

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

Plaintiff, :

v. :

AHMED KHALFAN GHAILANI, :

Case No. 98 Cr. 1023 (S-10) (LAK)

a/k/a "Fupi," :

a/k/a "Abubakary Khalfan
Ahmed Ghailani," :

a/k/a "Abubakar Khalfan Ahmed," :

Defendant. :

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**BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL
LAW IN OPPOSITION TO MOTION TO DISMISS INDICTMENT**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
ARGUMENT	4
I. The Time Defendant Spent In CIA Or Military Custody Does Not Count For Speedy Trial Purposes.....	4
A. The speedy trial clock does not run against the DOJ when another agency detains the defendant for a purpose other than criminal prosecution on a particular indictment	4
B. The CIA and the military detained Defendant for purposes other than prosecution on the indictment.....	9
II. A Contrary Rule Would Have Grave Public Policy Implications	12
A. The Executive Branch would be forced into the untenable position of having to choose between developing potentially vital intelligence information and bringing suspected terrorists to justice	12
B. Alternatively, the Executive Branch would be incentivized to try suspected terrorists in military commission proceedings where they have far fewer rights	15
III. To The Extent Defendant Raises Valid Concerns, They Are Not Speedy Trial Concerns, And Can And Should Be Addressed With More Limited And Appropriate Remedies Than The Extraordinary Sanction Of Dismissal.....	19
CONCLUSION.....	21

TABLE OF AUTHORITIES

CASES

<i>Barker v. Wingo</i> , 407 U.S. 514 (1972).....	15, 20
<i>Boumediene v. Bush</i> , 128 S. Ct. 2229 (2008).....	14
<i>D'Aquino v. United States</i> , 203 F.2d 390 (9th Cir. 1951)	10
<i>Escobedo v. Illinois</i> , 378 U.S. 478 (1964).....	18
<i>Estes v. Texas</i> , 381 U.S. 532 (1965).....	16
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004).....	10, 11, 14, 20
<i>Hayes v. Washington</i> , 373 U.S. 503 (1963).....	18
<i>In re Oliver</i> , 333 U.S. 257 (1948).....	16
<i>In re Terrorist Bombings of U.S. Embassies in East Africa</i> , 552 F.3d 93 (2d Cir. 2008).....	19
<i>In re Terrorist Bombings of U.S. Embassies in East Africa</i> , 552 F.3d 157 (2d Cir. 2008).....	10, 15
<i>Johnson v. Eisentrager</i> , 339 U.S. 763 (1950).....	11
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966).....	18
<i>Owens v. Markley</i> , 289 F.2d 751 (7th Cir. 1961)	16
<i>United States v. Avellino</i> , 136 F.3d 249 (2d Cir. 1998).....	5
<i>United States v. Bin Laden</i> , 126 F. Supp. 2d 264 (S.D.N.Y 2000).....	10, 14, 15

<i>United States v. Blanco</i> , 861 F.2d 773 (2d Cir. 1988).....	8
<i>United States v. Bunty</i> , 617 F. Supp. 2d 359 (E.D. Pa. 2008)	20
<i>United States v. Cooper</i> , 58 M.J. 54 (C.M.A. 2003).....	15
<i>United States v. De la Pena-Juarez</i> , 214 F.3d 594 (5th Cir. 2000)	8, 9, 12
<i>United States v. Finnerty</i> , 411 F. Supp. 2d 428 (S.D.N.Y. 2006).....	5
<i>United States v. Grimmond</i> , 137 F.3d 823 (4th Cir. 1998)	11
<i>United States v. Guevara-Umana</i> , 538 F.3d 139 (2d Cir. 2008).....	<i>passim</i>
<i>United States v. Hung</i> , 629 F.2d 908 (4th Cir. 1980)	15
<i>United States v. Jones</i> , 129 F.3d 718 (2d Cir. 1997).....	2, 6
<i>United States v. Jones</i> , 91 F.3d 5 (2d Cir. 1996).....	6
<i>United States v. Lainez-Leiva</i> , 129 F.3d 89 (2d Cir. 1997).....	20
<i>United States v. MacDonald</i> , 456 U.S. 1 (1982).....	6, 7, 11
<i>United States v. MacDonald</i> , 531 F.2d 196 (4th Cir. 1976)	7
<i>United States v. Marler</i> , 756 F.2d 206 (1st Cir. 1985).....	7
<i>United States v. Moussaoui</i> , 382 F.3d 453 (4th Cir. 2004)	13, 14, 15
<i>United States v. Ortiz-Lopez</i> , 24 F.3d 53 (9th Cir. 1994)	6, 10

<i>United States v. Pasillas-Castanon</i> , 2007 WL 496642 (N.D. Okla. Feb. 9, 2007)	8
<i>United States v. Penn</i> , 434 F. Supp. 2d 229 (S.D.N.Y. 2006).....	6
<i>United States v. Rodriguez-Amaya</i> , 521 F.3d 437 (4th Cir. 2008)	7
<i>United States v. Slaughter</i> , 386 F.3d 401 (2d Cir. 2004).....	20
<i>United States v. Watford</i> , 468 F.3d 891 (6th Cir. 2006)	20
<i>United States v. Yousef</i> , 327 F.3d 56 (2d Cir. 2003).....	20
<i>Vermont v. Brillon</i> , 129 S. Ct. 1283 (2009).....	18
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963).....	19

STATUTES

Confidential Information Procedures Act, 18 U.S.C. App. 3, § 1	16
Military Commissions Act of 2009	
10 U.S.C. § 948a.....	16
10 U.S.C. § 948b.....	15
10 U.S.C. § 948i.....	17
10 U.S.C. § 948m.....	17
10 U.S.C. § 949a.....	17
10 U.S.C. § 949c.....	17
10 U.S.C. § 949d.....	16, 17
10 U.S.C. § 949m.....	17
10 U.S.C. § 950t.....	15
Speedy Trial Act	
18 U.S.C. § 3161	11, 15
18 U.S.C. § 3172.....	15
Uniform Code of Military Justice, 10 U.S.C. § 810	15
8 U.S.C. § 1551	6
10 U.S.C. § 127b.....	4

