UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, against AHMED KHALFAN GHAILANI, Defendant.	**S10 98 Crim. 1023 (LAK)** **ECF CASE**

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS

KENT S. SCHEIDEGGER
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
Telephone: (916) 446-0345
Fax: (916) 446-1194

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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The Criminal Justice Legal Foundation (CJLF) submits this brief *amicus curiae* pursuant to the court's order of November 2, 2009, inviting us to file and granting leave to do so.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation[1] organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case is a prosecution for two deadly bombings which were part of a massive and ongoing conspiracy to murder any and all Americans anywhere in the world. Prosecution has been delayed by the defendant's own acts of evading capture, by the overriding imperative of gaining intelligence from him after his capture, and by necessary delays in preparing for trial by military commission, a mode of trial reasonably deemed necessary by those who were responsible for national security at the time.

The defendant now contends that these delays entitle him to a dismissal of charges with prejudice, getting off scot-free for mass murder. The unthinkable injustice of such a result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Not all the facts of this case are publicly available. This summary is taken from this court's Memorandum Opinion of November 18, 2009, regarding the continuation of appointed military counsel ("Counsel Opn.") and the Memorandum of Law in Opposition to Defendant Ahmed

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1. Corporate Disclosure Statement: CJLF has no corporate parent, stockholder, subsidiary, or affiliate.

Khalfan Ghailani's Motion to Dismiss the Indictment Due to the Denial of His Constitutional Right to a Speedy Trial (cited below as "Govt. Memo").[2]

Defendant Ghailani was indicted on December 16, 1998, along with many other alleged members of al Qaeda, for the bombing of two United States embassies in East Africa. Counsel Opn. 1. He remained at large for five and a half years. During this time, the Government alleges he remained active in al Qaeda and learned important information about that organization. Govt. Memo 12-15.

Ghailani was captured by Pakistan on or about July 25, 2004. Govt. Memo 12. He was transferred to the custody of the CIA on a date not publicly disclosed. See Govt. Memo 12 (transfer date blackened out). While in CIA custody, he was interrogated, providing information important to the defense of the country against further al Qaeda terrorist attacks. See Govt. Memo 58-60.

Ghailani was transferred to Guantánamo in September 2006. Counsel Opn. 4; Govt. Memo 12, 20. On March 17, 2007, a Combatant Status Review Tribunal "determined that he was properly detained as an enemy combatant." Govt. Memo 20-21. Although aware of the indictment in the present case, he did not request a speedy trial. Govt. Memo 21.

The military investigated the case, and in March 2008 charged Ghailani with violations of the laws of war for trial by military commission. Govt. Memo 21-22; Counsel Order 4. He was provided counsel, and at no time did he or his counsel request speedy trial either before the military commission or this court. His counsel recognized that the complexity of the case required delay and consented to it. Govt. Memo 23.

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2. All references to the documents previously filed in this case are to the public "redacted" versions. *Amicus* CJLF has not had access to the full, classified versions.

Following a change of administration, President Obama halted the military commission process. On May 21, 2009, Ghailani was transferred for prosecution in this court under the 1998 indictment. On November 16, 2009, Ghailani made the present motion to dismiss for alleged violation of his right to a speedy trial.

SUMMARY OF ARGUMENT

The United States is engaged in a war declared on us by a terrorist organization. The crimes in this case are both crimes and acts of war. The detention that the defendant complains of was not custody by law enforcement officials but rather by persons whose duty was to defend the nation from foreign attacks and who have no domestic law enforcement responsibility or authority. This case is therefore different from the typical criminal case, and the difference must be kept in mind when invoking precedents established in ordinary criminal cases.

When the United States Government uses force against aliens outside the boundaries of the United States, the Constitution, and specifically the Bill of Rights, generally confers no rights upon the alien. Ghailani's detention and interrogation by the Central Intelligence Agency in a place that was neither within the United States nor under its complete and indefinite control could not have violated his rights under the Fifth Amendment or the *Miranda* rule because he had no such rights.

