiction to review *habeas* challenges that had been filed by or on behalf of Guantanamo detainees to the validity of the military commissions, which were established by M.C.O.1. The Court held these military commissions not to be “regularly constituted” since the DTA did not specifically authorize them and the President otherwise lacked the authority to create military commissions which deviated from the rules applicable to courts-martial without providing a satisfactory explanation for the deviation.<sup>4</sup>

### *The MCA and the Manual for Military Commissions*

The Military Commissions Act of 2006 or MCA authorized the establishment of military commissions for the purpose of trying alien unlawful enemy combatants for engaging in hostilities against the United States or violations of the law of war. The MCA also authorized the Secretary of Defense, in consultation with the Attorney General, to prescribe rules of evidence and pre-trial, trial, and post-trial procedures for the military commissions. On January 18, 2007, the Department of Defense released the Manual for Military Commissions which will govern the operation of the trials for detainees in Guantanamo. A number of key provisions of the Manual reflect the controversies surrounding the passage of the MCA.

### **DEFINITION OF UNLAWFUL ENEMY COMBATANT**

The MCA defines “unlawful enemy combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.”<sup>5</sup>

Some argue that the definition is overly broad since it could capture individuals who have not directly participated in hostilities but may have “purposefully and materially” supported hostilities through such things as feeding a family member who is a member of al Qaeda. Others maintain that the word “purposefully” is meant to include a *mens rea* element<sup>6</sup> that would include, for example, cooks in al Qaeda camps but not family members feeding their own. To the extent that the Administration includes conduct in its conceptualization of hostilities that falls beyond the commonly accepted definition of

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<sup>3</sup> Section 1005 of [P.L. 109-148](#) (denying aliens in military custody the privilege to file a writ of *habeas corpus* or “any other action against the United States or its agents relating to any aspect of [their] detention. . .”).

<sup>4</sup> Hamdan at 70 (plurality opinion); *Id.* (Kennedy, J., concurring) at 10.

<sup>5</sup> 10 U.S.C. § 948a(1).

<sup>6</sup> “The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.” Black’s Law Dictionary (Seventh Ed., 1999).

participation in armed conflict, the courts may disapprove of the use of military tribunals for these civilians.

## **HABEAS CORPUS**

Some within the Administration argue that the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) provide for review of military detentions which is an adequate alternative to that afforded by habeas corpus review<sup>7</sup> and, thus, negates a detainee's claim, if any is available,<sup>8</sup> under the Suspension Clause of the U.S. Constitution.<sup>9</sup> Others argue that Congress, in enacting the MCA, amended the DTA specifically to revoke habeas corpus jurisdiction over all statutory cases involving foreign enemy combatants, past, present, and future. The procedures for implementing the Combatant Status Review Tribunal process (see below), however, make clear that the CSRTs are not meant to substitute for *habeas* review.<sup>10</sup>

Some critics of the MCA and the DTA contend that these laws violate the Suspension Clause of the U.S. Constitution, (article I, §9, cl. 2) by suspending the writ of *habeas corpus* without the existence of "Rebellion or Invasion" as the Constitution requires. According to this view, the *habeas* provisions in the MCA and the DTA are, thus, invalid since Congress exceeded its authority in attempting to strip the federal courts of its constitutionally endowed jurisdiction. Others argue that without the ability of detainees to contest their detention in a civilian court, the federal government would have the ability to declare any foreign national, including permanent residents of the United States, as unlawful enemy combatants, detain them in military custody, and refuse to charge them with a crime indefinitely.

On February 20, 2007, in a 3-2 panel decision, the U.S. Court of Appeals for the District of Columbia (DC Circuit Court) decided Boumediene v. Bush, 476 F.3d 981. In Boumediene, the DC Circuit Court consolidated numerous *habeas corpus* cases which had been filed by foreign national who had been captured abroad and were being held in Guantanamo as enemy combatants. The appellate court held that, (1) the MCA deprived federal courts of jurisdiction over habeas petitions; and (2) Guantanamo detainees have

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<sup>7</sup> Accordingly, the argument goes: (1) the MCA and the DTA provide alien detainees with greater rights than those traditionally available under military tribunals; (2) like traditional habeas review of alien detention cases, the Court of Appeals for the District of Columbia may examine questions of law regarding the status determination of the unlawful enemy combatant which led to his detention; and (3) the Supreme Court held in a plurality opinion in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), that during times of ongoing military conflict substitutes for *habeas* for enemy combatants do not entitle the petitioners to full *de novo* review of their cases by reviewing courts.