18 U.S.C. § 4241	19
28 U.S.C. § 533	5
50 U.S.C. § 403-4a	4, 9

OTHER AUTHORITIES

John M. Burman, <i>The Ethical Duties of Prosecutors of Detainees Who Appear Before Military Commissions</i> , 18 Temple Pol. & Civil Rights L. Rev. 69 (2008)	18
Peter Finn, <i>Obama Endorses Indefinite Detention Without Trial for Some</i> , Wash. Post, May 22, 2009	19
Lt. Col. Paul Kantwill <i>et al.</i> , <i>Improving the Fighting Position: A Practitioner's Guide to Operational Law Support to the Interrogation Process</i> , 2005 Army Law. 12 (2005)	13
William R. Levi, Note, <i>Interrogation's Law</i> , 118 Yale L.J. 1434 (2009)	9
Michael Montañó, Note, <i>Who May Be Tried Under the Military Commissions Act of 2006?</i> , 61 Stan. L. Rev. 1281 (2009)	16
Congressional Research Service, <i>Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court</i> (Nov. 19, 2009)	18
United States Army Field Manual 2-22.3, <i>Human Intelligence Collector Operations</i> (Sep. 2006)	13
United States Central Intelligence Agency Historical Review Program Release, <i>The Interrogation of Suspects Under Arrest</i> (July 2, 1996)	13
Federal Bureau of Investigation Release (May 26, 2004)	1
Statement of United States Attorney General (May 26, 2004)	1, 14

PRELIMINARY STATEMENT

Defendant is charged with being a member of al Qaeda and murdering 224 innocent people by bombing the United States embassies in Kenya and Tanzania in simultaneous strikes on August 7, 1998. After he evaded capture for many years, in May 2004, he and six others were identified as being sought in connection with what “disturbing intelligence indicate[d] [was] al Qaeda’s specific intention to hit the United States hard” sometime “in the next few months.”¹ Defendant was captured a short time later in Pakistan following a lengthy gun battle with Pakistani forces. He subsequently was turned over to the United States.

The Central Intelligence Agency (“CIA”) then did exactly what one would hope it would do with someone believed to have had a “longstanding position in al Qaeda” and “a close relationship to high-ranking al Qaeda leaders, including Usama Bin Laden.” (Govt’s Mem. of L. in Opp’n to Mot. to Dismiss Indictment (“Opp’n”), filed Dec. 11, 2009, at 3.) The CIA endeavored, in Defendant’s words, to “turn[] him into an intelligence asset which our Government could rely upon in the defense of our Nation.” (Mem. of L. in Supp. of Def.’s Mot. to Dismiss Indictment (“Mot.”), filed Nov. 16, 2009, at 29.) The CIA sought to obtain, according to Defendant, information about “the whereabouts of . . . Usama bin Laden” and “whether [al Qaeda and its members] were planning to attack the United States” again. (*Id.* at 34, 37.) Whether the CIA used appropriate *methods* in developing this intelligence is and should be the subject of vigorous debate, but the issue here is one of *timing* — and there can be no doubt that developing this sort of critical intelligence, by even the most legitimate of methods, takes a

¹ May 26, 2004 Stmt. of United States Attorney General, *available at* <http://www.cnn.com/2004/US/05/26/terror.threat.transcript>; *see also* May 26, 2004 Federal Bureau of Investigation Release, *available at* <http://www.fbi.gov/page2/may04/bolo052604.htm>. Throughout this brief, any emphasis in quotations is added, and any internal quotation marks, citations, footnotes, brackets, and ellipses are omitted unless otherwise indicated.

long time. As Defendant himself puts it, it was only “by being able to interrogate Mr. Ghailani *for as long as they did* . . . [that] the Government obtained the information it sought.” (*Id.* at 41.)

Against this backdrop, Defendant’s motion to dismiss the indictment on speedy trial grounds must fail. *First*, Defendant’s brief, like the *amicus* brief filed in support of his position by the Center for Constitutional Rights (“CCR”), studiously ignores the elephant in the room: What Defendant consistently calls “the Government” is not a single monolithic entity, but rather numerous departments and agencies, including the CIA, the military, and the Department of Justice (“DOJ”) — each of which needs to be able to do its job. Not surprisingly, therefore, the law is settled that when a defendant is detained by an agency other than the DOJ for a purpose other than prosecution on a particular indictment, the speedy trial clock does not run against the DOJ — at least where the DOJ lacked the ability to compel the agency to hand over the defendant. *See, e.g., United States v. Guevara-Umana*, 538 F.3d 139, 141-42 (2d Cir. 2008) (“[D]etention by the immigration authorities does not constitute an arrest in connection with a federal criminal offense” for speedy trial purposes — even if “the immigration authorities also collaborated with the U.S. Attorney’s Office for purposes of a criminal investigation.”); *United States v. Jones*, 129 F.3d 718, 722 (2d Cir. 1997) (holding that even DOJ custody does not implicate speedy trial rights “if the deprivation of liberty — however labeled — is for a reason *other than* requiring the defendant to answer to federal criminal charges”) (emphasis in original).

Defendant concedes that the CIA and the military held him *not* for purposes of prosecuting him on the instant indictment, but instead to gather intelligence with which to protect the nation from further attack and to try him by military commission for violating the law of war. Defendant does not and cannot dispute that the prosecution lacked the ability to pry him out of CIA “black sites” or the military’s detention facilities at Guantanamo Bay (“Guantanamo”) to

bring him to New York to stand trial in a civilian court — such trials becoming possible only recently by order of the President. Under settled law, Defendant cannot invoke speedy trial rights against the prosecution in these circumstances.