The factors to be considered in evaluating a speedy trial claim are set forth in the Supreme Court's decision in *Barker v. Wingo*. The most heavily contested of these factors is typically the second, the reason for the delay. In this case, all of the delay from the time the United States government first obtained control of the defendant has been for valid reasons. Detention for interrogation to gather intelligence against a massive terrorist threat does not merely serve *an* important public interest, it serves *the most* important public interest. The "tactical advantage"

motive that *Barker* refers to as making a delay invalid is advantage over an adversary at trial, not advantage over an enemy at war.

The necessary delay while preparing for trial by military commission is also delay for a valid purpose. This delay might be considered analogous to the delay incurred while prosecuting a defendant in another jurisdiction, as the Government suggests, or it might be considered analogous to ordinary, necessary pretrial delays in the same case prior to a change of venue. Either way, it is a valid purpose for speedy trial analysis.

There has been no violation in this case of Rule 5 of the Federal Rules of Criminal Procedure, and even if there had been, dismissal would not be an available remedy. The rule requires law enforcement officials to bring an arrestee before a magistrate promptly in an ordinary criminal case. It has no application to detention of a person by intelligence or defense officials for reasons other than criminal prosecution.

In the event that this court or the Court of Appeals should decide that the defendant cannot be tried before an Article III court, the dismissal should be without prejudice to trial by military commission. Dismissal under the Speedy Trial Clause is an "unsatisfactorily severe remedy" in the best of circumstances. There is no need to make it more severe and less satisfactory by precluding a prosecution where that clause does not apply.

ARGUMENT

I. The dual war/crime nature of the offenses makes this case unusual and many of the regular criminal precedents of limited relevance.

A. War and Crime.

The United States of America is at war. In February 1998, this war was declared on us, not by a sovereign nation, but by a rogue terrorist group that "called for the murder of any American, anywhere on earth . . . ." National Commission on Terrorist Attacks Upon the United States, The

9/11 Commission Report 47 (2004). Usama Bin Ladin, the leader of al Qaeda, further declared, " 'We do not have to differentiate between military or civilian. As far as we are concerned, they are all targets.' " *Id*. On August 7, 1998, two American embassies in East Africa were bombed. *See id*. at 115; *see* also *In re Terrorist Bombings*, 552 F.3d 177, 180 (2d Cir. 2008).

The embassy bombings which are the subject of this case, along with the subsequent attack of September 11, 2001, are both crimes and acts of war. The dual nature of the *actus reus* makes the terrorist cases different from an ordinary criminal case and renders many of the precedents cited by the defendant and *amicus* Center for Constitutional Rights of little relevance. As we address the specific points of contention, it is important to keep this general principle in mind.

Defendant states the question presented as "Can national security trump an indicted defendant's Constitutional Right to a Speedy Trial?" Memorandum of Law in Support of Defendant Ahmed Khalfan Ghailani's Motion to Dismiss Indictment Due to the Denial of His Constitutional Right to a Speedy Trial 1 (emphasis omitted) (cited below as "Deft. Memo"). But the question is not whether national security "trumps" the Constitution; the question is what impact the national security aspects of this case have on the application of constitutional requirements to its unusual facts.

Because the Constitution is not a suicide pact, *see Terminiello v. Chicago*, 337 U.S. 1, 37, 69 S. Ct. 894 (1949) (Jackson, J., dissenting); R. Posner, Not a Suicide Pact: The Constitution in a Time of National Emergency v (2006), the national security implications of a case can be an important factor in how constitutional principles are applied. This is particularly true where the controlling precedent does not establish a mechanical, hard-and-fast rule but instead establishes a more general standard that calls upon the court to balance multiple factors. *See* Posner, *supra*, at 33-34. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182 (1972), certainly falls in the latter category of rules.

"It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821). Chief Justice Marshall's wisdom remains valid today. Language from cases that involve crimes which are simply crimes and government actors whose sole function is law enforcement cannot be invoked blindly in a case where the crime is also part of a war against our country and many of the governmental actors are persons tasked with national defense, not law enforcement.