<sup>8</sup> The Administration's position is that unlawful enemy combatants are not entitled to the Writ of *Habeas Corpus* as enshrined in the U.S. Constitution.

<sup>9</sup> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

<sup>10</sup> See Memorandum by Deputy Secretary England regarding "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base, Guantanamo Bay, Cuba" (stating that all detainees must be advised that "[a]s a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention").

no constitutional right to *habeas corpus*. The Court of Appeals did not reach the merits of the detainees' designation as enemy combatants by their Combatant Status Review Tribunals.<sup>11</sup> The petitioners have appealed the decision to the Supreme Court.

## **USE OF COERCED TESTIMONY AND HEARSAY**

The MCA proscribes the introduction of statements which were obtained through torture as evidence in a trial, except as evidence of torture against an individual who is standing trial for committing torture. For statements which were obtained through cruel, inhuman, or degrading treatment that does not amount to torture, the MCA permits their admissibility if: (1) the statement was obtained prior to the enactment of the DTA; (2) the "totality of circumstances under which the statement was made renders it reliable and possessing sufficient probative value"; and (3) "the interests of justice would best be served" by admission of the statement. For statements which were obtained after the passage of the DTA and which resulted from coercion in which the degree of coercion is disputed, the statements are admissible if, in addition to points (2) and (3), the military judge of the commission finds that "the interrogation methods used to obtain the statement do not violate the cruel, unusual, or inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution."

Moreover, the MCA allows for the admission of hearsay evidence beyond what is permitted under the Manual for Courts-Martial under certain conditions. For example, the Preamble for the "Manual for Military Commissions" states that the rules for the commissions permit "admission of hearsay evidence not meeting an exclusion or exception under the [Military Rules of Evidence, those procedures which govern Courts-Martial,] if the proponent gives notice and the opposing party does not demonstrate that the hearsay evidence lacks probative value or reliability."

Some argue that the combination of these two provisions may handicap the defense of detainees by permitting the prosecution to introduce hearsay evidence which was secured through coercive means abroad and is not subject to cross-examination because the source of the coerced statement is not available for the trial of the defendant detainee.

## **COMMON ARTICLE 3**

The Department of Defense contends that its treatment of detainees at Guantanamo complies fully with the principles of Common Article 3<sup>12</sup> as well as the standards which

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<sup>11</sup> In a 34-page dissent, Judge Rogers rejected the majority's conclusion that the MCA could divest federal courts of jurisdiction to hear habeas petitions of alien detainees at Guantanamo and be consistent with the Suspension Clause of the U.S. Constitution.

<sup>12</sup> Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following

were established in the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006.<sup>13</sup> The Administration further argues that the law of war does not require that a detaining power charge enemy combatants with crimes, provide them with legal counsel, or open access to Article III courts to challenge their detention. The Administration posits that even if detainees were entitled to prisoner of war (POW) status, the Geneva Conventions do not bestow on POWs the right to lawyers, access to courts to challenge detention, or the opportunity to be released prior to the end of hostilities.

Others argue that the Department's treatment of detainees at Guantanamo is not fully consistent with the principles of Common Article 3. Although not directly addressing the treatment of detainees during interrogations, Common Article 3 prohibits "outrages upon personal dignity, in particular *humiliating* and degrading treatment" (emphasis added) of any detainee during the length of their detention, which would arguably include times spent in interrogation. The MCA does not disallow the use of statements which resulted, at least in part, from humiliating treatment. Furthermore, given that the constitutionality of the military commissions remains questioned, some argue that they do not constitute "regularly constituted court[s] affording all the judicial guarantees which are recognized as indispensable by civilized peoples," as required by Common Article 3. Some critics of the MCA also point to the authority that it bestows upon the President to interpret the meaning of the Geneva Conventions<sup>14</sup> as possibly permitting the Administration to define what constitutes full compliance with its terms.