Second, the rule that the federal government is not a single entity for speedy trial purposes rests not on formalistic distinctions, but serves a bedrock public policy — the need for each agency of our government to be free to perform its work without undermining the work of other agencies. The rule ensures that the CIA can take the time that is reasonably necessary to develop intelligence from captured terrorists that may be vital to protecting the nation from further attack, without hamstringing the DOJ from thereafter bringing such terrorists to justice. The rule also helps ensure that accused terrorists are tried in Article III courts under the spotlight of public scrutiny, and with all the procedural rights that defendants enjoy in such proceedings. If the rule were otherwise, the Executive Branch, as an alternative to the Scylla of foregoing the intelligence-gathering process and the Charybdis of allowing terror suspects to go free on speedy trial grounds, may choose to try them in secretive military commissions where speedy trial rights do not apply — and where many rights defendants take for granted in Article III courts are sharply curtailed or nonexistent.

Finally, Defendant is, of course, right about one thing: A significant amount of time spent in custody prior to being brought to trial might well have consequences in criminal prosecutions if such custody prejudices the defense in a cognizable way. But while these are not, for the reasons discussed below, speedy trial issues in the context of this case, the Court has numerous tools at its disposal to remedy any such prejudice short of the drastic sanction of dismissal. For example, to the extent Defendant is ultimately able to demonstrate that his custody led him involuntarily to make “potentially inculpatory statements” (Mot. at 69), the Court can suppress

such statements and any evidence uncovered as a result of them. Similarly, Defendant's passing suggestion that his time in CIA and military custody caused him psychological harms that impair his ability to participate in his defense can, if necessary, be addressed in appropriate proceedings. Defendant has not shown that his detention raises a *speedy trial* issue, nor has he overcome what this Court has recognized to be the "overwhelming public interest in the determination of the charges against Ghailani on the merits." (Mem. Op. dated Nov. 18, 2009 ("Mem. Op.") at 11-12.)

ARGUMENT

I. The Time Defendant Spent In CIA Or Military Custody Does Not Count For Speedy Trial Purposes.

All of Defendant's arguments suffer from the same fundamental defect: As the Court put it earlier in this case, he uses "the word 'government' . . . to refer to the United States as a whole rather than in the more limited sense used in criminal cases, where it typically refers to the USAO and the Department of Justice." (*Id.* at 6.) Defendant's word choice is, of course, quite calculated, for the reality of the situation — that he was in CIA or military custody, not DOJ custody, until June 2009 (*see id.* at 5; Mot. at 3) — dooms his motion as a matter of law.

A. The speedy trial clock does not run against the DOJ when another agency detains the defendant for a purpose other than criminal prosecution on a particular indictment.

The United States government is not a monolith. It is a multi-faceted array of departments and agencies that fulfill separate, distinct, and individually important missions. The CIA is charged with "collect[ing] intelligence through human sources and by other appropriate means" in matters "affecting the national security." 50 U.S.C. § 403-4a(d). The Department of Defense ("DOD") is charged with fighting the nation's wars, including "operation[s] . . . against international terrorism." 10 U.S.C. § 127b(a)(1). The DOJ, by contrast, is charged with

“detect[ing] and prosecut[ing] crimes.” 28 U.S.C. § 533. Although the functions of these various entities sometimes complement or overlap with each other, gathering intelligence, fighting terrorists, and prosecuting crimes are separate and distinct missions — and in this context as in any other, each government entity must be permitted to carry out its mission without fear that doing so will impair or destroy the mission of another.

Not surprisingly, the Second Circuit and other courts consistently reject arguments requiring “a monolithic view of government” in criminal cases. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (holding that “[t]he *Brady* obligation extends only to material evidence that is known to the prosecutor,” not other government agencies or employees); *United States v. Finnerty*, 411 F. Supp. 2d 428, 434 (S.D.N.Y. 2006) (observing that because of the separateness of the DOJ and the CIA, the prosecution does not have to turn over CIA files except to the extent the prosecution reviewed them during its investigation). In particular, the Second Circuit and other courts long have held that if one part of the government detains an individual for a purpose other than prosecution on a particular indictment, the time spent in such custody does not “count” for speedy trial purposes, at least where the prosecution lacked the ability to procure the defendant’s presence in the criminal case.

For example, in *United States v. Guevara-Umana*, 538 F.3d 139 (2d Cir. 2008), the Immigration and Naturalization Service (“INS”) detained an alien to determine whether he was deportable. During the period of the detention, the INS “collaborated with the U.S. Attorney’s Office for the purposes of a criminal investigation” into the defendant’s “apparent violation of 8 U.S.C. § 1326” (illegal reentry). *Id.* at 141-42. The Second Circuit affirmed the defendant’s subsequent conviction for illegal reentry, and rejected his argument that “the government” had violated his speedy trial rights by the INS keeping him in custody. The Second Circuit held that

“administrative detention by the immigration authorities does not constitute an arrest in connection with a federal criminal offense.” *Id.* at 141;² *accord Jones*, 129 F.3d at 722 (federal law enforcement took a conspirator into custody for purposes of securing his cooperation against other conspirators, but then prosecuted him when he stopped cooperating; court finds no speedy trial violation because “the deprivation of liberty . . . [was] for a reason *other than* requiring the defendant to answer to federal criminal charges”) (emphasis in original); *United States v. Ortiz-Lopez*, 24 F.3d 53, 55 (9th Cir. 1994) (no speedy trial violation where there was a “valid reason” for a federal “civil arrest,” even though there was an “overlapping criminal investigation”).

United States v. Penn, 434 F. Supp. 2d 229 (S.D.N.Y. 2006), reached the same result in a case involving two different United States Attorney’s offices. In *Penn*, nearly 12 years passed from the time the defendant was indicted until he “was produced to the Southern District of New York for prosecution.” *Id.* at 230. The court rejected the defendant’s speedy trial arguments, including with respect to “[a]pproximately nine months of delay attributable to the need to complete the defendant’s [separate criminal] case in the Eastern District.” *Id.* at 232 n.5. The court explained: “Simply waiting for another sovereign to finish prosecuting a defendant is without question a valid reason for delay.” *Id.* (quoting *United States v. Grimmond*, 137 F.3d 823, 828 (4th Cir. 1998)); *accord United States v. Jones*, 91 F.3d 5, 8 (2d Cir. 1996) (no speedy trial violation despite “25 months from the date of the indictment to [the defendant’s] initial appearance in the Southern District, [because he] was involved in multiple criminal proceedings in the Eastern District”).

The Supreme Court’s speedy trial jurisprudence is in accord, although the Court does not appear to have ruled on the issue explicitly. In *United States v. MacDonald*, 456 U.S. 1 (1982),

² Unlike the CIA and the military, the INS was not a wholly different part of the Executive Branch, but was “created and established in the Department of Justice.” 8 U.S.C. § 1551.

an army officer was arrested by military authorities for committing murder on an army base, and he remained in military custody for many months before the military dropped the charges — only to have the DOJ prosecute him in federal district court for the same murders. *See id.* at 4-5. The court of appeals concluded that the indictment should be dismissed on speedy trial grounds, on the theory that “the government [had acted] in its single sovereign capacity, regardless of the number and character of the executive departments that participate[d] in the prosecution.” *United States v. MacDonald*, 531 F.2d 196, 204 (4th Cir. 1976). The Supreme Court reversed on other grounds, and in the process criticized the court of appeals’ reasoning: “Of course, an arrest or indictment by one sovereign would not cause the speedy trial guarantees to become engaged as to possible subsequent indictments by another sovereign.” *MacDonald*, 456 U.S. at 10 n.11; *see also United States v. Marler*, 756 F.2d 206, 211 (1st Cir. 1985) (observing that the fact that the military and the DOJ are separate sovereigns for speedy trial purposes was “seemingly self-evident to the Court” in *MacDonald*).

The foregoing cases establish a clear rule: If one agency detains an individual for its own purposes in furtherance of its own statutory responsibilities, the time spent in such custody does not count against the DOJ for speedy trial purposes, at least where the DOJ did not have the ability to compel the agency to hand over the defendant. The case law makes clear that this is true even if the individual “was detained by [the agency] for two purposes: [a non-criminal purpose] and prosecution,” because the individual would have been detained in any event.

Guevara-Umana, 538 F.3d at 142.³

³ The CCR’s anticipatory attempt to distinguish these cases as “relat[ing] to situations where charges are brought against an individual who is already in civil custody,” not “where the federal government detains an individual subject to an outstanding arrest warrant,” is off the mark. (Br. of CCR (“CCR Br.”), filed Dec. 7, 2009, at 10 n.7.) The case law rejects this purported distinction. *See United States v. Rodriguez-Amaya*, 521 F.3d 437, 441 (4th Cir. 2008) (rejecting speedy trial arguments based on detention by INS, even though the defendant was placed back into INS custody *after* a federal criminal complaint was filed). Further, to the extent the CCR

The case law recognizes only one exception to the rule: where there has been “collusion between [the agency] and criminal authorities, where the . . . detention is merely a *ruse* to avoid [speedy trial] requirements.” *Id.* The Second Circuit and other courts have made clear, however, that a defendant must meet a high standard to come within this exception, for even an agency’s “collaboration with the U.S. Attorney’s Office for the purposes of a criminal investigation . . . is not sufficient to establish collusion.” *Id.* Rather, “the defendant [must] demonstrate that the *primary or exclusive purpose* of the . . . detention was to hold him for future criminal prosecution” on the indictment, *United States v. De la Pena-Juarez*, 214 F.3d 594, 598 (5th Cir. 2000), and that “the federal prosecutor [or the other agency] acted in *bad faith*” in trying to circumvent speedy trial protections. *United States v. Pasillas-Castanon*, 2007 WL 496642, at *7 (N.D. Okla. Feb. 9, 2007). “If [the agency] has a valid reason for detaining the defendant, a ruse is not established.” *Id.*

The CCR thus completely misstates the law when it contends that the Court must assume, without basis, that the ruse exception applies unless “the government . . . prove[s] at a hearing that it was not involved in [Defendant’s] initial arrest, or any subsequent portion of his five-year detention.” (CCR Br. at 10 n.7.) It is Defendant, not the prosecution, that bears the burden on the issue, *see De la Pena-Juarez*, 214 F.3d at 598, and in any event, the Second Circuit’s decision in *Guevara-Umana* makes clear that “no involvement” is not the standard. *See Guevara-Umana*, 538 F.3d at 142.

means to rely on the line of cases requiring the prosecution to exercise due diligence in procuring the presence of a defendant known to be in custody elsewhere, those cases make clear that no speedy trial violation occurs where, as here, the prosecution lacks the legal or practical ability to do so. “Due diligence does not require the government to pursue goals that are futile.” *United States v. Blanco*, 861 F.2d 773, 778 (2d Cir. 1988) (finding “no duty” to attempt to obtain the defendant from authorities that were unwilling to hand him over).

As shown below, Defendant's own brief demonstrates that the CIA and the military held him for their own valid purposes pursuant to their own statutory mandates, and he does not even *attempt* to invoke the "ruse" exception.

B. The CIA and the military detained Defendant for purposes other than prosecution on the indictment.

Defendant's time in CIA or military custody can be divided into three phases. *First*, he contends that for an approximately two-year period, from sometime in 2004 until September 6, 2006, he was in CIA custody so that the CIA could seek intelligence information from him — a mission with which the CIA quintessentially is charged. *See* 50 U.S.C. § 403-4a(d); William R. Levi, Note, *Interrogation's Law*, 118 Yale L.J. 1434, 1436 (2009) ("The acquisition of information through interrogation traditionally has been a central component of military and intelligence operations. . . . [I]nterrogation [is] fundamental to the War on Terror."). Whether Defendant was held in appropriate locations or treated in an appropriate manner are issues for another day; thus, while Defendant's extended discussions of "standard" and "enhanced" interrogation techniques raise important issues that may well eventually figure into this case, they have nothing to do with the speedy trial calculus. Rather, the point for purposes of *this motion* is what Defendant freely concedes: that he was not held for the "primary or exclusive purpose of . . . criminal prosecution," *De la Pena-Juarez*, 214 F.3d at 598:

- "The underlying *purpose* . . . was to transform Mr. Ghailani from an accused defendant . . . into an *intelligence asset*." (Mot. at 35; *see also id.* at 8, 9, 28, 39 (similar).)
- "[T]he Government's goal was to obtain . . . information regarding a myriad of political and investigative issues, such as: the whereabouts of various individuals, including Usama bin Laden; details surrounding operations and logistics in Afghanistan; history and methods of operation of al-Qaeda; and the details of the Embassy bombing" (*Id.* at 34.)
- "[T]he Government made the political decision to deliberately delay Mr. Ghailani's trial in order to question him — presumably because the Government

decided that it was necessary to do so in the interest of *national security*.” (*Id.* at 34.)⁴

Second, Defendant contends that for an approximately 18-month period, from September 2006 until March 2008, he was in military custody at Guantanamo as an enemy prisoner prior to being charged in military commission proceedings. (*See* Mot. at 2 (stating date of transfer to Guantanamo); Mem. Op. at 4 (noting that Defendant was charged before a military commission in “March 2008”).) Defendant does not and cannot dispute that the military had a “valid reason to detain” him, *Ortiz-Lopez*, 24 F.3d at 55, quite apart from anything relating to the present indictment:

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incidents of war. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. . . . Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. . . . [But] [i]f the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of necessary and appropriate force and therefore are authorized

Hamdi v. Rumsfeld, 542 U.S. 507, 518-21 (2004) (plurality op.); *see also id.* at 587 (Thomas, J., dissenting) (agreeing with the four-member plurality that such detentions are valid); *D'Aquino v. United States*, 203 F.2d 390, 391 (9th Cir. 1951) (rejecting the defendant’s argument that her “detention . . . by the military” was “in effect [an] arrest [that] was a mere preliminary to the

⁴ The CCR’s argument that “[p]rolonged delays to extract additional information from the accused are core violations” of speedy trial rights is off point here. (CCR Br. at 7; *see also id.* at 8.) The CCR cites cases involving interrogations by law enforcement for purposes of *criminal* investigations, not intelligence-gathering. “Unlike ordinary police interrogation, interrogation undertaken to acquire intelligence information is not designed primarily to elicit admissions or information that may be used in a conventional prosecution.” Levi, *supra*, at 1435; *see also United States v. Bin Laden*, 126 F. Supp. 2d 264, 283 (S.D.N.Y. 2000) (declining to suppress evidence collected through electronic surveillance, because “the goal of the intelligence collection, to neutralize the Bin Laden threat to national security, overwhelmingly dominated the electronic surveillance,” and the “cooperation between the government agencies [was not] undertaken in bad faith to avoid constitutional restraints upon criminal law enforcement”), *aff’d sub nom, In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157 (2d Cir. 2008).

present prosecution”; the military’s express authorization to arrest “[c]itizens or nationals of the United Nations suspected of guilt of treason” was an “exercise of one of the powers incident to military occupation [of Japan]”). Furthermore, Defendant was subject to Combatant Status Review Tribunal proceedings during at least some of this period (*see* Opp’n at 70), and as the Speedy Trial Act embodies, “[a]ny period of delay resulting from other proceedings concerning the defendant” must “be excluded in computing . . . time.” 18 U.S.C. § 3161(h).

Third, Defendant contends that for an approximately 15-month period, from March 2008 until early June 2009, he remained in custody at Guantanamo after being charged by the military for violating the law of war. (*See* Mem. Op. at 3 (noting that Defendant was charged in military commission proceedings in March 2008); Mot. at 2-3 (stating that the charges were dropped on May 29, 2009).) Again, Defendant at this point manifestly was being held for two purposes other than prosecution on the instant indictment: “to prevent [him] from returning to the field of battle and taking up arms once again,” *Hamdi*, 542 U.S. at 518, and to face new charges by the military. *See Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (“The jurisdiction of military authorities . . . to punish those guilty of offenses against the laws of war is long-established.”). Even putting aside the former purpose, which suffices to take this 15-month period out of the speedy trial realm, the latter purpose also suffices: The military is “another sovereign” for speedy trial purposes, *MacDonald*, 456 U.S. at 10 n.11, and “[s]imply waiting for another sovereign to finish prosecuting a defendant is without question a valid reason for delay.” *Grimmond*, 137 F.3d at 828.

Unable to dispute that he was held by the CIA and the military for purposes other than prosecution on the instant indictment, Defendant resorts to rhetoric, asserting that “the Government” sought to gain a “tactical advantage” over him. (*E.g.*, Mot. at 33.) Defendant’s

idea of a “tactical advantage” appears to be a tactical advantage in the war against al Qaeda, not in the instant prosecution. Thus Defendant asserts that “the Government deliberately acted to delay [his] trial in order to gain a tactical advantage in the name of *national security*,” so that “the Government [would have information to] rely upon in the *defense of our Nation*.” (*Id.* at 29, 31.) And although Defendant makes a token effort at contending that his time spent in CIA or military custody had the *effect* of causing a loss of evidence and so forth, he does not and cannot contend — and certainly has not met his burden of showing — that his detention was some sort of “ruse” or that the “primary or exclusive *purpose* of the . . . detention was to hold him for future criminal prosecution.” *De la Pena-Juarez*, 214 F.3d at 598.