B. Aliens Abroad and the Bill of Rights.

At several points in his argument, the defendant seems to take as given that he had rights protected by the United States Constitution, other than the speedy trial right, during the time he was in CIA custody at a location not publicly disclosed but apparently outside the United States and not at Guantánamo. *See*, *e.g.*, Deft. Memo 34. However, the Supreme Court has held repeatedly that when the United States Government finds it necessary to use force against a noncitizen outside the boundaries of the United States, the Constitution has little or no application. The questions around such use of force are political and diplomatic, not constitutional and justiciable.

In *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936 (1950), the Supreme Court considered the Fifth Amendment Due Process claims of alien enemies tried by a military commission in foreign territory and held abroad pursuant to the judgment of that tribunal. Distinguishing other cases that had held constitutional protections applicable to aliens, the Court noted, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary the power to

act." *Id*. at 771. The Court then held that the Fifth Amendment was simply inapplicable to aliens detained abroad.

> "If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-rights Amendments, for none of them is limited by its express terms, territorially or as to persons. Such a construction would mean that during military occupation, irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trials as in the Fifth and Sixth Amendments.
>
> "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view." *Id*. at 784.

The Supreme Court relied on *Eisentrager*'s territorial view of the application of the Fifth Amendment to aliens in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 110 S. Ct. 1056 (1990). In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court held that the Suspension Clause would apply to Guantánamo Bay, but that decision relied heavily on the special status of Guantánamo as being under the complete and indefinite control of the United States, with no practical difference between it and our own territory. *Id*. at 2258-2259. Prior to his transfer to Guantánamo, then, Ghailani simply had no rights protected by the Fifth Amendment.

II. The military and intelligence agencies have no legal obligation to observe the *Miranda* requirements.

Defendant protests repeatedly that during his detention by intelligence and military authorities, he was not informed of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966) and that the questioning did not comply with his rights under that decision. *See* Deft. Memo 4-5, 33-34. The argument appears to simply assume that he *had* rights under

Miranda during this detention and then assert that the supposed violation of these rights weighs against the government in the *Barker* balance.

Even in the context of a police arrest, it is doubtful whether there is any "right to remain silent" that can be violated by interrogation alone, as distinguished from the introduction of the arrestee's answers against him in a subsequent criminal trial. In *Chavez v. Martinez*, 538 U.S. 760, 766, 123 S. Ct. 1994 (2003), the plurality opinion states unequivocally that the Fifth Amendment right is a trial right and cannot be violated by police interrogation alone. The Fifth Amendment right can only be violated when the defendant's statements are "admitted as testimony against him in a criminal case." *Id*. at 767. Justice Souter's concurring opinion is less clearly worded, but the two opinions together have been understood to stand for the conclusion "that a violation of the Self-Incrimination Clause does not arise until a privileged statement is introduced at some later criminal proceeding." *Id.* at 789 (Kennedy, J., concurring in part and dissenting in part); *see also Higazy v. Templeton*, 505 F.3d 161, 171-172 (2d Cir. 2007).

In its decision on companion cases to this one, the Second Circuit held that compliance with the *Miranda* rule may be a prerequisite to "admissibility in our domestic courts of custodial statements" in some circumstances. *In re Terrorist Bombings*, 552 F.3d 177, 203 (2008). However, the court also recognized that agents of the United States government engaged in gathering foreign intelligence have no independent legal obligation to comply with the rule.

> "Our recognition that *Miranda* might apply to foreign detainees held overseas should in no way impair the ability of the U.S. government to gather foreign intelligence. First, *Miranda*'s 'public safety' exception, *see New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984), would likely apply overseas with no less force than it does domestically. When exigent circumstances compel an un-warned interrogation in order to protect the public, *Miranda* would not impair the government's ability to obtain that information. Second, we emphasize that the *Miranda* framework governs only the admission of custodial statements at U.S. trials. Insofar as U.S. agents do not seek to introduce statements obtained through overseas custodial interrogations at U.S. trials, *Miranda*'s strictures would not apply." *Id*. at 203, n. 19.