### *Hicks Trial and Other Advanced Cases*

On February 2, 2007, the Department swore charges against three high-profile detainees:

**David Hicks** (Australian) — *material support for terrorism and attempted murder in violation of the Law of War*. Hicks is alleged to have joined al Qaeda in 2001

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acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (b) taking of hostages;
  - (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

<sup>13</sup> "Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense," Memorandum from the Deputy Secretary of Defense Gordon England (July 7, 2006).

<sup>14</sup> Section 6(a)(3)(A) of the Military Commissions Act of 2006.

in Afghanistan where he purportedly joined in combat operations against Coalition forces in Qandahar and Konduz.

**Omar Khadr** (Canadian) — *murder in violation of the Law of War, attempted murder in violation of the Law of War, spying, conspiracy to violate the Law of War, and material support for terrorism*. Although Khadr was born in Canada, he moved with his family to Pakistan when he was about 4 years old and then roamed Pakistan and Afghanistan with them. As a 15 year old, he allegedly threw the hand grenade which killed SGT Chris Speer in a fire fight.

**Salim Hamdan** (Yemeni) — *conspiracy to violate the Law of War and material support for terrorism*. Hamdan is alleged to have served as a bodyguard and personal driver for Usama bin Laden from 1996 until 2001 in Afghanistan. Hamdan was the petitioner in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), where a 5-3 decision of the Court held that the President's military order on detention, treatment, and trial of detainees had exceeded his authority and that the military tribunals which had been convened did not comply with the Uniform Code of Military Justice (UCMJ) or the Law of War, as incorporated in the UCMJ and embodied in Common Article 3 of the Geneva Conventions.

Since these three cases are currently proceeding under the Military Commissions Act, the government witnesses for the hearing on Wednesday, March 28, 2007, have been instructed not to answer specific questions about these three matters so as to avoid prejudicing either the prosecution or defense. The witnesses are prepared to answer questions about the Military Commissions Act as an instrument of law, the possible legal impact of transferring any detainee to the United States, and the status of *habeas* petitions and appeals which have been filed in the federal courts.

According to the Manual for Military Commissions, the next steps for these three high-profile detainees include: (1) Brig. Gen. Hemingway, as a legal advisor to the Convening Authority, reviews the sworn charges and, after consultations with the office of the Director of National Intelligence (DNI), makes recommendations to the Honorable Susan Crawford,<sup>15</sup> the Convening Authority,<sup>16</sup> as to whether to try each defendant on any or all of their respective charges; (2) having received the recommendations, the Convening Authority, after also consulting, as appropriate, with the DNI, disposes of any or all of the charges by dismissing them or referring any or all to a military commission; (3) the charges are served on the defendants; (4) within 30 days of service, the defendants are called upon to plead (Rule 707(a)(1), regarding timing of pre-trial matters, and Rule 904,

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<sup>15</sup> Prior to her appointment by the Secretary of Defense, the Honorable Susan J. Crawford served as Chief Judge to the U.S. Court of Appeals for the Armed Forces. She served on that court from 1991 until 2006. She has also served as the Inspector General for the Department of Defense, the General Counsel of the Army, and the Assistant State's Attorney for Garret County, Maryland. She earned her undergraduate degree in History at Bucknell University and her law degree at the New England School of Law in Boston.

<sup>16</sup> The Convening Authority for the Military Commissions is responsible for referring charges to trial by the Military Commissions, detailing Military Commission members, reviewing the findings and sentences of the commissions, and supervising the Office of the Convening Authority.

regarding arraignment); and (4) within 120 days of service, the military judges shall convene the commissions and begin the trials (Rule 707(a)(2)).

On March 2, 2007, David Hicks was served with the charge of Providing Material Support for Terrorism; he was not charged with Attempted Murder in Violation of the Law of War. Days before today's hearing, he is expected to have pled. As of March 23, 2007, Omar Khadr and Salim Hamdan had not been served with charges.

## **FUTURE USE OF GUANTANAMO BAY FOR DETAINEES**

### *Detainee Demographics*

There are approximately 380-400 "unlawful enemy combatant" detainees being held at GTMO. As of February 2007, the detainees hailed from 35 countries, particularly Afghanistan, Yemen, Saudi Arabia, Algeria, and China. Although approximately eight detainees are from Iraq, none of them were captured after the start of 2003. Since that time, Iraqi detainees are held either by the Multi-National Forces in Iraq or the Iraqi Government.