Simply put, Defendant’s time in CIA or military custody does not implicate his speedy trial rights in the instant Article III proceeding brought by the DOJ.

II. A Contrary Rule Would Have Grave Public Policy Implications.

A. The Executive Branch would be forced into the untenable position of having to choose between developing potentially vital intelligence information and bringing suspected terrorists to justice.

Although Defendant never acknowledges the rule established by the case law discussed above, he candidly acknowledges the effect of abandoning it. As Defendant puts it, if “the Government” made what he derides as the “political choice” of “turning him into an intelligence asset which our Government [can] rely upon in the defense of our nation,” “it was incumbent upon the Government to dismiss the pending prosecution.” (*Mot.* at 29, 36.) In other words, Defendant would have this Court put the Executive Branch to the Hobson’s choice of either foregoing seeking intelligence from captured terrorists that may be necessary to protect the country from further attack or foregoing the ability to bring those terrorists to justice once the intelligence-gathering process is completed. Defendant’s supposed choice not only is contrary to

the law, but would undermine all the relevant policy concerns regarding the proper functioning of our national security and criminal justice systems.

Obtaining reliable intelligence from captured enemy combatants “takes time.” United States Army Field Manual 2-22.3, *Human Intelligence Collector Operations*, at p. 1-14 (Sep. 2006) (“Field Manual”).⁵ It requires detailed advance planning based on the personality and other traits of the prisoner, and there are at least “eighteen different ways in which an interrogator may approach an interrogation subject . . . without crossing over impermissible boundaries.” Lt. Col. Paul Kantwill *et al.*, *Improving the Fighting Position: A Practitioner’s Guide to Operational Law Support to the Interrogation Process*, 2005 Army Law. 12, 19 (2005). Obtaining intelligence may entail, for example, “the interrogator and subject . . . meeting with each other over a *long period of time*” to “build[] on relationships of trust established between interrogator and subject.” *Id.* at 19-20 n.39; *see also* Field Manual at p. 1-22 (developing human intelligence requires “tenacity of purpose” and “patience . . . in creating and maintaining rapport [with] the source”). Developing reliable intelligence takes a particularly long time when done the morally right way — humanely — because although “almost anyone will eventually talk when subjected to enough physical pressures, . . . the information obtained in this way is likely to be of little intelligence value.” CIA Historical Review Program Release, *The Interrogation of Suspects Under Arrest* (July 2, 1996).⁶

The time it takes to obtain intelligence from captured terrorists is time well spent, because it can yield invaluable information critical to our national security – and “no governmental interest is more compelling than the security of the Nation.” *United States v.*

⁵ The Field Manual is available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>.

⁶ This document is available at https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol2no3/html/v02i3a08p_0001.htm.

Moussaoui, 382 F.3d 453, 470 (4th Cir. 2004). But if taking that time necessarily resulted in the dismissal of indictments brought against accused terrorists, the law in effect would penalize the Executive Branch for pursuing potentially valuable intelligence. The potential result of deterring intelligence-gathering (even if remote) could be disastrous; indeed, it is entirely possible that it was only by interrogating Defendant about his suspected involvement in what “disturbing intelligence indicate[d] [was] al Qaeda’s specific intention to hit the United States hard” sometime in 2004, that our country was able to avert that attack.⁷

The other unpalatable option — taking the time necessary to develop reliable intelligence, but letting accused terrorists go free on speedy trial grounds — poses equally grave dangers to our nation and our allies:

[Several] prisoners hitherto released from Guantanamo Bay have returned to the battlefield. . . . [Some] have succeeded in carrying on their atrocities against innocent civilians. In one case, a detainee released from Guantanamo Bay masterminded the kidnapping of two Chinese dam workers, one of whom was later shot to death when used as a human shield against Pakistani commandoes. Another former detainee promptly resumed his post as a senior Taliban commander and murdered a United Nations engineer and three Afghan soldiers. Still another murdered an Afghan judge. [Another] released detainee carried out a suicide bombing against Iraqi soldiers in Mosul, Iraq.

Boumediene v. Bush, 128 S. Ct. 2229, 2294-95 (2008) (Scalia, J., dissenting) (citing numerous sources).⁸

The courts should not adopt a rule that would force the Executive Branch onto the horns of such a dilemma. For this reason, numerous courts — including in the omnibus criminal case

⁷ May 26, 2004 Stmt. of United States Attorney General, *available at* <http://www.cnn.com/2004/US/05/26/terror.threat.transcript>.

⁸ It is no answer to say that the military could continue to hold suspected terrorists even if their indictments are dismissed. The Supreme Court has indicated that the military can hold them only for so long as “United States troops are still involved in active combat in Afghanistan,” after which they presumably will need to be repatriated. *Hamdi*, 542 U.S. at 521 (plurality op.) Because terrorism undoubtedly will continue long after overt combat operations in Afghanistan have wound down, permitting suspected terrorists to go free without any prosecution in civilian courts poses the very real danger that they will return to the battlefield — as some already have.

spawned by the embassy bombings at issue here — have recognized that courts should not adopt constitutional rules that could have “a disproportionate and perhaps even disabling burden on the Executive” as he exercises his “authority . . . over foreign intelligence collection.” *Bin Laden*, 126 F. Supp. 2d at 272-73 (holding that the Fourth Amendment’s warrant requirement should not apply to overseas wiretapping for intelligence purposes); *accord Moussaoui*, 382 F.3d at 470 (stating that the value of detainees in the CIA’s interrogation program “can hardly be overstated,” and deferring to the government’s assertion that interrupting their interrogations “will have devastating effects on the ability to gather information from them”); *United States v. Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (“[T]he needs of the executive are so compelling in the area of foreign intelligence . . . that a uniform warrant requirement would . . . unduly frustrate the President in carrying out his foreign affairs responsibilities.”). As the Second Circuit has noted in this very case, “the acknowledged wide discretion afforded to the executive branch in foreign affairs ought to be respected in these circumstances.” *In re Terrorist Bombings*, 552 F.3d at 170 n.7.

B. Alternatively, the Executive Branch would be incentivized to try suspected terrorists in military commission proceedings where they have far fewer rights.

If the Executive Branch were forced to choose between gathering vital intelligence and retaining the option of bringing criminal charges in Article III courts, the President likely would sidestep this dilemma by bringing charges in military commission proceedings in which speedy trial rights do not apply.⁹ *See* 18 U.S.C. §§ 3161, 3172 (providing that the Speedy Trial Act applies only in cases charging a “criminal offense,” and defining “offense” to *exclude* “an

⁹ Trying suspected terrorists in more traditional court-martial proceedings would not solve the dilemma, because speedy trial rights apply in such proceedings. *See* 10 U.S.C. § 810; *United States v. Cooper*, 58 M.J. 54, 61 (C.M.A. 2003) (holding that the factors set out in *Barker v. Wingo*, 407 U.S. 514 (1972), should be considered in assessing speedy trial arguments in court-martial proceedings).

offense triable by . . . military commission”); 10 U.S.C. § 948b(d) (providing that the portions of the Uniform Code of Military Justice “relating to speedy trial” “shall not apply to trial by military commission”); *Owens v. Markley*, 289 F.2d 751, 752 (7th Cir. 1961) (“Military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments.”); Michael Montaña, Note, *Who May Be Tried Under the Military Commissions Act of 2006?*, 61 Stan. L. Rev. 1281, 1291 (2009) (observing, based on a statutory provision that survived subsequent amendments, that “there is no right to a speedy trial” in military commission proceedings). Indeed, the President recently reauthorized trial by military commission by signing the Military Commissions Act of 2009, 10 U.S.C. §§ 948a-950t, fewer than two months ago. Forcing the President to use this forum, however, or to use it more often than he otherwise would, would be detrimental to society’s interests in fair and open proceedings and to the rights of the accused.

Because of “this nation’s historic distrust of secret proceedings[] [and] their inherent dangers to freedom,” *In re Oliver*, 333 U.S. 257, 273 (1948), the public nature of criminal trials “reflects a concept fundamental to the administration of justice in this Country.” *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). Article III proceedings permit the full daylight of public scrutiny, subject to provisions of the Classified Information Procedures Act (“CIPA”) restricting access to information concerning “the national defense and foreign relations of the United States” that is determined by “Executive order, statute, or regulation to require protection.” 18 U.S.C. App. 3, § 1.

Military commissions, by contrast, can be shuttered from public view based on what amounts to barely any standard at all: if they merely involve “the disclosure [of information] which could reasonably be expected to cause damage to the national security,” including mere

“law enforcement sources, methods, or activities.” 10 U.S.C. § 949d(c)(2). Worse, military commission proceedings can be cloaked with such secrecy without any “Executive order, statute, or regulation” requiring specified information to be protected, as required by CIPA in Article III proceedings, but instead based entirely on the unilateral opinion of the presiding officer that such information ought to be protected. *See id.* Further, the presiding officer is permitted to base such a finding solely on “a presentation ex parte or in camera” by the prosecuting attorney. *Id.* § 949d(c)(3).

Moreover, the Military Commissions Act of 2009 expressly strips defendants of numerous rights in these potentially secret trials that they unquestionably would enjoy in Article III trials. For example:

- “A statement of the accused that is otherwise admissible shall *not* be excluded from trial by military commission on grounds of *alleged coercion or compulsory self-incrimination*” if certain findings are made (and if such admissibility is otherwise authorized by DOD regulations, which have yet to be promulgated). *Id.* § 949a(b)(3)(B).
- “Evidence seized outside the United States shall *not* be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or authorization,” apparently without regard to whether the evidence was gathered for intelligence purposes or for pure law enforcement purposes (if forthcoming DOD regulations so provide). *Id.* § 949a(b)(3)(A).
- “[H]earsay evidence not otherwise admissible under the rules of evidence . . . may be admitted in a trial by military commission” if certain conditions are satisfied (again if forthcoming DOD regulations so provide). *Id.* § 949a(b)(3)(D).
- Defendants do not have a full right to counsel of their choice. Although they can retain their own counsel, such counsel must be “a United States citizen,” and even then, “military counsel shall act as associate counsel.” *Id.* § 949c(b)(3)(A), (b)(4).
- Defendants do not have a right to trial by a jury drawn at random from the laity, but only by a panel of “commissioned officer[s] of the armed forces on active duty.” *Id.* § 948i(a).
- Defendants do not have a right to a twelve-member jury with the full and robust exchange of viewpoints that that entails, but only to a five-member panel (except in capital cases). *See id.* §§ 948m(a), 949m(c).

- Defendants do not have a right to a unanimous verdict, but can be “convicted by a military commission . . . [upon] the concurrence of *two-thirds* of the members present at the time the vote is taken.” *Id.* § 949m(a); *cf.* John M. Burman, *The Ethical Duties of Prosecutors of Detainees Who Appear Before Military Commissions*, 18 Temple Pol. & Civil Rights L. Rev. 69, 94 (2008) (“While . . . the prosecution’s burden to prove the guilt of the accused beyond a reasonable doubt allegedly appl[ies] to Military Commission trials, . . . [o]ne wonders . . . how anything less than a unanimous vote of a commission can ever constitute a finding ‘beyond a reasonable doubt.’”).