The *Miranda* rule, by its terms, applies to "questioning initiated by law enforcement officers after a person has been taken into custody," *Miranda*, 384 U.S. at 444, and the custody the Court had in mind was "police custody." *See id.* at 461. Neither the Central Intelligence Agency nor the Department of Defense is a law enforcement agency. *See* 50 U.S.C. § 403-4a(d)(1); 18 U.S.C. § 1385. The *Miranda* rule does not apply when they are engaged in their tasks of gathering foreign intelligence or fighting the country's enemies. The present motion is distinguishable from *In re Terrorist Bombings* in two ways. First, the interview in that case was conducted by law enforcement agents: an FBI agent, a New York police detective, and an Assistant United States Attorney. *See* 552 F.3d at 181-182. Second, the Fifth Amendment issue being adjudicated in that case was "the admissibility of evidence at U.S. trials, not the conduct of U.S. agents investigating criminal activity" as such. *Id*. at 199. *A fortiori*, the conduct of agents who are not conducting a criminal investigation but gathering intelligence and fighting a war is one step further removed.

The motion presently before this court is not a motion to suppress custodial statements or their fruits as evidence. When and if such a motion is made, the court can consider whether the *Miranda* rule or the more basic rule against compelled statements requires exclusion. For the purpose of the present motion, it is only necessary to recognize that the Fifth Amendment itself and the prophylactic *Miranda* rule do not govern the conduct of military or intelligence agents questioning captured enemies for the purpose of obtaining intelligence to prevent another attack such as the embassy bombings or 9/11. Noncompliance with an inapplicable rule does not transform an otherwise valid delay into an invalid one for the purpose of speedy trial analysis.

III. The entire period of detention before presentment in this case counts as "valid" delay under *Barker v. Wingo*.

The Supreme Court recently summarized the jurisprudence of the Speedy Trial Clause in *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009):

> "The Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.' The speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative.' *Barker*, 407 U.S., at 522, 92 S. Ct. 2182 (quoting *Beavers v. Haubert*, 198 U.S. 77, 87, 25 S. Ct. 573, 49 L. Ed. 950 (1905)). It is 'consistent with delays and depend[ent] upon circumstances.' 407 U.S., at 522, 92 S. Ct. 2182 (internal quotation marks omitted). In *Barker*, the Court refused to 'quantif[y]' the right 'into a specified number of days or months' or to hinge the right on a defendant's explicit request for a speedy trial. *Id*., at 522-525, 92 S. Ct. 2182. Rejecting such 'inflexible approaches,' *Barker* established a 'balancing test, in which the conduct of both the prosecution and the defendant are weighed.' *Id*., at 529, 530, 92 S. Ct. 2182. '[S]ome of the factors' that courts should weigh include '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.' " *Id*.

Commonly in cases applying *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182 (1972), "[t]he flag all litigants seek to capture is the second factor, the reason for delay." *United States v. Loud Hawk*, 474 U.S. 302, 315, 106 S. Ct. 648 (1986). In *Loud Hawk*, once the reasons were found valid, little more was needed to find that the delays "do not justify the severe remedy of dismissing the indictment." *Id*. at 317. In the present case, the reason for the delay was an "important public interest[]," *cf. id*. at 315, orders of magnitude greater than the interest found valid in *Loud Hawk*.

A. Detention for Intelligence Gathering.

In the present case, defendant Ghailani was indicted in 1998, at a time when terrorism was being treated primarily as a law enforcement matter. Ghailani could not be prosecuted at that time for the obvious reason that he was still at large and remained so for another five and a half years. *See* Deft. Memo 1-2. In the interim, there occurred one of the most important, transformational events in modern history—the 9/11 attacks. A week later, Congress passed the

Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001). Al Qaeda's declared war against the United States and every one of its citizens was now seen by both of the elected branches as primarily a national defense matter.

