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The Speedy Trial Right and National Security Detentions: Critical Comments on *United States v. Ghailani*

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Abstract

This article reviews the decision of the United States Court of Appeals for the Second Circuit to uphold the conviction and sentence of Ahmed Khalfan Ghailani, the sole Guantánamo detainee to have been transferred to the United States for trial. Ghailani was captured nearly five years before his arraignment and argued that his constitutional right to a speedy trial was violated by the delay. The article contends that, in rejecting Ghailani's argument, the Second Circuit distorted the doctrinal framework governing speedy trial claims and mischaracterized the interests that the speedy trial right is intended to protect. The article also explores the implications of the Second Circuit's decision for cases in which the government asserts a national security interest in postponing a defendant's prosecution while continuing to hold the defendant in custody.

1. Introduction

Ahmed Khalfan Ghailani's trial has had political reverberations that, at least in the short term, have drowned out discussion on the doctrinal significance of this case. Charged with the 1998 bombings of two United States embassies, Ghailani, a Tanzanian national, avoided capture until July 2004. After nearly five years detention — first in Central Intelligence Agency (CIA) custody and then under military custody at Guantánamo — he was arraigned in a United States federal district court in June 2009. Ghailani is the sole Guantánamo detainee transferred to the United States for trial. His case thus served to test whether the Obama administration could make good on its promise to close

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Guantánamo and prosecute some of the high profile detainees in United States federal courts.[1]

In November 2010, a jury acquitted Ghailani of 284 murder and conspiracy charges and convicted him for one count of conspiracy to destroy United States government buildings and property.[2] The verdict owes in part to District Judge Lewis Kaplan's laudable, but doctrinally unremarkable, decision to exclude the testimony of a significant government witness, whose identity the government had obtained by interrogating Ghailani while he was in CIA custody.[3] Some heralded the verdict and Judge Kaplan's ruling as proof that United States courts are adequate forums for prosecuting foreign nationals implicated in the war on terror.[4] In the short term, however, the verdict has strengthened American political resistance to transferring Guantánamo detainees to the United States for trial.[5] The current federal budget prevents any new transfers and it appears that Ghailani's case may be the last of its kind for some time.[6]

However, whatever the long-term political ramifications may be, the *Ghailani* case involved one ruling that may significantly influence constitutional doctrine in the United States and abroad. In both the District Court and on appeal to the United States Court of Appeals for the Second Circuit, Ghailani raised a novel speedy trial claim, which is certain to recur in future national security cases. The constitutional right to a speedy trial, Ghailani contended, was violated by the nearly five-year delay between his capture and his arraignment.[7] Both courts rejected the claim and held that neither the length of the

1 See, for example, C. Savage, 'Terror Verdict Tests Obama's Strategy on Trials', *The New York Times*, 18 November 2010, available online at http://www.nytimes.com/2010/11/19/nyregion/19detainees.html?pagewanted=all (visited 11 February 2014). In addition to Ghailani, the Obama administration planned to transfer five detainees for trial in the United States District Court for the Southern District of New York. See United States Department of Justice et al., *Final Report: Guantanamo Review Task Force*, 22 January 2010, available online at http://www.justice.gov/ag/guantanamo review final report.pdf (visited 17 April 2014), at 11 12.

2 See B. Weiser, 'Detainee Acquitted on Most Counts in '98 Bombings', *The New York Times*, 17 November 2010, available online at http://www.nytimes.com/2010/11/18/nyregion/18ghailani.html? r=0 (visited 11 February 2014).

3 See *United States v. Ghailani*, 743 F. Supp. 2d 261 (S.D.N.Y. 2010) (hereinafter '*Ghailani*, 743 F. Supp. 2d').

4 See, for example, D. Cole, 'A Fair Trial, Without Torture's Taint', *The New York Times*, 5 February 2013, available online at http://www.nytimes.com/roomfordebate/2010/11/18/prosecuting terrorists in federal court/a fair trial without tortures taint (visited 11 February 2014).

5 See C. Savage, 'In a Reversal, Military Trials for 9/11 Case', *The New York Times*, 4 April 2011, available online at www.nytimes.com/2011/04/05/us/05gitmo.html (visited 10 February 2014).

6 See Consolidated Appropriations Act of 2014, § 528. It is worth noting, however, that the Obama administration has continued to use the United States District Court for the Southern District of New York as a forum for prosecuting terrorism cases involving defendants who were not subjected to long periods of detention following their capture. See, for example, B. Weiser, 'Jurors Convict Abu Ghaith, Bin Laden Son in Law, in Terror Case', *The New York Times*, 26 March 2014, available online at http://www.nytimes.com/2014/03/27/nyregion/bin ladens son in law is convicted in terror trial.html (visited 17 April 2014).

7 See *United States v. Ghailani*, 733 F 3d 29 (2d Cir. 2013) (hereinafter '*Ghailani*, 733 F 3d'); *United States v. Ghailani*, 751 F. Supp.2d 515 (S.D.N.Y. 2010) (hereinafter '*Ghailani*, 751 F. Supp.2d').

delay nor the abuse Ghailani suffered during the course of that delay were sufficient to establish a constitutional violation.