See also Congressional Research Service, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court* (Nov. 19, 2009).¹⁰

Defendant’s speedy trial arguments would pressure the Executive Branch to try suspected terrorists in military commissions where their rights would be severely truncated as compared to an Article III court. As a result, his arguments necessarily pit speedy trial rights against a host of other rights that are even more fundamental to the fairness and accuracy of a trial. Speedy trial rights are important, but they are “amorphous, slippery, and *necessarily relative*.” *Vermont v. Brillon*, 129 S. Ct. 1283, 1290-91 (2009) (quoting *Barker*, 407 U.S. at 522). They certainly do not take precedence over, for example, the *absolute* right not to have one’s coerced confession admitted as substantive evidence of one’s purported guilt. *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Hayes v. Washington*, 373 U.S. 503 (1963).

Thus, enforcing what Defendant wrongly contends are his speedy trial rights would risk the deprivation of numerous other rights if the Executive Branch were to choose to send him back to military commission proceedings. Perhaps Defendant is willing to run that risk, but if his motion were granted, other terrorism suspects — who may have arguments of factual innocence

¹⁰ This report is available at <http://www.fas.org/sgp/crs/natsec/R40932.pdf>.

that they want to press in a more rights-protective Article III court — are more likely to be denied an Article III forum if Defendant gets what he wants in this case.¹¹

In short, the Executive Branch, the public, and even other detained individuals would all be ill-served if Defendant secures the dismissal he seeks. This Court should reject Defendant's arguments, not only because they have no basis in law as explained above, but because their public policy implications are profoundly menacing.

III. To The Extent Defendant Raises Valid Concerns, They Are Not Speedy Trial Concerns, And Can And Should Be Addressed With More Limited And Appropriate Remedies Than The Extraordinary Sanction Of Dismissal.

None of the foregoing is meant to suggest that Defendant's motion does not raise serious issues that need to be addressed. As the foregoing makes clear, however, those issues are not *speedy trial* issues, and it is inappropriate for Defendant to try to shoehorn them into the speedy trial rubric in an effort to obtain the extreme sanction of dismissal. Rather, the issues Defendant raises can and should be addressed with other established procedures and remedies:

- Defendant's contentions regarding the fruits of his interrogation while in custody (*see, e.g.*, Mot. at 36-39), are more properly addressed in suppression hearings that might assess the constitutional significance of the interrogation methods he alleges were employed. Any involuntariness found can be addressed by applying familiar principles of the exclusionary rule and the "fruit of the poisonous tree" doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 487-91 (1963).¹²
- Defendant's contention that his incarceration by the CIA and the military somehow has impaired his ability to participate in his defense (*see* Mot. at 40-41), can be raised and addressed through an appropriate competency motion. *See* 18 U.S.C. § 4241.

¹¹ As an alternative to military commissions, the President may choose simply to place suspected terrorists in detention for the duration of active combat, where, obviously, they would have no chance to argue their innocence and even fewer opportunities to vindicate other rights. *See, e.g.*, Peter Finn, *Obama Endorses Indefinite Detention Without Trial for Some*, Wash. Post, May 22, 2009.

¹² Defendant's speculation that the Government might use the fruits of his interrogations as evidence against *other* possible co-conspirators is, as he appears rightly to concede, a complete red herring. "Mr. Ghailani cannot assert the rights of his co-conspirators." (Mot. at 40.)

- Defendant's accusations of government interference with his counsel's attempts to interview witnesses and otherwise to investigate the allegations against him (*see* Mot. at 68), if substantiated, could be subject to appropriate evidentiary or other remedies, such as a missing-witness instruction. *See United States v. Slaughter*, 386 F.3d 401, 403 (2d Cir. 2004).
- Defendant's hypothesis that the "the government's" so-called delay caused a general loss of evidence over the years (*see id.* at 24-25, 68), aside from the fact that this "may work to the accused's advantage" because "it is the prosecution which carries the burden of proof," *Barker*, 407 U.S. at 521, is akin to a claim of spoliation and can be addressed as such. "[T]here are a variety of sanctions that the Court in its discretion may impose," including instructing the jury that it may draw an "adverse inference" against the government's case. *United States v. Bunty*, 617 F. Supp. 2d 359, 370 (E.D. Pa. 2008); *accord In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 149 (2d Cir. 2008) (citing case law holding that "a district court has broad discretion in crafting a proper sanction for spoliation," and that any such sanction should be properly "molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine").
- Defendant's professed concern about potential contamination of the jury pool due to allegedly prejudicial publicity about his pretrial statements (*see* Mot. at 69-70), can be addressed through established remedies, such as "searching voir dire of the members of the jury pool." *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (holding that this was a sufficient remedy for potentially prejudicial pretrial publicity in the case arising from the 1993 World Trade Center bombing).¹³

Simply put, Defendant will have adequate — and procedurally more appropriate — avenues through which to raise the serious allegations he attempts to shoehorn into the present speedy trial motion. For this additional reason, the Court should not countenance his attempt to distort settled speedy trial jurisprudence to gain the windfall of dismissal.

¹³ Any *inherent* prejudice Defendant suffered from the deprivation of liberty that accompanies every custodial detention is not cognizable here because Defendant would have suffered such prejudice in any event. With or without the present indictment and criminal prosecution, he was going to remain an enemy prisoner after he was captured, undoubtedly for so long as "United States troops are still involved in active combat in Afghanistan." *Hamdi*, 542 U.S. at 521 (plurality op.); *see also United States v. Watford*, 468 F.3d 891, 907 (6th Cir. 2006) ("[B]ecause [the defendant] was already incarcerated on state murder charges, he had suffered no oppressive pretrial incarceration at the hands of federal authorities."); *United States v. Lainez-Leiva*, 129 F.3d 89, 92 (2d Cir. 1997) (per curiam) (holding that the defendant could not "claim prejudice traceable to any oppressive pretrial incarceration, because he would have been serving his state sentence in any event").