In a world where a fanatical band of terrorists seeks to indiscriminately kill every American citizen it can, the Government would be derelict in its duty if it did not gather as much information as it could about this organization and its plans, thereby risking the kind of intelligence failure that led to 9/11. Ghailani complains that the Government made "an effort to turn Mr. Ghailani from a mere criminal defendant into a Government intelligence asset." Deft. Memo 9. No "turning" was required. If Ghailani is indeed a member of al Qaeda, then he became an intelligence asset by his own voluntary act.[3]

Remarkably, in the eight years since 9/11, al Qaeda has been unable to commit any more terrorist attacks against America on our own soil, even while other countries that are lower on al Qaeda's hit list have suffered attacks. The interrogation of detainees was part of that success. The details of the information gathered specifically from Ghailani are not publicly available. *See* Govt. Memo 59-60 (nearly all blacked out in the public version). However, we do know from publicly available records that the program was successful. *See*, *e.g.*, Finn, Warrick, & Tate, *How a Detainee Became An Asset*, Washington Post (Aug. 29, 2009) (describing obtaining important information from Khalid Sheik Mohammed).[4]

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3. Whether he is a member of al Qaeda is one of the issues to be tried in the present case, and much of the evidence on that question is not available to the public. For the purpose of this brief, we will assume that the information available to the Government and the Court is sufficient to establish by at least a preponderance of the evidence that Ghailani is indeed a member of al Qaeda.

4. http://www.washingtonpost.com/wp-dyn/content/article/2009/08/28/AR2009082803874.html.

In deciding whether pretrial appeals should be categorized as valid reasons for delay under the second *Barker* factor, *Loud Hawk* noted in general "the important public interests in appellate review." 474 U.S. at 315. In deciding this question in individual cases, appropriate considerations included "the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and—in some cases—the seriousness of the crime." *Id*. These considerations are instructive for the present case.

For the public interest in general, there simply is no public interest more important than the national defense. Analogous to the seriousness of the crime factor in *Loud Hawk*, the measures taken in this case were for the purpose of preventing a repeat of the most deadly attack in our history. On the importance of the issue, there can be no serious doubt that the interrogation program was a vital part of the effort to prevent that reoccurrence.

In his attempt to classify the delay here as illegitimate, defendant quotes the "tactical advantage" phrase from footnote 32 of *Barker*. Deft. Memo 31. The statement from *Barker* that footnote supports is this: "A deliberate attempt to delay the trial *in order* to hamper the defense should be weighed heavily against the government." 407 U.S. at 531 (emphasis added). It is the purpose, not the effect, of the delay that is critical for the second *Barker* factor. The effect is considered under the fourth factor. Quite obviously, during the Bush Administration the delay was *not* for the purpose of hampering the defense in a trial under the indictment pending in this court, because that Administration had no intention of bringing Ghailani before this court.

As the defendant effectively admits, the purpose was to gain a "tactical advantage" over al Qaeda in America's war with that monstrous organization:

> "In Mr. Ghailani's case, however, the Government's goal was to obtain, what it believed would be, 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; all without the Constitutional protections *Miranda* warnings, or their equivalents, would provide." Deft. Memo 34.

That is one reason why *Miranda* does not apply to intelligence interrogations, as the Second Circuit has already indicated. *See supra*, at 8. Gathering that information was not simply an important government interest, it was an imperative of transcendent importance. Defendant continues,

> "Undoubtably, if the Government had followed Constitutional and statutory protocol and promptly brought Mr. Ghailani to trial once he was arrested, there would have been virtually no possibility that they would have had the opportunity to immediately interrogate him, let alone interrogate him without counsel for over four years. This was a deliberate decision by the Government to gain the tactical advantage of having direct access to Mr. Ghailani in order to obtain information, unobstructed by counsel or a panoply of rights and Constitutionally mandated protections." Deft. Memo 34.

The references to "Constitutional and statutory protocol" and "Constitutionally mandated protections" assume disputed propositions. *See supra*, Parts I.B. & II. This passage concedes that an essential national security objective could not have been achieved if the Government had brought the defendant immediately to New York to face a civilian trial. This was not a "deliberate decision by the Government to gain a tactical advantage" in the sense that *Barker* uses those terms, because the purpose of obtaining the information was not for use in prosecution of the 1998 indictment.

B. Delay for Trial Preparation.

Much of the delay during the time that Ghailani was detained at Guantánamo was in preparation for trial before a military commission. There was nothing unusual in this pretrial delay for a complex case, and he consented to delay on this basis. Govt. Memo 23, 88.