This critical commentary examines the Second Circuit's speedy trial ruling in *United States v. Ghailani*. This article argues that the reasoning of the Court of Appeals distorts the doctrinal framework governing constitutional speedy trial claims and mischaracterizes the interests that the right is meant to protect. Notwithstanding the Court's assertion to the contrary, its analysis renders the speedy trial right ineffective to protect defendants whose trials are postponed in the name of national security.

2. Factual and Procedural Background

In August 1998, the United States embassies in Dar es Salaam and Nairobi were bombed simultaneously, resulting in 224 deaths and several thousand injuries. Based on their alleged roles in the bombings, the United States filed an indictment against Ghailani and several other defendants in December 1998. This indictment charged Ghailani with substantive offenses as well as 'a broad conspiracy by Usama Bin Laden and others to wage a campaign of terror against the United States'.[8] Several of Ghailani's alleged co-conspirators were captured shortly after the bombings and were tried and convicted in the United States District Court for the Southern District of New York in early 2001.[9] Ghailani, however, evaded capture for six years, during which time he allegedly remained an active member of Al Qaeda.[10]

Meanwhile, following the attacks on 11 September 2001, the Bush administration established a CIA program to detain and interrogate individuals suspected of possessing valuable foreign intelligence.[11] President Bush also issued an executive order authorizing the detention and trial by military tribunal of individuals designated as 'enemy alien combatants'.[12] In 2006, Congress authorized the President to establish military commissions to try 'alien unprivileged enemy belligerents' for violations of the laws of war and other offenses.[13]

Ghailani was captured in July 2004 and held in CIA custody outside the United States for approximately two years. During this period, the CIA used so-called 'enhanced' interrogation techniques — including waterboarding,

8 *Ibid.*, at 521.

9 See *Ghailani*, 733 F3d, at 38.

10 *Ibid*. The government contends that, after the bombings, Ghailani's responsibilities for Al Qaeda included serving as Bin Laden's cook and bodyguard and working as a document forger. See *Ghailani*, 751 F. Supp.2d, at 521. The government did not seek to introduce this information at Ghailani's trial. See B. Weiser, 'Conspirator's Path From Poverty as a Boy in Zanzibar to bin Laden's Side', *The New York Times*, 23 January 2011, available online at www.nytimes.com/2011/01/24/nyregion/24ghailani.html?pagewanted=all (visited 11 February 2014).

11 *Ghailani*, 751 F. Supp.2d, at 521 522.

12 *Ibid.*, at 522. See Military Order, Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism (2001), § 4.

13 Military Commissions Act of 2006, § 948b(a); see also *Ghailani*, 751 F. Supp.2d, at 522.

facial and abdominal slaps, prolonged diapering, extended sleep deprivation (for over 72 hours), stress positions, and cramped confinement — on detainees who, like Ghailani, were thought to hold high value information.[14] According to the CIA's Office of Medical Services, these techniques were 'designed to psychologically "dislocate" the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist [the United States government's] efforts to obtain critical intelligence'.[15] The District Court's findings regarding the details of Ghailani's treatment while under CIA custody are classified. The Court publicly concluded, however, that 'the CIA Program was effective in obtaining useful intelligence from Ghailani throughout his time in CIA custody'.[16]

In September 2006, Ghailani was transferred into military custody at Guantánamo.[17] He received a hearing on his designation as an enemy combatant in March 2007 before a Combatant Status Review Tribunal. The rules provided Ghailani with a non-lawyer representative but forbade the representative from informing him of the content of classified material. In February or March 2007, the Department of Defense began investigating whether Ghailani could be tried before a military commission for violating the laws of war based on his alleged role in the bombings of the embassies.[18] In March 2008, after preparing a charge sheet and prosecution memorandum, the Department of Defense brought charges against Ghailani. He was finally arraigned before a military commission in October 2008. Several months of pretrial motion practice followed, including a May 2009 motion wherein Ghailani requested a speedy trial before the military commission.[19]

After taking office in January 2009, President Obama suspended the Guantánamo military commissions.[20] In May 2009, the Obama administration announced that it would transfer Ghailani for prosecution to the District Court for the Southern District of New York based on the 1998 indictment.

14 *Ghailani*, 733 F. Supp 2d, at 523.

15 *Ghailani*, 751 F.Supp 2d, at 523, quoting draft Office of Medical Services Guidelines, at 1.

16 *Ibid.* The District Court also found that 'the period during which he was subjected to enhanced interrogation techniques and other treatment that he has recounted in an affidavit that re mains classified, was not of sufficient length to be material' to Ghailani's speedy trial claim. However, consistent with the Second Circuit's analysis, the District Court further held that Ghailani's treatment while under CIA custody was irrelevant to his speedy trial claim because there was 'no causal connection' between that treatment and his trial delay. See *ibid.*, at 535. The District Court's analysis is subject to the same criticisms offered below with respect to the Second Circuit's analysis.

17 See *Ghailani*, 751 F. Supp 2d, at 525.

18 *Ibid.*

19 *Ibid.*, at 526. Throughout this period of prosecution by a military commission, Ghailani filed a number of habeas corpus petitions and other motions for relief in federal courts. None of these petitions included a speedy trial claim. See *ibid.* In March 2009, two months before he was transferred for trial in civilian court, Ghailani filed a habeas corpus petition raising a speedy trial claim in the District Court for the Southern District of New York. See *ibid.*, at 525 526.

20 *Ibid.* See Executive Order No. 13, 492, 74 Fed. Reg. 4897, 4899, 22 January 2009, § 7.

The military commission charges were dismissed without prejudice.[21] Ghailani was brought to the United States and he was arraigned on 9 June 2009.

Ghailani moved to dismiss the indictment on substantive due process grounds based on the torture he allegedly endured while under CIA custody.[22] The District Court disposed of this claim with relative ease. Specifically, Judge Kaplan held that to the extent that the CIA's treatment of Ghailani amounted to a substantive due process violation, dismissal of the indictment was inappropriate because Ghailani failed to allege any causal connection between his torture and 'the deprivation of life or liberty threatened by the prosecution'.[23]

In addition, Ghailani moved to dismiss the indictment on the ground that his constitutional right to a speedy trial was violated by the delay between his capture and arraignment.[24] In response, the government acknowledged that it intentionally delayed Ghailani's prosecution — first to place him in CIA custody for the purpose of obtaining intelligence and then to try him before a military commission in Guantánamo.[25] However, the District Court denied Ghailani's speedy trial motion and the case proceeded to trial.

In November 2010, the jury acquitted Ghailani of 284 conspiracy and murder counts and convicted him of one count of conspiracy to destroy government buildings and property.[26] The District Court sentenced him to life imprisonment.[27] Ghailani appealed his conviction and sentence on three grounds, two of which are not central to this article.[28] Ghailani's principal argument, however, was that the District Court abused its discretion in rejecting his speedy trial claim.[29]

3. The District Court's Speedy Trial Analysis

Ghailani's speedy trial claim highlights a significant underdevelopment in the law governing situations in which the government delays a trial to detain a defendant for national security reasons. Ghailani's claim does not implicate the

21 See *Ghailani*, 751 F. Supp 2d, at 526.
22 See *ibid.*, at 502, 503.
23 *Ibid.*
24 *Ibid.*
25 See *ibid.*
26 See Weiser, *supra* note 2.
27 See *Ghailani*, 733 F3d, at 54.
28 First, Ghailani challenged the District Court's decision to give the jury a 'conscious avoidance' instruction, which permitted the jury to find that Ghailani possessed the requisite *mens rea* for the conspiracy charge even if he deliberately avoided learning whether his associates were planning to attack an American embassy. The Second Circuit properly rejected this argument, concluding that the government adduced evidence sufficient for a rational juror to conclude that he was involved in a plot to attack American targets. See *ibid.* Second, Ghailani argued that the District Court abused its discretion by sentencing him to life imprisonment. The Second Circuit rejected this claim, holding that Ghailani's sentence was both procedurally and substantively reasonable. See *ibid.*, at 55.
29 See *ibid.*, at 36.

detailed statutory framework that governs most speedy trial claims litigated in United States federal courts. Most federal speedy trial claims are based on the Speedy Trial Act, which is triggered when a defendant makes his or her first court appearance.[30] Ghailani's claim, however, is predicated on the delay that occurred between his capture in July 2004 and his arraignment in June 2009. Accordingly, the claim is based exclusively on the constitutional speedy trial right contained in the Sixth Amendment of the United States Constitution, which is triggered when the government files an indictment against the defendant.[31]

Ghailani's claim was, therefore, subject to the notoriously indeterminate doctrinal framework that applies to speedy trial claims based on the Sixth Amendment.[32] The Supreme Court has struggled to craft a tractable definition of the Sixth Amendment's speedy trial guarantee and has repeatedly characterized the speedy trial right as '"amorphous", "slippery", and "necessarily relative"'.[33] Accordingly, the Court has declined to interpret the Sixth Amendment to impose any specific obligations on the government with respect to when it must bring a criminal defendant to trial. Instead, in *Barker v. Wingo*, it established a four-factor balancing test expressly designed to allow lower courts to evaluate constitutional speedy trial claims 'on an ad hoc basis'.[34]

Under *Barker*, in deciding whether a defendant's constitutional speedy trial right was violated, courts are required to consider: first, the length of the delay before the defendant was brought to trial; second, the reason for the delay; third, whether the defendant asserted his speedy trial right in advance of the trial; and fourth, whether the delay resulted in prejudice to the defendant.[35] The Supreme Court stressed, however, that none of these factors in *Barker* should be treated as 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial', and that the factors 'must be considered together with such other circumstances as may be relevant'.[36] The Court's speedy trial jurisprudence thus leaves courts with ample discretion to determine whether a defendant merits relief under the Sixth Amendment.

The Second Circuit used that discretion to reject Ghailani's speedy trial claim.[37] As a political matter, this outcome is unsurprising. In an article

30 See 18 USC, § 3161(c)(1). For the observation that the Speedy Trial Act 'has largely supplanted the Sixth Amendment's Speedy Trial Clause' as the basis for speedy trial litigation, see R.J. Allen, J.L. Hoffman, D.A. Livingston, W.J. Stuntz, and A.D. Leipold, *Comprehensive Criminal Procedure* (3rd edn., Wolters Kluwer Law and Business, 2011), at 1065.

31 *United States v. Marion*, 404 U.S. 307, 313 (1971).

32 The Sixth Amendment to the US Constitution provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial'.

33 *Vermont v. Brillon*, 556 U.S. 81, 89 (2009); quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (here inafter '*Barker*, 407 U.S.').

34 *Barker*, 407 U.S., at 530.

35 See *ibid.*

36 *Barker*, 407 U.S., at 533.

37 Strictly speaking, the discretion to balance the factors in *Barker* lies in the first instance the district court and the appellate court reviews the district court's decision for abuse of discre tion. However, as the Second Circuit observed, 'in evaluating a defendant's rights under the

defending the concurrent use of both military commissions and civilian courts to prosecute terrorism suspects, Aziz Huq recognized that jurisdictional competition between these forums could incentivize courts to tailor their procedural rules to the exigencies of the national security context.[38] The test in *Barker* lends itself to such tailoring and gives courts the discretion to foreclose speedy trial claims threatening to the judiciary's institutional interests. As the first — and, thus far, only — case in which a Guantánamo detainee has been prosecuted in a United States federal court, the Second Circuit faced considerable institutional pressure to reject Ghailani's speedy trial claim. A ruling in Ghailani's favour would have precluded the Obama administration from transferring other high profile Guantánamo detainees for civilian trial where, like Khalid Sheik Mohamed, they had been indicted prior to capture. Moreover, if Ghailani's constitutional claim had prevailed, the Court would have been required to order that his conviction be overturned and that the indictment be dismissed with prejudice.[39] This remedy would have required the Obama administration to make a politically perilous choice between releazing Ghailani and transferring him back to military detention notwithstanding the Court's decision.[40] Given these stakes, it is unsurprising that the Second Circuit applied the standard in *Barker* to hold that Ghailani's rights under the Sixth Amendment had not been violated. However, while the doctrinal framework governing constitutional speedy trial claims is highly malleable, the Second Circuit's reasoning nevertheless distorts the doctrine in significant ways.

The Court correctly held that the third factor in *Barker* — whether the defendant invoked his speedy trial right — did not count against Ghailani's claim.[41] Ghailani did not invoke his constitutional speedy trial right until March 2009.[42] There was no evidence, however, that Ghailani opportunistically refrained from invoking the right in the hope of having his indictment dismissed. The Supreme Court emphasized in *Barker* that a 'defendant has no duty to bring himself to trial', and accordingly, a defendant in Ghailani's

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Speedy Trial Clause, a district court is in no better a position than the reviewing court to under take the required balancing'. *United States v. Ghailani*, 733 F.3d, at 44. Accordingly, the Second Circuit essentially engaged in *de novo* review of how the district court balanced these factors, while according deference to the factual determinations that formed the basis of the district court's decision.

38 See A.Z. Huq, 'Forum Choice for Terrorism Suspects', 61 *Duke Law Journal* (2012) 1415, at 1483 1484.

39 See *Strunk v. United States*, 412 U.S. 434 (1973).

40 In an opinion ordering the exclusion of Hussein Abebe's testimony, District Judge Kaplan opined that, regardless of the verdict, the government could detain Ghailani as an enemy combatant as long as hostilities continue between the United States and Al Qaeda. See *Ghailani*, 743 F. Supp. 2d, at 288; *United States v. Ghailani*, S10 98 CRIM 1023 LAK, 2010 WL 4006381 (S.D.N.Y. 6 October 2010).

41 Accordingly, as the District Court observed in *Ghailani*, a defendant's failure to demand a speedy trial is generally irrelevant to whether his or her constitutional right has been violated unless the defendant has been 'opportunistic' in invoking the right. See *Ghailani*, 751 F. Supp 2d, at 529.

42 See the commentary contained in *supra* note 19.

position should not be punished for failing to assert his speedy trial right earlier in the course of his detention.[43] The Second Circuit's application of the remaining factors in *Barker*, however, is problematic.

With respect to the first factor in *Barker*, the Second Circuit held that the delay between Ghailani's transfer to Guantánamo for trial before a military commission — in September 2006 — and his arraignment in a federal district court — in June 2009 — was long enough to trigger analysis under the remaining three factors. The Court's application of this factor is flawed in two respects. First, when analysing the length of delay for Ghailani's trial, the Court discounted the period during which Ghailani was in CIA custody because that part of the delay 'was caused by national security concerns'.[44] The Court assumed that, because (in its view) the government was justified in detaining Ghailani for national security reasons, this period of detention is irrelevant under the first factor in *Barker*. By making this assumption, the Court conflated the first factor, which pertains to the *existence* of a delay, with the second factor in *Barker*, which concerns whether the government had an adequate *reason* for the delay. In order to maintain an analytical distinction between these concepts, the Second Circuit should have recognized that the entire period of delay between Ghailani's capture and his arraignment was relevant under the first factor.

Second, the Court mistakenly treated the factor on the length of delay exclusively as a threshold question, which, if resolved in the defendant's favour, requires balancing of the three remaining factors in *Barker*. In *Doggett v. United States*, however, the Supreme Court stressed this factor involves a twofold inquiry. As a threshold matter, a defendant must establish 'that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay'.[45] Once this threshold has been met, the court should consider, 'as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim'.[46]

In *Ghailani*, the Court faithfully described this two stage process when summarizing the test in *Barker*.[47] When it applied the test, however, the Court did not treat the unusual length of the delay as a *factor* that, on balance, weighed in favour of Ghailani's constitutional claim. Instead, the Court merely concluded that the length of delay 'was long enough to trigger the *Barker* analysis', and then proceeded to balance the remaining three factors in *Barker*.[48] In other words, the Court properly analysed whether the length of delay was sufficient for his speedy trial claim to merit further scrutiny. However, it failed to consider the delay 'as one factor among several' relevant to whether a Sixth

43 *Barker*, 407 U.S., at 527.
44 *Ghailani*, 733 F.3d, at 46.
45 *Doggett v. United States*, 505 U.S. 647, 652 (1992) (hereinafter '*Doggett*, 505 U.S.').
46 *Ibid.*
47 See *Ghailani*, 733 F3d, at 43.
48 See *ibid.*, at 46.

Amendment violation had occurred.[49] Granted, if the Court had properly balanced the length of Ghailani's delay alongside the other factors, the period of five years would not have been sufficient in itself to establish a speedy trial violation. For example, the delay at issue in *Barker* exceeded five years and the Supreme Court nonetheless rejected the speedy trial claim in light of the defendant's own culpability in bringing about the delay.[50] Nevertheless, a proper consideration of this factor would have revealed Ghailani's speedy trial claim to be much more compelling than the Court deemed so.

The Court's analysis of the second factor in *Barker* — the reason for the delay — is still more troubling. In *Barker*, the Supreme Court stressed that this factor requires judges to consider the government's culpability for a trial delay.[51] A 'deliberate attempt to delay' weighs heavily against the government, a 'neutral' reason for delay counts against the government's case to a lesser degree, and a 'valid' reason for delay falls in its favour.[52] In *Ghailani*, the Second Circuit held that the government did not deliberately delay the trial and its culpability for the delay differed with respect to two different time periods. For the period of time when Ghailani was detained in Guantánamo, the Court held that the government had a neutral reason for delaying Ghailani's trial.[53] The Court's analysis with respect to this issue, however, is confusing to say the least. Although Ghailani was transferred to Guantánamo in September 2006, the government did not provide him with a hearing before the Combatant Status Review Tribunal until March 2007, and did not bring charges before a military commission until March 2008.[54] The Second Circuit, however, mistakenly analysed Ghailani's entire tenure at Guantánamo, including the first year and a half, as a period during which the government was 'preparing to prosecute Ghailani before the military commission'.[55] The Court held that this delay weighed against the government because it was the product of its own choice to try Ghailani before a military commission.[56] Puzzlingly, however, the Court also stated that '[s]ome significant period of delay' while the government was preparing to try Ghailani before a military commission was 'reasonable', and that 'the pertinent factors' bearing upon

49 *Doggett*, 505 U.S., at 652.

50 See *Barker*, 407 U.S., at 533 537. Indeed, the Supreme Court approved a 90 month delay between a defendant's trial and indictment that was caused in part by the government having filed several interlocutory appeals. See *United States v. Loud Hawk*, 474 U.S. 302 (1986), at 312 313 (hereinafter '*Loud Hawk*').

51 See *Barker*, 407 U.S., at 531.

52 *Ibid*.

53 See *Ghailani*, 733 F3d, at 49.

54 See *ibid.*, at 39 40

55 *Ibid.*, at 49. The District Court did not make the same error. Instead District Judge Kaplan recognized that the only justification the government offered for failing to proceed with Ghailani's trial between September 2006 and March 2007 was its interest in preventing Ghailani from engaging in hostile acts towards the United States. Judge Kaplan rejected this justification, reasoning that the government could have accomplished its goal by incarcerating Ghailani while he awaited criminal trial in the United States. See *Ghailani*, 751 F. Supp.2d, at 536 537.