### *CSRTs and ARBs*

First established in 2004, a Combatant Status Review Tribunal (CSRT) determines by a preponderance of the evidence whether each detainee at GTMO is an enemy combatant. An enemy combatant is "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." CSRTs, each comprised of three military officers, provide detainees, either with or without a DOD-assigned Personal Representative, with the opportunities to appear, present evidence, and request witnesses. Normally, unclassified portions of the CSRTs' deliberations are open to the media and other observers. If the CSRT determines that a detainee is no longer an enemy combatant, then the Secretary of Defense notifies the Secretary of State who coordinates the release of the individual to their home country.<sup>17</sup>

Between July 2004 and early 2005, DOD conducted 558 CSRTs, resulting in 520 confirmations of "enemy combatant" status and 38 determinations of "no longer enemy combatant". Approximately forty percent of detainees chose not to attend their CSRT tribunal.<sup>18</sup>

On March 9, 2007, the 14 high value detainees who were transferred to GTMO in September 2006 began their CSRTs. As of March 20, 2007, half of these detainees had been processed, including Khalid Shaykh Muhammad, the purported mastermind of the

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<sup>17</sup> England memorandum, *supra* at 10.

<sup>18</sup> See "Combatant Status Review Tribunal/Administrative Review Board" unclassified briefing materials by DOD (March 20, 2007).



9/11 attacks and other terrorist atrocities. All other detainees who are being held at GTMO have received a CSRT.

Also established in 2004, the Administrative Review Board (ARB) process is an annual review to determine whether an enemy combatant being held at GTMO should remain detained. The ARB, a three member panel of commissioned officers, reviews inputs from a number of U.S. government agencies, the home country of the detainee, and the detainee himself, if he chooses to attend the unclassified portion of the proceeding. Based on a number of considerations, the ARB makes a recommendation to the Designated Civilian Official (DCO), who makes the ultimate decision. Deputy Secretary of Defense Gordon England is the DCO.

After the first two cycles, 791 ARBs were completed. These resulted in 14 decisions to release, 174 decisions to transfer, and 603 decisions to continue to detain. The third cycle of ARBs began on January 30, 2007. There are 83 detainees who are approved for release or transfer, pending the finalization of agreements by the Department of State with home countries.

#### *Current Facility and Other Installations for Detention and Military Commissions*

Some have argued that the detention facility at the U.S. Naval Station at Guantanamo Bay, Cuba, should no longer be used for the detention and trial of unlawful enemy combatants. Many with this view arguably contend that the facility, in the minds of many of our allies, has become so associated with ill-conceived detention practices and constitutional challenges that convictions emanating from the Military Commissions process would appear to be illegitimate. Others with this view contend that moving the detainees to the U.S. could save the U.S. government money in transportation and other costs, facilitate the preparation of cases for trial, and possibly expedite the consideration of the cases. Defenders of Guantanamo contend that it is the most secure facility for the detention and trial of very dangerous terrorists, resources have already been spent to upgrade the existing courtroom in Guantanamo, and the possible interaction between Guantanamo detainees and the regular prison population in the United States could result in the former sharing dangerous tactics and expertise with the latter.<sup>19</sup>

Some advocates of closing the facility at Guantanamo argue that there are credible alternative locations in which to hold those detainees who cannot be released. These facilities are at military prisons around the country or, potentially, at facilities within the civilian federal corrections system. To display possible recipients of GTMO detainees, the following chart highlights the military correction facilities which could possibly detain foreign unlawful enemy combatants and incarcerate those who may be convicted and sentenced in the future. The figures are current through 2003 and were utilized for the latest BRAC determination in fiscal year 2005. Notably, Level II correction facilities have a surge capacity of 320 inmates if provided with the necessary resources to

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<sup>19</sup> The existing courthouse at Guantanamo, Building AV-34, has undergone substantial renovations at a projected construction cost of \$225,000. Although the construction portion of the renovation is complete, information technology upgrades remain pending until mid-April 2007.

maximize the potential capacity of each facility. An inmate is placed in a Level II facility if confinement is greater than one year but less than five. In general, each facility has the capacity to hold courts-martial or similar adjudicative procedures.