The Government argues that this case is analogous to cases where a trial is delayed while another case is prosecuted in another jurisdiction. Govt. Memo 67-75. That analogy is valid and thoroughly explained in the Government's memo and need not be repeated here.

Another way to look at this case is that it is analogous to a change of venue. If there were a pretrial delay in a case while a case was pending in another District Court, both parties agreed that delay was in order due to the complexity of the case, and the venue was then changed to this court, would the defendant be able to claim that period of delay as a speedy trial violation? Of course not. The time spent resolving the novel issues regarding trial by military commission and in preparation of this complex case for that trial should be counted as valid periods of delay for the purpose of the second *Barker* factor.

In summary, the entire period of delay in this case is attributable to valid reasons for the purpose of the second factor of *Barker v. Wingo*. A speedy trial violation could be made out, if at all, only with a powerful showing of prejudice to defendant. In fact, *none* of the prejudice the defendant claims is attributable to the pendency of the criminal charges, as the Government has explained. Govt. Memo 93-118.

IV. There has been no violation of Rule 5, and dismissal is not a remedy in any event.

The bases of the defendant's motion are "the Speedy Trial Clause of the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and Federal Rule of Criminal Procedure 48(b)(3)." Motion to Dismiss Indictment Due to Denial of Defendant's Constitutional Right to a Speedy Trial (Nov. 16, 2009). Even so, *amicus* Center for Constitutional Rights (CCR) argues that there has been a violation of Rule 5 of the Federal Rules of Criminal Procedure and that dismissal is the remedy. CCR Brief 6-10. A ground of decision raised only by an *amicus* can

be and usually is simply ignored by the court.[5] If the court does choose to address the argument, it should be found to be without merit.

Rule 1(a)(1) of the Federal Rules of Criminal Procedure addresses the scope of the rules. "These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States." Rule 1(a)(2) says that the rules can apply to proceedings before state officers only when they expressly so state. Nothing in the rules purports to govern the Central Intelligence Agency or the Department of Defense. Rule 5(a) "pulled the several statutory presentment provisions together in one place," *Corley v. United States*, 129 S. Ct. 1558, 1562 (2009), provisions that had previously been interpreted in *McNabb v. United States*, 318 U.S. 332, 63 S. Ct. 608 (1943). Those provisions were addressed to law enforcement officers, prescribing their duties in the course of criminal prosecutions. There is no reason to believe that Rule 5 has any application to the capture and detention of an alien enemy in wartime merely because that person has also been indicted, when the capture and detention does not depend on the indictment and is not for the purpose of trial under the indictment.

Even if Rule 5 applied, however, its prompt presentment requirement is qualified by the limitation "unless a statute provides otherwise." Statutes provide otherwise.

The detention and interrogation of Ghailani by the CIA for intelligence purposes falls well within the Authorization for the Use of Military Force. *See* Govt. Memo 54-56. Any suggestion that a rule of criminal procedure could detract from a necessary and proper power of the

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5. This issue comes up most often in the Supreme Court, where the filing of *amicus* briefs is the norm in cases briefed on the merits. *See* E. Gressman *et al*., Supreme Court Practice 740 (9th ed. 2007). The leading treatise notes, "On rare occasions, the Court will decide cases on a ground 'raised only in an *amicus* brief.' " *Id*. at 741 (quoting *Teague v. Lane*, 489 U.S. 288, 300, 109 S. Ct. 1060 (1989)). The usual practice, though, is to decline to decide such issues. *See*, *e.g.*, *Kamen v. Kemper Fin. Servs.* 500 U.S. 90, 97, n. 4, 111 S. Ct. 1711 (1991).

commander-in-chief, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 518, 124 S. Ct. 2633 (2004) (plurality opinion), acting pursuant to an act of Congress can be summarily dismissed. The pretrial detention provision of the Uniform Code of Military Justice that *amicus* CCR relies on, CCR Brief 6, n. 5, is inapplicable to the CIA detention, which was not for the purpose of trial.