56 *Ghailani*, 733 F.3d, at 50.

this period of delay 'sufficiently favor the government'.[57] Given these errors of internal logic, extraction of any clear doctrinal principles from the analysis by the Second Circuit is difficult.

By contrast, the Second Circuit's analysis of the two-year period when Ghailani was held in CIA custody is clear, but disturbing. For this period, the Court held that there was a valid reason for the delay, namely, national security.[58] With the exception of the District Court's ruling on the claim of a speedy trial in *Ghailani*, the Second Circuit appears to have been the first United States court to confront a speedy trial claim based on the government's decision to delay a criminal trial while keeping a defendant in extended detention for interrogation purposes. In addressing the government's rationale for holding Ghailani in CIA custody, the Court held that it was obligated to 'accord… deference' to the Executive's decision-making in the national security context. In light of this deference, the Second Circuit accepted the CIA's determination that: first, Ghailani could provide valuable information concerning Al Qaeda's operations; and second, the government could not obtain this information while simultaneously prosecuting Ghailani in a federal court.

With respect to his time in CIA custody, Ghailani argued that the government had to bear the cost of foregoing a criminal conviction where, instead of bringing him to trial, it chose to hold him for the purpose of extracting intelligence.[59] In rejecting this argument, the Second Circuit adopted a reading of *Barker* that is both novel and ill reasoned. In *Barker*, the Supreme Court excused a trial delay that could be characterized as *intrinsic* to the criminal adjudication process. Specifically, the government delayed the defendant's trial while it sought to prosecute a potential witness in order to secure his testimony against the defendant.[60] Thus, the government chose to delay the defendant's trial in order to better ensure that it had the evidence necessary to obtain a conviction. In *Ghailani*, however, the Second Circuit applies the factor in *Barker* on the reason for the delay to excuse one that the government chose to create for a reason *extrinsic* to the criminal adjudication process. Specifically, the government did not delay Ghailani's trial in order to better ensure his conviction, but to pursue the alternative goal of using Ghailani to obtain intelligence information.

None of the precedents the Second Circuit cites for this reading of *Barker* actually supports the conclusion that courts may excuse delays for reasons extrinsic to the criminal adjudication process.[61] Moreover, in *Doggett*, the

57 *Ibid.*, at 49.

58 *Ibid.*, at 46–47.

59 See Ghailani Opening Brief (redacted), 17 January 2012, available online at http://www.lawfareblog.com/wp-content/uploads/2012/05/2012-05-31-Ghailani-Brief-2nd-Cir.pdf (visited 11 February 2014), at 55–57 (hereinafter 'Ghailani Opening Brief').

60 See *Barker v. Wingo*, 407 U.S. 514 (1972), at 517–518.

61 All but one of the cases the Second Circuit cites in support of its conclusion concerning trial delays that the government caused in order to prosecute a criminal defendant more effectively. See *Ghailani*, 733 F.3d, at 46–47. These include the type of delay at issue in *Barker* as well as delays in which the government filed an interlocutory appeal challenging a district court's

Supreme Court characterized the second factor in *Barker* as an inquiry into 'whether the government or the criminal defendant is more to blame for that delay'.[62] This gloss on *Barker* suggests that, if the government deliberately chooses to delay a trial to pursue a goal that is unrelated to the defendant's conviction, the strength of the defendant's speedy trial claim does not depend on the merit of that goal. Thus, as Ghailani's counsel argued, *Barker* does not permit the government to stop the clock on a criminal prosecution in order to detain and extract intelligence from the accused. Regardless whether the government's national security interest is compelling or whether its intelligence gathering methods are appropriate, it must accept constitutional cost of any trial delay it creates in order to pursue that interest.

Finally, the Second Circuit's analysis of the fourth factor in *Barker* — whether the defendant was prejudiced by the delay — is at stark odds with its conclusion that the government's national security objectives are relevant to the strength of a defendant's speedy trial claim. The Supreme Court has held that the ways in which a defendant may be prejudiced include being subjected to 'oppressive pretrial incarceration'.[63] Drawing upon this precedent, Ghailani argued that he was prejudiced by the physical and psychological harm that he suffered as a result of the 'enhanced interrogation techniques' applied on him during CIA custody.[64] In addressing this argument, the Second Circuit held that any harm Ghailani suffered while in CIA custody did not count as prejudice under *Barker* because it was 'not incarceration for the purpose of awaiting trial'.[65] The Second Circuit observed that, in cases where a defendant is being incarcerated for a separate crime during a trial delay, courts have held that the delay did not *result* in the defendant's pretrial incarceration. Analogously, the court reasoned, 'Ghailani would have been detained by the CIA for the purpose of obtaining information whether or not he was awaiting trial, and the conditions of his detention were a product of the CIA's investigation, not incarceration as a prelude to trial'.[66] Therefore, his detention was not

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order to exclude evidence, see *Loud Hawk*, at 312 313; and decided whether it was appropriate to seek the death penalty (*United States v. Abad*, 514 F3d 271 (2d Cir. 2008) at 274 (hereinafter '*Abad*'). In the remaining case, the Supreme Court denied a constitutional speedy trial claim caused by the government postponing a prosecution while the defendant was being brought to trial in a separate jurisdiction. See *Beavers v. Haubert*, 198 U.S. 77 (1905), at 86 87. However, as District Judge Kaplan correctly observed, in cases such as *Beavers* there is an 'inherent need for one of two cases involving different crimes, each subject to the Speedy Trial Clause, to pro ceed first'. *Ghailani*, 751 F. Supp.2d, at 538 539.

62 *Doggett*, 505 U.S., at 651.

63 *Barker*, 407 U.S., at 532; see also *Doggett*, 505 U.S., at 654.

64 See Ghailani Opening Brief, at 69 79. Ghailani also argued that he was prejudiced because the trial delay hampered his ability to prepare a defense. See *ibid.*, at 70, 79 88. The Court held that Ghailani failed to identify specific ways in which the trial delay (as opposed to other gov ernment conduct) impaired his defense and that he lacked support for many of his claims con cerning the tactical advantages that the government gained through delaying his trial. See *Ghailani*, 733 F.3d, at 51.

65 *Ghailani*, 733 F.3d, at 51.

66 *Ibid.*

the sort of 'oppressive pretrial incarceration' that the Supreme Court contemplated in *Barker*.

In reaching this conclusion, the Second Circuit failed to recognize the causal link between the government's decision to postpone Ghailani's criminal trial and the interrogations he endured while under CIA custody. In cases where the defendant is being imprisoned for a separate crime during the course of a trial delay, there is no causal link between the delay of a trial and the fact that the defendant was incarcerated during that period of delay. In Ghailani's case, however, the government acknowledged that its decision to 'detain and interrogate' Ghailani 'had the effect of delaying his criminal trial'.[67] As described above, the Second Circuit endorsed this decision, holding that the government may delay a trial for national security reasons that are extrinsic to the criminal adjudication process. In doing so, the Court acknowledged that the government sometimes has a choice, as with Ghailani, between bringing a defendant to trial or subjecting him to extrajudicial detention and interrogation. The District Court found (and the Second Circuit accepted) that, in Ghailani's case, these choices were mutually exclusive: the government could *either* conduct an effective interrogation *or* bring Ghailani to trial on a timely basis.[68]

It follows that, if the government had chosen to bring Ghailani to trial instead of holding him in CIA custody, he would have been spared the enhanced interrogation techniques that the government used to extract intelligence. When interpreting the factor concerning prejudice in *Barker*, however, the Second Circuit elides the existence of this choice. Instead, the Court treats the detention of Ghailani as though it was inevitable and unrelated to the decision not to present Ghailani for trial. Thus, the Court adopted a framework for evaluating constitutional speedy trial claims whereby the government's national security interests weigh in its favour, but the means by which the government pursues those interests is deemed constitutionally irrelevant.

4. Some Critical Comments

In rejecting Ghailani's speedy trial claim, the Second Circuit was careful to assert that it was not establishing a general national security exception to the Sixth Amendment's speedy trial right.[69] As a practical matter, however, it is difficult to see how the Second Circuit's interpretation of the framework in *Barker* places any meaningful constraints on the government in national security cases. The Court's reading of the factor on the reason for the delay

67 Government Response Brief (redacted), 17 October 2012, available online at http://www.lawfareblog.com/wp content/uploads/2013/04/2012 10 17 Ghailani Response Brief.pdf (visited 11 February 2014), at 63.

68 According to the District Court, 'the evidence show[ed] that the government had reason to believe that this valuable intelligence could not have been obtained except by putting Ghailani into that program and that it could not successfully have done so and prosecuted him in federal court at the same time'. See *Ghailani*, 751 F. Supp.2d, at 533.

69 See *Ghailani*, 733 F3d, at 48–49.

enables the government to delay a trial for national security reasons without fear that the delay will strengthen the defendant's speedy trial claim. Moreover, if the government chooses to exercise this prerogative, the Court's reading of the prejudice factor ensures that it will not be held responsible for any harm the defendant suffers during the course of the trial delay.

Even if Ghailani remains the only Guantánamo detainee to have been transferred to the United States for trial, the doctrinal implications of this analysis are troubling. In an essay criticizing the decision to try Ghailani in a federal court, former United States Attorney General Michael Mukasey suggested that the stakes of the case could incentivize courts to distort constitutional doctrine in order to ensure Ghailani's conviction. Furthermore, Mukasey cautioned, the doctrinal rules that emerge from Ghailani's case will be 'nearly impossible to confine… solely to terrorism cases'.[70] Unfortunately, the Second Circuit's treatment of Ghailani's speedy trial claim appears to validate Mukasey's prediction.

Consider, for example, how the government may choose to proceed with an indicted defendant who is known to possess sensitive governmental information and who could not be prosecuted without creating some risk of that information being publicly disclosed. Could the government detain this defendant — a defendant not unlike Edward Snowden — to protect itself against an information leak? Once the defendant is detained, could the government postpone the defendant's trial until such a time that public disclosure of the information no longer presents a threat to the government? The constitutional right to a speedy trial should serve as a bulwark against such governmental overreach. The Second Circuit's opinion in *Ghailani*, however, could be drawn upon to construct a plausible doctrinal argument that the right would not apply in such a case. Specifically, in other contexts, the Supreme Court has declared that the government has a compelling interest in preventing the disclosure of sensitive governmental information.[71] Under the Second Circuit's analysis of *Barker*, this government interest — potentially combined with a national security interest if the information includes military intelligence — would seem more than sufficient to excuse a lengthy trial delay. Moreover, under *Ghailani*, the defendant's detention for the purpose of preventing an information leak would not qualify as the sort of prejudice that strengthens a speedy trial claim. Thus, the right to a speedy trial, as it was construed in *Ghailani*, would be of little value to the hypothetical defendant.

Even if United States courts limited *Ghailani*'s application to terrorism cases, the opinion could have a pernicious effect on how the speedy trial right is applied in other jurisdictions. The right to a speedy trial is guaranteed in a number of national constitutions and international agreements,[72] and the Supreme Court's opinion in *Barker* has provided an influential framework for

70 M.B. Mukasey, 'The Obama Administration and the War on Terror', 33 *Harvard Journal of Law and Public Policy* (2010) 953, at 961.

71 See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989).

72 See M.C. Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', 3 *Duke Journal of Comparative & International Law* (1993) 235, at 285 286.

delineating the scope of this right.[73] This framework, as it has traditionally been interpreted in United States courts, could serve to deter governments from subjecting individuals who are perceived as national security threats to prolonged extrajudicial detention. By detaining individuals for reasons unrelated to the criminal process, such governments create the type of trial delays and inflict the type of injuries, for which they have traditionally been responsible under *Barker*. Under *Ghailani*, however, these governments could plausibly argue that their national security interests render the speedy trial right inoperative in a broad range of circumstances.

5. Conclusion

By design, the framework set out in *Barker* allows judges to undertake the type of highly contextualized, fact-sensitive analysis necessary to determine whether a trial delay was appropriate under unusual circumstances. Notwithstanding its malleability, the framework can discipline courts to examine whether government created delay exceeded the length necessary to effectively prosecute a defendant and evaluate the extent to which the delay harmed the defendant. However, in addressing Ghailani's speedy trial claim, the Second Circuit adopted an interpretation of *Barker* that fails to attend to these considerations. Instead, under the Second Circuit's interpretation of *Barker*, the government may, in the name of national security, extrajudicially detain individuals for prolonged periods without fear that doing so will bar it from subsequently prosecuting those individuals in civilian courts.

When called upon to balance the demands of the speedy trial right against claims of national security, courts not bound by *Ghailani* would be well advised to reject the Second Circuit's interpretation of *Barker*. Instead, it should be recognized that, under *Barker*, the government should not be excused for creating trial delays justified by reasons extrinsic to the criminal adjudication process — even if those extrinsic reasons are as normatively compelling as the interest in national security. In other words, under the factor in *Barker* addressing the reason for the delay, courts should look favourably upon the government's decision to delay a trial for reasons that are *intrinsic* to the criminal process. Examples include securing a witness's testimony,[74] filing an interlocutory appeal,[75] and evaluating the level of punishment for which it will advocate.[76] However, courts should disfavour the government's decision to delay a trial in the interest of national security. Moreover, under *Barker*'s prejudice factor, courts acknowledge that there is a causal connection between the

73 For example, the *Barker* framework has been adopted by the Canadian Supreme Court, see *R. v. Askov*, 2 S.C.R. 1199 (1990); the South African Supreme Court, see *Bothma v. Els*, CCT 21/09 [2009] ZACC 27; and the International Criminal Tribunal for the former Yugoslavia, see Sentencing Judgment, *Mrda* (IT-02-59-S), Trial Chamber, 31 March 2004, §§ 97–102.

74 See *Barker*, 407 U.S., at 517–518.

75 See *Loud Hawk*, at 312–313.

76 See *Abad*, at 271, 274.

government's decision to postpone a trial for national security reasons, and the treatment that a detainee receives during that period of postponement.

Of course, this approach carries obvious and significant costs. It may, for example, make civilian trials constitutionally impossible for defendants, like Ahmed Ghailani, whom are brought to court only after years of detention and torture at the hands of a government that is seeking to prosecute them. These costs, however, are precisely the type of disincentives against prolonged detention that the speedy trial right is designed to create. By penalizing the decision to detain an individual for national security reasons, the *Barker* framework could help deter the government from making that decision lightly. The Second Circuit's interpretation of *Barker*, however, generates the opposite incentives and thus reflects a troubling conception of the speedy trial right.