<b>Metric (Inmates)</b>	<b>Current Capacity</b>	<b>Maximum Potential Capacity</b>	<b>Current Usage</b>	<b>Surge Capacity Requirement</b>	<b>Excess/(Shortfall)</b>
<b>LEVEL III (Total)</b>	<b>534</b>	<b>534</b>	<b>450</b>	<b>0</b>	<b>84</b>
Fort Leavenworth, KS	534	534	450	0	84
<b>LEVEL II (Total)</b>	<b>1684</b>	<b>2004</b>	<b>1498</b>	<b>320</b>	<b>186</b>
Fort Knox, KY	137	246	148	109	(11)
Fort Sill, OK	157	185	123	28	34
Fort Lewis, WA	176	212	206	36	(30)
MCB Camp Lejeune, NC	232	280	186	48	46
MCB Camp Pendleton, CA	185	204	164	19	21
MCAS Miramar, CA	374	414	320	40	54
NAVBIG Norfolk, VA	135	175	148	40	(13)
WPNSTA Charleston, SC	288	288	203	0	85
<b>LEVEL I (Total)</b>	<b>347</b>	<b>437</b>	<b>193</b>	<b>90</b>	<b>154</b>
NAVSTA Pearl Harbor, HI	100	100	43	0	57
SUBASE Bangor, WA	54	64	32	10	22
NAS Jacksonville, FL	50	60	17	10	33
NAS Pensacola, FL	40	44	21	4	19
MCB Quantico, VA	36	90	46	54	(10)
Edwards AFB, CA	22	22	14	0	8
Kirtland AFB, NM	20	32	4	12	16
Lackland AFB, TX	25	25	16	0	9
<b>TOTALS</b>	<b>2565</b>	<b>2975</b>	<b>2141</b>	<b>410</b>	<b>424</b>

### *Security of Detention*

The Naval Consolidated Brig in Charleston, South Carolina, maintains that one of its missions is to detain enemy combatants under the laws of war, when directed by a superior authority. The brig held Jose Padilla<sup>20</sup> for approximately three years and Yaser Eser Hamdi<sup>21</sup> for about one year. In both cases, the Administration invoked its authority

<sup>20</sup> An American citizen, Jose Padilla, who is also known as Abdullah Muhajir, was arrested on May 8, 2002, in the United States for allegedly returning from Pakistan with the intent to participate in a plot to use a radiological bomb against unknown targets within the country. He is now in civilian federal custody in Florida.

<sup>21</sup> Yaser Eser Hamdi, who had been captured in Afghanistan in November 2001, was initially detained at the U.S. Naval Station in Guantánamo Bay, Cuba, until it was discovered that he was born in Baton Rouge and, thus, had a colorable claim to U.S. citizenship. Hamdi was first transferred to the Naval Brig Norfolk

under the international law of war, and the President's authority as Commander-In-Chief, to justify the detentions.

### *Use of Civilian Criminal Justice System for Adjudicating Terrorists*

Terrorists and others who are politically motivated to commit their offenses can be tried for acts of physical violence and property destruction. For fiscal years 2003 and 2004 alone, the Executive Office for U.S. Attorneys (EOUSA) reported at least 183 terrorism convictions and at least 521 terrorism-related convictions.<sup>22</sup>

Prominent terrorism or terrorism-related cases include Ted Kaczynski, also known as the Unabomber, who pled guilty to violations of federal explosives laws. Timothy McVeigh and Terry Nichols were convicted under federal laws outlawing the killing of federal law enforcement officers, bombing federal buildings, and the use of weapons of mass destruction.

The co-conspirators of the al Qaeda-financed bombing attack on the World Trade Center in 1993 were charged with numerous federal offenses, including bombing motor vehicles which are used in interstate commerce, possession of a bomb during the commission of a federal crime of violence, and assault on federal officers. In October 1995, the militant Islamist and blind cleric Sheik Omar Abdel-Rahman, was sentenced to life imprisonment for masterminding the bombing. In 1998, Ramzi Yousef was convicted of "seditious conspiracy" to bomb the towers. In all, ten militant Islamist conspirators were convicted for their part in the bombing.

Richard Reid, also known as the shoe bomber who attempted to detonate plastic explosives during a commercial airline flight, was convicted on January 30, 2003, on terrorism and terrorism-related charges, including Attempted Use of a Weapon of Mass Destruction and Attempted Murder. He is serving a life sentence in ADX Florence, a Supermax federal civilian prison in Florence, Colorado. Other prisoners also at the ADX Florence Supermax prison include Theodore Kaczynski, Terry Nichols, Zacarias Moussaoui (conspirator in the September 11, 2001 terrorist attacks), and Ramzi Yousef.

More recently, Jose Padilla is now awaiting trial in a federal court for Conspiracy to Murder U.S. Nationals, Conspiracy to Provide Material Support to Terrorists, and Providing Material Support to Terrorists.

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in April 2002 before being transferred to the Charleston Brig in August 2003. The government eventually negotiated an agreement that allowed Hamdi to return to Saudi Arabia in October 2004.

<sup>22</sup> The EOUSA defines a terrorism conviction as "domestic and international incidents that involve acts, including threats or conspiracies to engage in such acts, which are violent or otherwise dangerous to human life and which appear to be motivated by an intent to coerce, intimidate, or retaliate against a government or a civilian population. EOUSA defines a terrorism-related conviction as incidents involving terrorism-related hoaxes, terrorist financing, and a matter or case where the underlying purpose or object of the investigation is anti-terrorism related." U.S. Department of Justice, Office of the Inspector General, Audit Division, Audit Report 07-20 (February 2007).

## **PROPOSED QUESTIONS**

### *Transferring All Detainees Out of Guantanamo*

The *New York Times* reported last week that Secretary of Defense Gates and Secretary of State Rice had urged the President to shut down the detention facility at Guantanamo Bay, Cuba, because it had “become so tainted abroad that legal proceedings at Guantanamo would be viewed as illegitimate.” The President reportedly rejected the idea of devising plans to close the detention facility, despite having said publicly that Guantanamo should be closed.<sup>23</sup>

- Did Secretary Gates at any point order the Department to produce a contingency plan for closing the detention facility at the U.S. Naval Station in Cuba? What are the reasons, if any, why a military brig or a federal correctional facility in the United States could not hold detainees in anticipation of trial or as part of a convicted detainee’s sentence?
- Do you anticipate that some Guantanamo detainees will be held without being charged for the duration of the global war against terrorism? If yes, is such a detention constitutional?
- If the detainees at Guantanamo were to be transferred to the United States, many have questioned what would be the legal impact of such a transfer on an array of issues: forum selection and jurisdiction; the structure of proceedings; procedural rules; due process rights, including the right to be present during an adjudication, the definition of admissible evidence, and the use of hearsay; the applicability of the Geneva Conventions and other international law; the protection of classified information from unwarranted disclosure; methods of interrogations; and appellate review rights. How will the transfer of the Guantanamo detainees to U.S. soil affect each of these considerations? What would be the impact of the transfer on the Department’s ability to secure convictions?
- Why is Guantanamo the preferred facility for detaining unlawful enemy combatants?
- Are GTMO detainees disadvantaged in any way by not being held in a military facility in the United States?

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<sup>23</sup> “Guantanamo Prison Likely to Stay Open Through Bush Term,” the *Washington Post*, March 24, 2007 (quoting President Bush as saying in July 2006, “I’d like to close Guantanamo, but I also recognize that we’re holding some people there that are darn dangerous and that we better have a plan to deal with them in our courts.”).

### *Military Commissions Act*

- In your opinion, what are some of the more striking deficiencies of the Military Commissions Act?
- Evidence obtained by torture is excluded from military commissions and courts-martial. Why is it necessary to make statements which have been obtained through coercion admissible as evidence?
- What guidance do judges and prosecutors have to guide their discretion in determining whether evidence has been derived from cruel, inhumane, and degrading treatment as oppose to torture? What are the boundaries of coercion versus torture? What types of coercion do not amount to cruel, inhumane, or degrading treatment?
- Would evidence obtained from a witness who was forced to stand 20 hours without moving be admissible? 10 hours? How about evidence obtained from a witness who was subject to prolonged exposure to hot and cold temperatures? Deprived of sleep for extended periods of time? Combination of factors?
- Does defense counsel have access to the interrogation logs of defendant detainees or of the sources for hearsay evidence which the prosecution intends to introduce at trial? If the methods and sources of interrogation are classified, how will defense counsel be able to contest the use of evidence which may have been obtained through torture if he is denied a request to see interrogation logs?
- Is it the goal of the General Counsel's Office to repatriate detainees in Guantanamo who are tried and are not convicted of a crime?
- A plurality of the Court in *Hamdan* (Stevens, Ginsburg, Breyer, and Souter) concluded that conspiracy is not a recognized violation of the law of war and thus a conspiracy charge alone cannot be tried by a military commission. Yet, the Military Commissions Act and the Manual for Military Commissions maintain that conspiracy is a chargeable offense. By seizing on a potential infirmity of the Military Commissions Act, does the MCA and its accompanying Manual deliberately expose the government's case against detainees who are charged with conspiracy to the Court's ire?

### *Detainee Demographics*

About two weeks ago, the "Saudi Repatriates Report" — a statistical analysis of 24 cases of repatriated Saudis from a total of 53 Saudi nationals who have been repatriated to their home country from 2003 until December 2006 — was released by two local attorneys. In it, the authors found, among other things, that half of the repatriated 24 Saudis had been captured by Pakistani authorities and turned over to the U.S. not for being front-line

jihadists but rather for being associated with humanitarian organizations which were suspected of supporting Taliban or al-Qaeda sympathizers or supporters.

- What percentage of the current detainee population in Guantanamo would you characterize as being similar to some of these repatriated Saudis in that they are not accused of being associated with al Qaeda or the Taliban or have not fought against U.S. or coalition forces in Afghanistan?
- The “Saudi Repatriates Report” also found that a number of the men who were returned to Saudi Arabia had been accused of being associated with al Qaeda or the Taliban. Are these men currently in Saudi custody? What is the status of these men?
- More generally, how many of the approximately 800 detainees who have been held in Guantanamo over the last several years were captured by U.S. forces in Afghanistan? How many were delivered to U.S. or Coalition Forces by local warlords or others in Afghanistan or by the Pakistani government?
- Aside from the 14 high-value detainees who were relatively recently transferred to Guantanamo, how many other Guantanamo detainees are providing actionable intelligence? Is the intelligence tactical or strategic in nature?

#### *Combatant Status Review Tribunals and Appellate Review*

- Please describe the CSRT procedure. How does it ensure that detainees are properly designated as enemy combatants?
- Is there an analogous procedure under the Uniform Code of Military Justice? If yes, how does the CSRT differ?
- Under the DTA and the MCA, does an enemy combatant have the right to challenge the legality of their detention? Can a detainee appeal to the DC Circuit Court on the grounds that their detention violates the laws of the United States or the Constitution? If so, at what stage of the process can the detainee make this appeal?

#### *Interference with Defense Counsel*

COL Morris Davis, the Chief Prosecutor in the case against David Hicks, the Australian, has threatened MAJ Michael Mori, Hick’s military defense lawyer, with possible prosecution under the Uniform Code of Military Justice for criticizing the President’s detention policies to the Australian press and public.

- Do you believe that COL Davis’ accusations against MAJ Mori are appropriate? How has the Department responded to COL Davis?

- What should the Department do to protect MAJ Mori and other military defense attorneys from intimidation in the future?

### *Released Detainees*

Approximately 400 detainees who were in U.S. custody in Guantanamo have now been released. In December 2006, an investigative report of the *Associated Press* found that approximately 80 percent of 245 repatriated former detainees of Guantanamo had been released by their home countries upon their return.

- How does the Department or other agencies of the U.S. government track the whereabouts and treatment of these repatriated detainees? How many of the approximately 400 repatriated detainees are still in custody in their home countries?
- The AP investigation quoted Afghan and Pakistani officials as saying that many of the individuals who ended up in Guantanamo were there because of personal or tribal rivalries or because Afghan warlords “sold” the detainees to U.S. forces in Afghanistan. How many Guantanamo detainees came into U.S. custody as a result of monetary rewards? How large were the bounties?
- Does the Department or other government agencies pay for evidence or intelligence on detainees? If so, does the Department inquire about the methods through which the evidence or intelligence was gathered?

### *Common Article 3*

- Please explain how the Department’s detention policy complies with Common Article 3? Is the Department’s detention policy fully compliant with Common Article 3? If not, in what ways does it fall short?
- How does the Department ensure that detainees do not suffer “outrages upon personal dignity,” such as humiliating and degrading treatment?