On December 30, 2005, before the Guantánamo portion of Ghailani's detention began, Congress specifically addressed detention of persons at that facility. It directed the Secretary of Defense to develop procedures for Combatant Status Review Tribunals and submit them to Congress. Detainee Treatment Act of 2005, Pub. L. 109-148, §1005, 119 Stat. 2740-2745. That procedure was followed in Ghailani's case. *See* Govt. Memo 20-21.

Amicus CCR maintains that the "unless a statute provides otherwise" clause is not relevant because it was enacted with a particular statute in mind. CCR Brief 5-6, n. 5. However, the clause on its face is not limited to a particular statute. It uses the indefinite article, "a statute." It therefore applies to any statute, not just the one that prompted its enactment. Even if it did not, the later, specific statute would control over the earlier, general rule.

Finally, even if there were a violation of Rule 5, the remedy would be exclusion, not dismissal. In rejecting a claim that Congress had abolished the exclusionary remedy, the Supreme Court said, "if there is no *McNabb-Mallory* [rule of exclusion] there is no apparent remedy for delay in presentment." *Corley*, 129 S. Ct. at 1570. This statement strongly implies that there is no dismissal remedy, in accordance with the weight of authority on the point. *See United States v. Garcia-Echaverria*, 374 F.3d 440, 453 (6th Cir. 2004). The only authority that *amicus* CCR can muster for a dismissal remedy is two dated district court decisions, CCR Brief 9, and their authority is doubtful after *Corley*. Further, those decisions deal with "outrageous conduct," and there has been none here. Ghailani's detention in both the CIA and DoD phases was a proper exercise of executive power pursuant to legislative authorization in a time of war.

For all of these reasons, *amicus* CCR's claim that the indictment should be dismissed for a supposed violation of Rule 5 is without merit.

V. If dismissal is necessary, it should be without prejudice to resumption of the military commission proceedings.

Defendant Ghailani contends that he is entitled to the remedy of dismissal with prejudice. Deft. Memo 73. *Amicus* CJLF does not believe that he is, for the reasons stated in this brief and the Government's memorandum. However, given that "[t]he speedy trial right is 'amorphous,' 'slippery,' and 'necessarily relative,' " *Vermont v. Brillon*, 129 S. Ct. 1283, 1290 (2009), we cannot altogether dismiss the possibility that this court or the Court of Appeals might agree with the defendant. In that event, the court would have to address the question of "prejudice" as to what?[6]

Few people, if any, know more about the problems of trying terrorists in civilian courts than Michael Mukasey, a former judge of this court and former Attorney General of the United States. He recently wrote about the numerous problems of such trials and argued that the transfer was a mistake. *See* Mukasey, *Civilian Courts Are No Place to Try Terrorists*, Wall Street Journal (Oct. 19, 2009). Among the problems he noted in that article is the speedy trial issue presently before this court. The present Administration disagrees, and its decision to transfer this case for civilian prosecution is based on the belief that justice can be achieved in the terrorism cases in the Article III courts. See U.S. Dept. of Justice, Press Release, *Accused East African Bomber Held at Guantánamo Bay to Be Presented in U.S. Federal Court* (May 21, 2009).[7]

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6. Although this specific issue has not been raised by the parties, it is fairly included in the question presented by defendant's motion. By requesting the remedy of dismissal with prejudice, defendant has raised the question of what "prejudice" means in the unusual context of this case.

7. http://www.justice.gov/opn/pr/2009/May/09-ag-496.html.

If the present motion is found to have merit and require dismissal, that would establish that Mr. Mukasey was correct, and the case should never have been transferred here in the first place. In that event, the defendant should not receive the additional windfall of precluding the trial by military commission originally planned for him.

Dismissal is an "unsatisfactorily severe remedy," *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182 (1972), in the best of circumstances. There is no need to make it even more severe and even less satisfactory than the law requires. To let a conspirator off scot-free for the murder of hundreds of people would be a miscarriage of justice of cataclysmic proportions. No precedent and no statute requires such a result. If Ghailani cannot be tried in this court, he should be sent back to the military.

CONCLUSION

The defendant's motion should be denied. If it is granted, it should be granted without prejudice to trial by military commission.

December, 2009

Respectfully submitted,

s/
KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation