UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
v.	:	
AHMED KHALFAN GHAILANI, a/k/a "Fupi," a/k/a "Abubakary Khalfan Ahmed Ghailani," a/k/a "Abubakar Khalfan Ahmed,"	:	S(10) 98 Cr. 1023 (LAK)
Defendant.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT AHMED KHALFAN GHAILANI'S MOTION TO DISMISS THE INDICTMENT DUE TO THE DENIAL OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

PREET BHARARA
United States Attorney
Southern District of New York

Michael Farbiarz
Jesse M. Furman
Harry A. Chernoff
Nicholas Lewin
Sean S. Buckley
Assistant United States Attorneys

- Of Counsel -

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Table of Authorities

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STATUTES, RULES, AND OTHER AUTHORITIES

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(U) PRELIMINARY STATEMENT

(U) On November 16, 2009, Ahmed Khalfan Ghailani, a/k/a "Fupi," a/k/a "Abubakary Khalfan Ahmed Ghailani," a/k/a "Abubakar Khalfan Ahmed" (the "defendant"), filed a Motion to Dismiss the Indictment Due to the Denial of his Constitutional Right to a Speedy Trial ("Speedy Trial Motion"), as well as a supporting memorandum of law ("Defendant's Memorandum" or "Deft. Mem."). For the reasons set forth below, the Government respectfully submits that the Speedy Trial Motion should be denied.

(U) The indictment in this case (the "Indictment") charges the defendant with participating in a terrorist conspiracy that

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killed 224 people and destroyed two United States Embassies. In his Speedy Trial Motion, the defendant argues that the Government should not be permitted to try him for these crimes because, before being arraigned in the Southern District of New York, he was held for [redacted] years [redacted] outside of the United States – first in Central Intelligence Agency ("CIA") custody, and then in Department of Defense ("DoD") custody. That argument should be rejected.

(U) The Defendant's Memorandum stresses that the circumstances here are highly unusual, if not unprecedented – and indeed they are. But the Defendant's Memorandum ignores precisely what makes this case unique. Unlike his co-defendants who were previously tried in this case, the defendant, a foreign national, was captured abroad after spending six years as a fugitive from justice; while working directly with top al Qaeda terrorists; as the United States was waging a difficult war against al Qaeda; and following a terrorist attack by al Qaeda on American soil that left almost 3,000 Americans dead.

~~(S//NF)~~ Thus, unlike his co-defendants, the defendant was captured during a war, at a time when the Government reasonably feared a terrorist attack on its soil on a scale equal to, or even greater than, the September 11th attacks. In light of the nature of the threat, the Government had shifted dramatically toward intelligence-gathering as the primary means to prevent

such an attack. And when he was captured, the defendant was believed to have, and in fact did have, actionable intelligence about al Qaeda – by virtue of his longstanding position in al Qaeda; his assistance to known al Qaeda terrorists; and his close relationship to high-ranking al Qaeda leaders, including Usama Bin Laden.

~~(S//NF)~~ In light of those extraordinary circumstances, the United States justifiably opted to initially treat the defendant as an intelligence asset – to obtain from him whatever information it could concerning terrorists and terrorist plots. This was done, simply put, to save lives. And when significant intelligence had been collected from the defendant, the United States made the entirely reasonable decision to continue holding him as an alien enemy combatant pursuant to the laws of war and to prosecute him in a military commission for his many violations of those laws. That prosecution continued until the defendant was brought to the Southern District of New York.

(U) In short, and as discussed in more detail below, the Government had unusual but highly compelling reasons for its treatment of the defendant, which had the effect of delaying his case. This is not a case where the Government sought to delay the defendant's trial to hamper his defense or to gain some tactical advantage in federal court. Nor is it a case where the Government sought to delay the defendant's trial for a more

neutral reason, such as negligence or overcrowded courts. Instead, it is a case where the Government reasonably sought to defend the country from a profound and novel threat, a threat made shockingly concrete by the terrorist attacks of September 11, 2001. Further, it is a case where the Government took the steps it did largely because of the defendant's own conduct after his involvement in the Embassy bombings – that is, his ongoing and active involvement as a fugitive for nearly six years in the very group that would and did perpetrate the September 11th terrorist attacks. Under these circumstances, the Speedy Trial Clause of the Sixth Amendment does not preclude the Government from now seeking to hold the defendant accountable for his crimes in federal court.

(U) These facts and this context indisputably make this case unique. Nevertheless, denial of the defendant's Speedy Trial Motion follows logically from well-established Supreme Court and Second Circuit precedent – much of which is ignored in the Defendant's Memorandum. Indeed, courts have routinely denied motions to dismiss on speedy trial grounds in cases where the delay was even longer; where the justifications for delay were far less compelling; and where the circumstances were even less extenuating. These Sixth Amendment cases compel the conclusion that the defendant's Speedy Trial Motion is without merit. It

should therefore be denied.[1]

(U) BACKGROUND

I. (U) The Criminal Conduct of the Defendant and His Co-Conspirators and the 1998 Indictment

(U) Al Qaeda is an international terrorist organization founded and led by Usama Bin Laden. See FBI Declaration ¶ 12.[2] During the 1990s, al Qaeda and its affiliated terrorist organizations trained mujahideen ("holy warriors") at camps in, among other locations, the Sudan and Afghanistan. See id. In 1996, Bin Laden issued a public declaration of jihad ("holy war") against United States military forces stationed in Saudi Arabia. See id. In February 1998, Bin Laden expanded his declared war –

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[1] (U) Given the novelty and complexity of the issues relating to this motion, the Government respectfully requests permission to submit this memorandum of law, even though it exceeds the page limits set forth in the Court's rules.

[2] (U) The Government has submitted five Declarations with this memorandum of law. The "FBI Declaration" is executed by one of the co-case agents on this matter from the Federal Bureau of Investigation ("FBI"). The "CIA Declaration" is executed by a CIA Officer. The "DoD Declaration" is executed by an attorney who was the lead prosecutor in the military commission case against the defendant. The "Farbiarz CIA Declaration" is executed by one of the Assistant United States Attorneys assigned to this matter, and attaches various documents, most of which are summaries of CIA documents that have been provided to cleared defense counsel. The "Farbiarz Filings Declaration" attaches various filings that have been made by and on behalf of the defendant – in the Southern District of New York, in the federal courts of the District of Columbia, and in the military commission proceedings.

calling for the murder of American civilians anywhere in the world. See id.

(U) On August 7, 1998, the United States Embassy in Nairobi, Kenya, and the United States Embassy in Dar-es-Salaam, Tanzania, were destroyed by truck bombs within minutes of each other. See id. ¶ 13. The bomb at the Embassy in Kenya killed 213 people, including twelve United States citizens, and injured thousands. See id. The bomb at the Embassy in Tanzania killed twelve people, and injured hundreds. See id. Al Qaeda leaders claimed responsibility for both attacks. See id.

(U) The defendant's involvement in the al Qaeda attacks on the United States Embassies was extensive. For example, the defendant made a number of trips within Tanzania to buy various bomb components, including TNT, detonators, and detonation cord. The defendant transported these bomb components to Dar-es-Salaam. See id. ¶ 14. In addition, the defendant was involved in the purchase of the truck that, when loaded with explosives, was used to attack the United States Embassy in Tanzania; facilitated the purchase of oxygen tanks (which were used as components in the Tanzania bomb); and helped move bomb components to various safe houses in and around Dar-es-Salaam. See id.

(U) Furthermore, shortly before the bombings, the defendant traveled to Nairobi, Kenya, where he met at a hotel with various co-conspirators. He then returned to Dar-es-Salaam. One day

before the United States Embassies were bombed, the defendant, who had left Dar-es-Salaam, flew from Nairobi to Karachi, Pakistan, on a flight with other co-conspirators. See id. ¶ 15.

(U) As a result of this conduct, the defendant was indicted on December 16, 1998. The Indictment is captioned United States v. Usama Bin Laden, et al., (S10) 98 Cr. 1023 (LAK), and it charges the defendant and others in 286 counts. These include multiple counts of murder, in violation of Title 18, United States Code, Sections 930(c) and 1111, and multiple counts of participating in a conspiracy to kill United States nationals, in violation of Title 18, United States Code, Section 2332(b).

(U) Aside from the instant defendant, all of the other defendants named in the Indictment have been convicted in the Southern District of New York; have been killed (in many cases by the United States in its war with al Qaeda); are detained in foreign countries awaiting extradition to the United States; or remain fugitives. (Usama Bin Laden is one of the named defendants who remains a fugitive.) Among those convicted in the Southern District of New York are: Wadih El-Hage, Mohamed Rashed Daoud al-'Owhali, Mohamed Sadeek Odeh, and Mamdouh Mahmud Salim, all of whom were captured in 1998, after the Embassy bombings; and Khalfan Khamis Mohamed, who was captured in or about October 1999. El-Hage, al-'Owhali, Odeh, and Mohamed were convicted following a jury trial before the Honorable Leonard B. Sand that

began in January 2001 and were sentenced to life imprisonment in October 2001. Salim was convicted after a guilty plea of charges relating to his attack on a jail guard. In May 2004, he was sentenced by the Honorable Deborah A. Batts to 384 months' imprisonment, but that sentence was vacated after the Government appealed, and he has not yet been resentenced.

(U) As discussed in more detail below, in the period that these defendants were captured, convicted, and sentenced, the instant defendant remained a fugitive. During that time, he was aware of the charges pending against him in the United States. In addition, he was working directly with top al Qaeda terrorists.

II. (U) The September 11th Attacks and the War Against Al Qaeda

(U) On September 11, 2001, while the defendant was still a fugitive working abroad for al Qaeda, al Qaeda attacked the United States. Al Qaeda operatives hijacked four civilian airplanes, crashed two into the World Trade Center in New York City, one into the Pentagon, and one into a field in Pennsylvania, killing a total of 2,976 people. In the wake of the attacks, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized,

committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism." Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001).

(U) The September 11th terrorist attacks prompted a significant strategic shift in the Government's approach to dealing with the threat of international terrorism. In light of the newly perceived scope of the threat, the Government began shifting its resources and focus toward intelligence-gathering to prevent further catastrophic attacks; making preparations for war against al Qaeda and its associates; and establishing a military tribunal system to try alien enemy combatants captured in that war.

(U) For example, on October 7, 2001, the United States attacked Afghanistan, where al Qaeda was headquartered and Bin Laden was believed to be located. Additionally, on November 13, 2001, President Bush signed an order providing for the detention and trial of certain alien enemy combatants by military tribunals. See Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 16, 2001). In the order, the President found that "[t]o protect the United States and its citizens and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to

this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." Id. § 1(e). The order further stated that due to the "nature of international terrorism," these military tribunals could not operate under the same "principles of law and the rules of evidence generally recognized in the United States district courts." Id. § 1(f). In October 2006, Congress formalized the President's authority to create military commissions in the Military Commissions Act, 10 U.S.C. §§ 948b et seq. (2006).[3]

~~(TS~~ [redacted] ~~NF)~~ [redacted]

[3] (U) The Military Commissions Act of 2009, Pub. L. 111-84, Title XVIII, §§ 1801-07, was enacted in October 2009, after the defendant's arrival in the Southern District of New York, and therefore has no relevance to this motion.

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In the CIA's judgment, the conditions and rules applicable to detentions of prisoners within the United States were not compatible with the goals of the RDI Program. See id. ¶¶ 16, 17.

III. (U) Overview of the Defendant's Capture and Detention

~~(TS/~~ [redacted] ~~NF)~~ The defendant was indicted for his role in the Embassy bombings on December 16, 1998. As discussed in more detail below, the ten-and-a-half years between then and

[redacted]

his arraignment before this Court on June 9, 2009, can be divided into four periods:

DATES	APPROX. DURATION	DESCRIPTION
December 16, 1998, to July 25, 2004	67 months	Fugitive - active participant in al Qaeda, bodyguard to Usama Bin Laden, and working directly with top al Qaeda terrorists
[redacted]		
[redacted] to September [redacted] 2006	[redacted]	CIA Custody - held in the RDI Program, during which he was subjected to EITs [redacted] and otherwise interviewed [redacted] for actionable intelligence on al Qaeda
September [redacted] 2006, to June 9, 2009	33 months	DoD Custody - held as an alien enemy combatant, as confirmed in a March 2007 Combatant Status Review Tribunal hearing, and prosecuted in the military commission system authorized by Congress

Each of these periods will be discussed in turn.

A. (U) Fugitive and Active Participant in Al Qaeda

(U) As noted above, the defendant fled from Africa to Pakistan one day before the Embassy bombings in 1998. The defendant later admitted that, in the nearly six years that

followed – during which time several of his co-defendants were arrested, convicted, and sentenced in the Southern District of New York – he remained an active participant in al Qaeda, directly working with top al Qaeda terrorists. At some point during this time, the defendant learned that he was wanted by the United States; indeed, he even showed his wife his wanted poster. See FBI Declaration at 4 n.2.

(S//NF) During his years as a fugitive, the defendant played a number of roles within al Qaeda that gave him deep first-hand knowledge of the group, knowledge that would later make him the source of important intelligence for the United States Government. [redacted]

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(TS NF) In the months leading up to his capture in 2004, the defendant was asked to forge documents

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[redacted]

(S//NF) In short, the defendant played an active role in al Qaeda, which enabled him to learn the identities and intentions of a number of high-level al Qaeda terrorists.

B. (TS/[redacted]NF) Capture and Detention [redacted]

(TS[redacted]NF) On or about July 25, 2004, [redacted] in [redacted] Pakistan, the defendant was finally captured following a 14-hour gun battle with Pakistani authorities. [redacted]

C. (U) Detention and Interrogation by the CIA

(TS/[redacted]NF) [redacted]

[redacted] The defendant was then held as part of the above-described RDI Program.

(TS/[redacted]NF) [redacted]

[redacted]

(TS/[redacted]NF) [redacted] after receiving a written opinion from the Department of Justice, see Farbiarz CIA Declaration, [redacted] at 1, officials at CIA headquarters authorized CIA officers to use certain specified techniques in their interrogation of the defendant, and provided guidance with respect to how these techniques were to be used. See id. [redacted]

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~~(TS/~~[redacted]~~NF)~~ [redacted]

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4 ~~(TS/~~[redacted]~~NF)~~ [redacted]

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[redacted]

See id.

(TS/ [redacted] NF)

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D. (U) Detention and Prosecution by DoD

(S//NF) On or about September [redacted] 2006, the defendant was transferred from CIA custody to DoD custody for detention as an alien enemy combatant and for potential prosecution by military tribunal. See generally Remarks by the President from the White House (September 6, 2006). The DoD held the defendant at a detention facility located at Guantanamo until June 9, 2009. During that period, the defendant was interviewed on a small number of occasions by FBI agents; he was never interviewed by CIA officers or subjected to the interrogation techniques discussed above.[6] On March 17, 2007, the defendant had a

[redacted]

(S//NF) At the trial of this case, the Government will not seek to use any statement made by the defendant in response to interrogation – on any subject – during the period when he was in

Combatant Status Review Tribunal ("CSRT") hearing, which determined that he was properly detained as an enemy combatant. See Farbiarz Filings Declaration, Exhibit A (Unclassified CSRT Hearing Transcript). During the CSRT hearing, in which the defendant had the services of a personal representative and a translator, a CSRT panel member expressly referred to the fact that the defendant had been indicted in 1998 in the Southern District of New York. See id. at 2-4. Although given an opportunity to speak, neither the defendant nor his personal representative requested, let alone indicated any interest in, a trial on those charges.

(U) In addition, soon after the defendant's arrival at Guantanamo, the Office of Military Commissions initiated an investigation of the defendant for violations of the laws of war. See DoD Declaration ¶ 4. This was a complex undertaking that required prosecutors and agents together to assess a great deal

[redacted] custody. Nor does the Government currently intend to offer in its case-in-chief any evidence — regardless of the source of that evidence — with respect to the defendant's conduct after August 1998, when the Embassies were destroyed and the defendant fled to Pakistan. Accordingly, the Government does not at this time intend to prove what the defendant's statements, among other evidence, make clear — namely, that he worked on behalf of al Qaeda and with senior al Qaeda figures from approximately August 1998 until July 2004, when he was captured by Pakistani authorities.

of evidence in a fairly new legal context. See id. at ¶¶ 4-8. The Military Commissions Act of 2006 had been passed only a few months before, and the governing regulations and rules of evidence applicable to the proceedings were not fully adopted until May 2007. See id. ¶ 4. Beginning in March 2008, charges were sworn against the defendant, and the Convening Authority referred those charges in October 2008. See id. ¶ 8.[7] At the direction of the Convening Authority, the military commission prosecution did not seek the death penalty against the defendant. See Farbiarz Filings Declaration, Exhibit B (October 3, 2008 Direction of the Convening Authority) (removing the death penalty as an option in the military commission proceedings).

(U) The defendant was charged in the military commission with various law-of-war offenses, including: conspiracy, murder of protected persons, murder in violation of the laws of war, attempted murder, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, destruction of property in violation of the laws of war, terrorism, and

[7] (U) Under the Military Commissions Act of 2006, charges were first sworn against the accused. This involved the chief military prosecutor certifying to the Convening Authority that a prosecutable case existed. The Convening Authority, which performed a function similar to that of a Grand Jury, then determined whether or not to refer – that is, file – the charges against that accused.

providing material support to terrorism. See DoD Declaration ¶¶ 3, 8. The charges related not only to the Embassy bombings, but also to the defendant's work on behalf of al Qaeda in the years after the Embassy bombings. See id. ¶ 9. Multiple military defense attorneys were appointed to represent him, some discovery was produced, more than ten motions were filed, and various pre-trial proceedings took place. See id. ¶ 9.

(U) As discussed in more detail below, over the course of the military commission proceedings, the defendant was represented by multiple lawyers, both military defense lawyers and civilian lawyers. Through them and pro se, the defendant made many filings asserting various rights, both in the military commission proceedings and in federal court. Nevertheless, the defendant never once made a demand for, or expressed an interest in, a speedy trial on the Indictment. Nor, for that matter, did he make a demand for a speedy trial on the military commission charges until after it became clear that he might be transferred to the Southern District of New York, where the death penalty was still in play. To the contrary, he expressly consented to a delayed trial date in the military commission system on the ground that his case was complex. See Farbiarz Filings Declaration, Exhibit C (Scheduling Motion) at 2-3.

E. (U) Transfer to the Southern District of New York

(U) On January 22, 2009, two days after his inauguration, President Obama issued Executive Order 13492, governing the review and disposition of individuals detained at Guantanamo. Among other things, the Order provided that the cases of individuals detained at Guantanamo not otherwise approved for release or transfer "shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution." Executive Order 13492 § 4(c)(3) (Jan. 22, 2009).

(U) On May 21, 2009, the President announced that the defendant would be transferred from DoD custody to the Southern District of New York to answer to the Indictment. See Remarks by the President on National Security, National Archives, Washington, D.C. (May 21, 2009). On May 29, 2009, the charges against the defendant in the military commissions were dismissed.

(U) On or about June 9, 2009, the defendant was transferred to the custody of the United States Marshal for the Southern District of New York. The same day, he was arraigned on the Indictment and pled not guilty. Over the course of the

proceedings before the Court, the defendant has been represented by three criminal defense lawyers as well as, until recently, by the two military defense lawyers who had represented him in the military commission proceedings.

(U) The defendant is currently detained at the Metropolitan Correctional Center ("MCC") awaiting trial on the Indictment.

(U) ARGUMENT

(U) The defendant's Speedy Trial Motion is governed by the Speedy Trial Clause of the Sixth Amendment, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." The right to a speedy trial under that Clause attaches when a person becomes an "accused" by "formal indictment . . . or else the actual restraints imposed by arrest and holding to answer to a criminal charge." United States v. Marion, 404 U.S. 307, 320 (1971).[8]

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[8] (U) Although the defendant also invokes in passing the Due Process Clause of the Fifth Amendment and Federal Rule of Criminal Procedure 48(b) ("Rule 48(b)"), see Deft. Mem. at 1, 3, 73, resolution of his Speedy Trial Motion is governed exclusively by the Sixth Amendment.

(U) With respect to the Due Process Clause, the Supreme Court has left open the possibility that post-accusation delay may be challenged as a denial of due process. See, e.g., Doggett v. United States, 505 U.S. 647, 655 n.2 (1992). But cf. Graham v. Connor, 490 U.S. 386, 395 (1989) (stating that where a particular Amendment "provides an explicit textual source of

constitutional protection" against government behavior, "that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."). Nevertheless, the test for whether delay violated a defendant's rights under the Due Process Clause is even more stringent than it is under the Speedy Trial Clause. Cf., e.g., United States v. Gouveia, 467 U.S. 180, 192 (1984) (holding that, for a defendant to show that pre-accusation delay violated the Due Process Clause, he must prove that the delay "was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense") (emphases added). By definition, therefore, it is not met here.

(U) Rule 48(b), on the other hand, has no independent force because the Second Circuit has held that it is "coterminous" with the Speedy Trial Clause. E.g., United States v. Rucker, 586 F.2d 899, 907 (2d Cir. 1978); accord United States v. Singleton, 460 F.2d 1148, 1152 (2d Cir. 1972) ("Because the primary purpose of Rule 48(b) is to enforce the right to a speedy trial, no special attention need be given the Rule outside the discussion concerning the Sixth Amendment.") (citations omitted); see also United States v. Jones, 91 F.3d 5, 9-10 (2d Cir. 1996) (dismissing a defendant's argument under Rule 48(b) in one sentence following a detailed Sixth Amendment analysis). Thus, because the defendant's Sixth Amendment rights were not violated, his rights under the Rule were not violated either.

(U) In its amicus curiae brief, the Center for Constitutional Rights ("CCR") contends that the defendant's motion is also supported by Federal Rules of Criminal Procedure 5 and 9 ("Rules 5 and 9") and by the Speedy Trial Act ("STA"), 18 U.S.C. §§ 3161-74. See Brief of the Center for Constitutional Rights as Amicus Curiae Supporting Defendant Ahmed Ghailani's Motion to Dismiss the Indictment at 5-20 ("Amicus Brief"). These arguments were not raised by the defendant himself, however. See, e.g., Bano v. Union Carbide Corp., 273 F.3d 120, 127 n.5 (2d Cir. 2001) (declining to consider an argument raised by amici because it was not raised by "the appellants themselves, and because it apparently was not raised by any party before the district court"); Elektra Enter. Group, Inc. v. Barker, 551 F. Supp. 2d 234, 240 n.6 (S.D.N.Y. 2008) (declining to reach arguments raised only by amici). In any event, they are plainly without merit. Rules 5 and 9 are triggered only by a federal criminal arrest, see, e.g., United States v. Jones, 129 F.3d 718,

(U) As the Supreme Court has noted, "[t]he speedy-trial right is amorphous, slippery, and necessarily relative." Vermont v. Brillon, -- U.S. --, 129 S. Ct. 1283, 1290 (2009) (internal quotation marks omitted). It is "consistent with delays and dependent upon circumstances." Id. (internal quotation marks and brackets omitted). Thus, the Court has "refused to quantify 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. (internal quotation marks and brackets omitted). Instead, whether the right has been violated turns on a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." Id. (internal quotation marks omitted).

(U) In Barker v. Wingo, 407 U.S. 514 (1972), the Supreme Court identified four factors relevant to a claim under the Speedy Trial Clause. These four factors are: the length of the delay; the reason for the delay; the defendant's demand for a speedy trial; and prejudice to the defendant. See Barker, 407

721-22 (2d Cir. 1997), and the STA is triggered by arraignment (where that date occurs after the filing of the information or indictment), see, e.g., 18 U.S.C. § 3161(c)(1); see also, e.g., United States v. Williamson, 437 F.3d 354, 357 (3d Cir. 2006), both of which occurred in this case on June 9, 2009.

U.S. at 530-32.[9] The Barker Court held that these four factors are to be balanced, see id. at 530, and if, on balance, the defendant's speedy trial right has been violated, the consequence is "the unsatisfactorily severe remedy of dismissal of the . . . indictment," id. at 522; accord Strunk v. United States, 412 U.S. 434, 439-40 (1973) (holding that dismissal is the only remedy for denial of a defendant's Sixth Amendment right to a speedy trial).

(U) In this case, balancing the four Barker factors, properly understood, the defendant's Speedy Trial Motion fails.[10] First, although the relevant delay may seem long, courts have often held, in circumstances far less compelling than these, that comparable or even longer delays did not run afoul of the Speedy Trial Clause. Moreover, the law is clear that the length of

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[9] (U) The first factor – the length of delay – is "actually a double enquiry." Doggett, 505 U.S. at 651. That is, the threshold question for any speedy trial claim is whether the delay is long enough "to trigger the Barker enquiry." Id. at 652 n.1. If it is, then the length of delay becomes merely "one factor among several" in the analysis of whether the defendant has been denied the right to a speedy trial. Id. at 652. Here, the Government concedes that the delay in the defendant's trial was long enough to trigger the Barker inquiry.

[10] (U) In its amicus brief, CCR contends that there should be a hearing to resolve the defendant's speedy trial claims. See Amicus Brief at 20-21. There is no need for a hearing, however, when, as in this case, the parties submit evidence to the Court, and there is no material dispute of fact. See, e.g., United States v. Watson, 404 F.3d 163, 167 (2d Cir. 2005). Notably, the defendant himself has not requested a hearing.

delay is not to be considered in a vacuum. The acceptability of the delay varies directly with the seriousness and complexity of the case. This case was and is as complex as it could be, not just because of the charges in the Indictment, but also because of the context and circumstances of the defendant's capture and prior conduct. In these circumstances — circumstances largely of the defendant's and his co-conspirators' own making — the delay did not violate the Speedy Trial Clause.

(U) Second, two reasons justified the delay: the protection of national security and the pendency of other proceedings. The Supreme Court and the Second Circuit have long recognized as valid all manner of reasons for delay, even where the delay is intended to strengthen the criminal prosecution and patently disadvantages the defendant, including delays to encourage a co-defendant to testify against the defendant and delays to ensure that the people best suited to handle a prosecution can work on it. Measured against these judicially endorsed justifications, the reasonable efforts taken here to protect national security — including the detention, interrogation, and prosecution by military commission of a dangerous alien enemy combatant captured during a war after a 14-hour gun battle — plainly justified the resulting delay. Similarly, it was reasonable to delay the

prosecution while other proceedings were pending – namely, the CSRT process to confirm that the defendant was properly held as an alien enemy combatant and the prosecution of the defendant in a military commission for his violations of the laws of war.

(U) Third, the defendant's complete failure to assert his right to a speedy trial until the present Speedy Trial Motion weighs against his claim. In fact, under well-established Supreme Court case law, that failure is entitled to "strong evidentiary weight," Barker, 407 U.S. at 531-32, and "weigh[s] heavily" against the defendant's claim, Doggett, 505 U.S. at 653. During the six years that the defendant was a fugitive, when he learned he was wanted in the United States, the defendant never sought a criminal trial, let alone a speedy criminal trial, to answer the charges against him. Nor did he during the period when he was in DoD custody, even though for much of that time he was ably represented by skilled counsel and made various submissions, not just in the military commission, but also in federal court.

(U) Finally, the defendant has not, and cannot, establish prejudice arising from the delay. Given the record and the nature of the evidence in this case, the delay has in many ways harmed the Government's ability to present its case, while it has

not hindered the defendant's ability to defend against the charges. And although pretrial detention can provide a basis for a finding of prejudice, that is true only where the criminal charges themselves cause or detrimentally affect the detention. Here, although some of the conditions of the defendant's detention were undoubtedly aggressive, the Indictment itself played no role in that detention. Accordingly, under well-established precedent, they do not figure in the speedy trial analysis.

(U) Each of these factors is addressed in turn.

I. (U) **The Length of the Delay Does Not Favor the Defendant**

(TS [redacted] NF) The period from indictment in 1998 to arraignment in 2009 in this case was long, but the first Barker factor – the length of the delay – does not actually favor the defendant. As an initial matter, more than half of that delay (nearly six years) is fully the fault of the defendant's remaining a fugitive. [redacted]

[redacted] See Deft. Mem. at 3.

(TS/ [redacted] NF) Critically, for almost the entire period prior to [redacted] 2004, the defendant was not only a fugitive from justice, but also an active participant in al Qaeda. The law is well established that where, as here, the Government made reasonable efforts to find and capture the defendant, the period during which a defendant is a fugitive does not count for Speedy Trial Clause purposes. See, e.g., United States v. Blanco, 861 F.2d 773, 778-80 (2d Cir. 1988). Thus, the maximum length of delay for purposes of the defendant's speedy trial claim is [redacted] during which time he spent [redacted] in CIA custody as part of the RDI Program and 33 months in DoD custody, where he was prosecuted for his violations of the laws of war in a military commission. See Deft. Mem. at 3.

(U) Such a delay may seem long, but many courts – including the Supreme Court, the Second Circuit, and this Court – have held that comparable or even longer delays did not run afoul of the Speedy Trial Clause. See, e.g., United States v. Stone, 510 F. Supp. 2d 338 (S.D.N.Y. 2007) (Kaplan, J.) (14 years); United States v. Perez-Cestero, 737 F. Supp. 752 (S.D.N.Y. 1990) (almost 11 years); Reynolds v. Leapley, 52 F.3d 762 (8th Cir. 1995)

(about nine years); Garcia Montalvo v. United States, 862 F.2d 425 (2d Cir. 1988) (eight years); Bell v. Lynaugh, 828 F.2d 1085 (5th Cir. 1987) (per curiam) (eight years); United States v. Loud Hawk, 474 U.S. 302, 315-17 (1985) (90 months); Rayborn v. Scully, 858 F.2d 84, 89 (2d Cir. 1988) ("over seven years"); United States v. Woods, 851 F. Supp. 1564, 1569-70 (S.D. Fla. 1994) (over six years); United States v. Saglimbene, 471 F.2d 16, 18 (2d Cir. 1972) (six years); Barker, 407 U.S. at 533-34 ("well over five years"); United States v. Lane, 561 F.2d 1075, 1078-799 (2d Cir. 1977) (58 months); Look v. Amaral, 725 F.2d 4, 6-8 (1st Cir. 1984) (almost five years); Beckwith v. Anderson, 89 F. Supp. 2d 788, 795-804 (S.D. Miss. 2000) (almost five years); United States v. Franco, 112 F. Supp. 2d 204, 220-21 (D.P.R. 2000) (56 months); United States v. Schwartz, 464 F.2d 499, 504-06 (2d Cir. 1972) (54 months); United States v. Fasanaro, 471 F.2d 717, 717 (2d Cir. 1973) (per curiam) (52 months); United States v. Leary, 695 F. Supp. 1250, 1252-54 (D. Me. 1988) (52 months).

(U) More fundamentally, the Supreme Court has cautioned that the length of a delay cannot be considered in a vacuum. That is, depending on the circumstances, a relatively short delay might be a speedy trial violation, while a seemingly lengthy delay might not be; the number of months is less important than

the circumstances. In its first Speedy Trial Clause case, Beavers v. Haubert, 198 U.S. 77, 87 (1905), for example, the Court emphasized that the right "is necessarily relative. It is consistent with delays and depends upon circumstances." In Barker, the Court was even more explicit, noting that whether the length of a delay violates the right to a speedy trial "is necessarily dependent upon the peculiar circumstances of the case." 407 U.S. at 530-31; cf., e.g., Doggett, 505 U.S. at 652 n.1 (noting that whether delay triggers a speedy trial inquiry in the first instance depends on "the nature of the charges"). By way of example, the Barker Court indicated that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." 407 U.S. at 531; see also, e.g., Rayborn, 858 F.2d at 89 (noting that a court "must" consider "the complexity of the case" in evaluating a speedy trial claim).

(U) The present case involves "a serious, complex conspiracy charge." Barker, 407 U.S. at 531. The charges here are about as "serious" and "complex" as criminal charges can get. Cf., e.g., United States v. Vassell, 970 F.2d 1162, 1164 (2d Cir. 1992) (describing a case against 43 members of a domestic narcotics organization as "complex" for speedy trial purposes);

United States v. Williams, 372 F.3d 96, 99, 113 (2d Cir. 2004) (describing a case involving a drug-trafficking organization that "was believed to have been one of the largest suppliers of cocaine in the Buffalo, New York area" as "extraordinar[il]y complex[]" for speedy trial purposes). The Indictment contains 286 counts and charges the defendant and others with participating in some of the most serious crimes imaginable. Moreover, the crimes and investigation both occurred abroad, requiring work with foreign governments and witnesses, and the amount of information accumulated is both massive and, in many instances, highly classified. Notably, the defendant himself acknowledged the complexity of the case in the military commission proceedings, when he "specifically agree[d]" that, in light of its complexity, "all delay" in the proceedings would be "attributable to the Defense." Farbiarz Filings Declaration, Exhibit C (Scheduling Motion) at 3.

(U) Moreover, the "serious[ness]" and "complex[ity]" of this case go well beyond the charges in the Indictment. Nothing in Barker or its progeny suggests that, in considering whether "peculiar circumstances" warrant longer delay, Barker, 407 U.S. at 530-31, the inquiry is limited to the charges themselves. See, e.g., Williams, 372 F.3d at 113 (noting that "much of the

delay before trial was justifiably required for investigation associated with the superseding indictment and for time spent on discovery and pre-trial motions") (emphasis added). Thus, it is appropriate to consider the actual cause of delay in this case, which is the unprecedented context and circumstances of the defendant's capture and prior conduct. The terrorist attacks of September 11, 2001, starkly revealed the seriousness of the threat posed by al Qaeda. The attacks naturally resulted in a heightened focus on intelligence-gathering to preempt another attack.

(TS/[redacted]NF) Thus, when the United States took custody of the defendant abroad, and it justifiably believed that he had actionable intelligence that could be used to save lives, it reasonably opted to treat him initially as an intelligence asset. When that process finally ran its course, the Government was confronted with another unprecedented situation — what to do with a high-value detainee who had been held in CIA custody — and made the decision to hold him as an alien enemy combatant and to prosecute him, along with similarly situated detainees, for violations of the laws of war in a military commission. The crucial point is that while a [redacted] delay in an ordinary criminal case might be intolerable under the Speedy Trial Clause,

this is no ordinary case.

(U) Finally, it is significant that the defendant's own actions are a principal cause of the predicament he complains of today. Simply put, the September 11th terrorist attacks and the defendant's active involvement in al Qaeda up to the day of his capture put him in a starkly different posture than his co-defendants who were tried in the Southern District of New York in 2001. Had the defendant not so successfully evaded arrest in the period prior to the September 11th terrorist attacks, when his co-defendants who were previously tried were apprehended, there is little doubt he would have been tried along with them. Similarly, had the defendant's terrorist activity ended with the Embassy bombings in 1998, it is hard to imagine the Government would have viewed him as a valuable intelligence asset upon his capture in 2004, six years later. But during the period in which he was a fugitive – a period strikingly ignored in the Defendant's Memorandum – the defendant was an active participant in al Qaeda and closely aligned with various al Qaeda leaders, including Bin Laden. Thus, it was precisely because of the defendant's own dilatory and dangerous conduct that, when he was finally captured in 2004, the Government did not – in the midst of waging war – bring him immediately to answer the present

criminal charges.

(U) In short, although long in calendar days, the relevant length of the delay, as that term is used in Barker, does not actually weigh in the defendant's favor in this case. As noted above, whether the length of delay is tolerable under the Speedy Trial Clause is "necessarily dependent upon the peculiar circumstances of the case." Barker, 407 U.S. at 530-31. The "peculiar circumstances" here – the nature of the charges in the Indictment, the September 11th terrorist attacks, the war with al Qaeda, the shift toward intelligence-gathering to prevent another attack, and the defendant's ongoing and active role in al Qaeda – justified a lengthy delay in bringing the defendant to trial and distinguish this case from any other case that has addressed the right to a speedy trial.

II. (U) The Reasons for the Delay Weigh Strongly in the Government's Favor

(U) The second Barker factor – the reason for the delay – strongly favors the Government. Here, there were two reasons for the delay: the protection of national security and, for the Guantanamo period, the pendency of other proceedings, namely, the CSRT process and the military commission prosecution. Measured against other governmental reasons that the Supreme Court and the

Second Circuit have recognized to be "valid," these reasons plainly justified the actions the Government took in this case, even though they had the collateral effect of delaying the defendant's trial.

A. (U) Applicable Law

(U) As noted, the second Barker factor is "the reason the government assigns to justify the delay." Barker, 407 U.S. at 531. The Barker Court explained that "different weights should be assigned to different reasons." Id. Thus,

> [a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id. (footnote omitted). In a footnote, the Court stated further that it is "improper for the prosecution intentionally to delay 'to gain some tactical advantage over [defendants] or to harass them.'" Id. at 531 n.32 (quoting Marion, 404 U.S. at 325).

(U) In his Memorandum, the defendant suggests that where a delay is "deliberate" or "intentional," it automatically weighs heavily against the Government, see, e.g., Deft. Mem. at 20, but that is not the case. For delay to weigh heavily against the

Government, it not only has to be deliberate or intentional, but it also has to be for an unreasonable purpose. See, e.g., Garcia-Montalvo v. United States, 862 F.2d 425, 426 (2d Cir. 1988) ("Where there is a reasonable explanation for the delay, its negative implications will be vitiated."); United States v. Jones, 91 F.3d 5, 8 (1996) (finding no speedy trial violation when it was "reasonable to delay the prosecution").

(U) The Barker Court itself, for example, did not refer merely to a "deliberate attempt to delay a trial," but rather to a "deliberate attempt to delay the trial in order to hamper the defense." 407 U.S. at 531 (emphasis added); accord Brillon, 129 S. Ct. at 1290 ("Deliberate delay 'to hamper the defense' weighs heavily against the prosecution.") (quoting Barker, 407 U.S. at 531). Additionally, the one example the Barker Court gave of a "valid reason" for delay was "a missing witness." 407 U.S. at 531. Yet where the Government seeks a delay of trial to secure the testimony of a missing witness, it is indisputably proceeding deliberately and intentionally. Thus, the critical factor in the analysis is the reasonableness or unreasonableness of the explanation for the Government's deliberate conduct.

(U) The defendant's interpretation of Barker's reference in the footnote to "tactical advantage" is similarly misguided.

Throughout his Memorandum, the defendant argues that "tactical advantage" should be understood broadly to include obtaining intelligence with respect to the defendant, co-defendants, and co-conspirators. See, e.g., Deft. Mem. at 32 (arguing that the Government sought "to gain a tactical advantage over Mr. Ghailani, his co-defendants, and co-conspirators"); id. at 34 (asserting that the Government sought "to gain the tactical advantage of having direct access to Mr. Ghailani in order to obtain information"). As the defendant all but concedes, however, there is no support for this interpretation in the case law. See id. (acknowledging that "[c]ases that have examined 'tactical advantage' in the past generally focus on 'tactical advantage' gained against the defendant at trial").

(U) In fact, the case law makes clear that "tactical advantage" in this context means, as the sentence to which the footnote in Barker was attached stated, "hamper[ing] the defense." Barker, 407 U.S. at 531; accord Brillon, 129 S. Ct. at 1290. Indeed, it is not even enough to show that by seeking a delay the Government gained an "advantage" over a defendant at trial. After all, whenever the Government obtains a continuance to locate a witness whose testimony would inculpate the defendant, the resulting delay disadvantages the defendant. But,

as noted above, the Barker Court itself made clear that was a "valid reason" for delay. Id.; see also id. at 534; cf. United States v. Abad, 514 F.3d 271, 275 (2d Cir. 2008) (per curiam) (holding that trial prejudice for speedy trial purposes involves instances when the passage of time impedes the defense, not when it strengthens the prosecution).

(U) More generally, the flaws in the defendant's interpretation of the second Barker factor are revealed by a review of what the Supreme Court and the Second Circuit have deemed to be "valid" reasons for trial delay. Among those reasons are the following:

> (1) "collect[ing] witnesses against the accused," Doggett, 505 U.S. at 656 ("Our speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable. The government may need time to collect witnesses against the accused . . . . We attach great weight to such considerations . . . ."); accord Barker, 407 U.S. at 531, 534; see also, e.g., United States v. Bufalino, 576 F.2d 446, 453 (2d Cir. 1976) ("Appellants' contention that they were denied a speedy trial is specious, since the district court properly found that delays otherwise excessive were tolled by the unavailability of an essential prosecution witness");
>
> (2) persuading a co-defendant or other material witness to testify against the defendant, see, e.g., United States v. Vassell, 970 F.2d 1162, 1165 (2d Cir. 1992) (holding that seeking a delay to "encourage a co-defendant to testify" was a "valid" reason under Barker); see also, e.g., United States v. Baumgarten, 517 F.2d 1020, 1025 (5th Cir. 1975) ("[W]e agree with the government's contention that its efforts to procure

[a key witness's] cooperation constituted a valid reason which, under Barker, 'should serve to justify appropriate delay'");

(3) determining how best to proceed in a given case, see, e.g., Abad, 514 F.3d at 274 (holding that "valid reasons for the delay" of a particular criminal case included time spent by the Department of Justice in determining whether to seek the death penalty against a particular defendant); Vassell, 970 F.2d at 1165 (affirming denial of speedy trial claim in light of, among other things, the time it can take for prosecutors to obtain supervisory approval of a plea agreement);

(4) securing the involvement of certain personnel in a prosecution, see, e.g., Barker, 407 U.S. at 533-34 (characterizing the illness of the law enforcement officer leading a particular investigation as a "strong excuse" for delay); United States v. McGrath, 622 F.2d 36, 41 (2d Cir. 1980) (affirming denial of speedy trial claim when delay was occasioned by, among other things, the illness of the prosecutor); and

(5) waiting for a prosecution in another federal district or jurisdiction, see, e.g., Beavers v. Haubert, 198 U.S. 77, 86 (1905); Jones, 91 F.3d at 8; McGrath, 622 F.2d at 41 (dismissing a speedy trial claim when, among other things, one federal trial was delayed in favor of another); United States v. Mejias, 552 F.2d 435, 443 (2d Cir. 1977); see also, e.g., United States v. Thomas, 55 F.3d 144, 150-51 (4th Cir. 1995) (holding that the need to conclude a state prosecution was "an obvious reason for delaying [the defendant's] federal prosecution . . . . To do otherwise would be to mire the state and federal systems in innumerable opposing writs, to increase inmate transportation back and forth between the state and federal systems with consequent additional safety risks and administrative costs, and generally to throw parallel federal and state prosecutions into confusion and disarray.").

In each of these cases, the Government proceeded deliberately or

intentionally in seeking to delay a defendant's trial and (at least in the first four categories of cases) the delay plainly disadvantaged the defendant in the most injurious sense possible — by making his conviction more likely. Yet in each case, the reasons were deemed "valid" for speedy trial purposes, and thus the "deliberate" delay was not weighed against the Government.

(U) The Second Circuit's decisions in Vassell and Jones are especially instructive. In Vassell, the defendant argued that his speedy trial rights had been violated, relying primarily on the "reason for the delay" and "prejudice" prongs of the Barker analysis. See Vassell, 970 F.2d at 1165. With respect to the former, the defendant argued that the "reason for the delay" weighed heavily against the prosecution because "the government orchestrated the delay in order to persuade one of his co-defendants to plead guilty and testify against him at trial." Id. The Second Circuit assumed arguendo that this was the reason for the delay, yet concluded it did not "involve a violation of the Sixth Amendment." Id. The delay, the Second Circuit held, was "not transformed into a Sixth Amendment violation just because the government sought the delay to encourage a co-defendant to testify against a remaining defendant at trial."

Id. In other words, even though the Government's assumed purpose for seeking the delay was to strengthen its prosecution – to make conviction of the defendant more likely – that was not charged against the Government.

(U) In Jones, the federal Government brought charges against the defendant in the Southern District of New York while charges were already pending in the Eastern District of New York. See 91 F.3d 5. After the Government waited for the Eastern District prosecution to run its course – a period that lasted 25 months, in part because it included a conviction vacated on appeal and a subsequent retrial (that ended in acquittal) – the defendant moved to dismiss the Southern District charges for violation of the Speedy Trial Clause. See id. at 6-8. The District Court granted the motion, but the Second Circuit reversed. Although the Eastern and Southern Districts are across the river from one another, and it was therefore theoretically possible to have proceeded concurrently in the two cases, the Court of Appeals held that it was "reasonable to delay the prosecution of the Southern District case until the Eastern District proceedings had ended." Id. at 8.

(U) In sum, Supreme Court and Second Circuit cases establish that, consistent with the Speedy Trial Clause, the

Government may delay a trial for "valid" reasons – e.g., to locate inculpatory witnesses or encourage them to testify, see, e.g., Doggett, 505 U.S. at 656; Vassell, 970 F.2d at 1165; to assess its options, see, e.g., Abad, 514 F.3d at 274; Vassell, 970 F.2d at 1165; to let another proceeding go first, see, e.g., Beavers, 198 U.S. at 86; Jones, 91 F.3d at 8; or even to make sure that the people who are best suited to handle a prosecution can work on it, see, e.g., Barker, 407 U.S. at 533-34; McGrath, 622 F.2d at 41 – even where that causes disadvantage to the defendant.

(U) These cases add up to a simple proposition: Where the Government has a legitimate reason to seek a delay, and it does not do so for the purpose of "hamper[ing] the defense," it is "valid" under Barker. 407 U.S. at 531.

B. (U) Discussion

(U) Measured against these well-established principles, the reasons for the delay in this case – the need to protect national security and, for the Guantanamo period, the existence of other proceedings – were valid.

1. (U) The Need to Protect National Security Provided a Compelling Reason for the Delay in This Case

(U) First, the Government's interest in protecting national security justified the delay in this case. The Supreme Court has

stated that it is "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964) and citing Cole v. Young, 351 U.S. 536, 546 (1956), and Zemel v. Rusk, 381 U.S. 1, 13-17 (1965)). If vindicating the Government's interest in, for example, presenting a more effective case by seeking to persuade a co-defendant to testify against the defendant is a "valid" reason for delay, see supra, it follows that this most compelling of interests is "valid" as well.

(U) Indeed, delay is more justifiable in this case than when the Government delays a trial to persuade a co-defendant to testify against the defendant (as in Vassell). In both cases, the defendant's trial is intentionally delayed by the Government. But it is only in the Vassell-type situation that the Government delays the proceedings in order to put the defendant himself in a worse position at trial. The possibility that delay will harm an individual's defense at trial is the core concern of the Speedy Trial Clause, see, e.g., Doggett, 505 U.S. at 654, and the Vassell-type situation skirts close to this concern with trial prejudice. If trial may be delayed even in that situation, then surely it may be put off in a case such as this one — when the

purpose of the delay was not to enhance the chances of convicting the defendant, but rather to obtain information that could be used to prevent future terrorist attacks against the nation by incapacitating others. Cf. United States v. Muse, 633 F.2d 1041 (2d Cir. 1980) (en banc) (holding, under Federal Rule of Criminal Procedure 6(e)(4), that the interest in capturing the defendant's co-conspirators justified delaying the unsealing of an indictment – and, by extension, the prosecution of the defendant).[11]

(U) The defendant attempts to discredit the importance and relevance of national security in this case by calling it "an intentionally amorphous concept that can fluctuate depending on the specific aims that the Government seeks to protect." Deft. Mem. at 35. But, however vague or overstated the invocation of national security could conceivably be in other contexts, there

[11] (U) The logic of this conclusion is underscored by considering its alternative – in which a trial could be delayed to strengthen the Government's case and increase the chances of convicting a defendant, see, e.g., Vassell 970 F.2d at 1165, but could not be delayed to gain information that could lead to the capture of others. This would make no sense. It would render the Speedy Trial Clause an anomaly in constitutional criminal procedure – a right less concerned with protecting the defendant from the Government than with protecting third parties. Cf., e.g., Rakas v. Illinois, 439 U.S. 128, 134 (1978) (holding that only a defendant whose own rights have been violated can claim the protections of the Fourth Amendment).

is nothing "amorphous" about the concept as applied here, and no question that the strength of the Government's interest was at its zenith in this case. The defendant was a longstanding al Qaeda terrorist, and al Qaeda is the group responsible for the brutal murder of thousands of American citizens here and abroad. The United States was, and still is, at war with al Qaeda. And because the group does not control territory as a sovereign nation does, the war effort relies less on deterrence than on disruption – on preventing attacks before they can occur. At the core of such disruption efforts is obtaining accurate intelligence about al Qaeda's plans, leaders, and capabilities. Cf. Boumediene v. Bush, - U.S. -, 128 S. Ct. 2229, 2277 (2008) ("Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict.").

(S//NF) In these circumstances, the Executive Branch's decision initially to treat the defendant, a foreign national captured abroad in an al Qaeda safe house after a 14-hour gun battle, as an intelligence asset – to detain him abroad in order to obtain vital, real-time intelligence about al Qaeda – warrants considerable deference. As the Supreme Court explained only last year:

> In considering both the procedural and substantive standards used to impose detention to prevent acts of

> terrorism, proper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Boumediene, 128 S. Ct. at 2276-77 (citation omitted); see also, e.g., United States v. Moussaoui, 382 F.3d 453, 470 (4th Cir. 2004) (stating that the value of the 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"); cf. Central Intelligence Agency v. Sims, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.").

(U) That deference is particularly significant in this context. In fact, the Second Circuit has expressly held – in a case that the defendant fails to cite – that where, as here, the decision-making of the Executive Branch is entitled to deference, the Speedy Trial Clause should not be construed to stand in the

way of that deference by mandating that the Government seek to bring a defendant to trial despite other compelling interests. See United States v. Diacolios, 837 F.2d 79, 83-84 (2d Cir. 1988); accord United States v. Hooker, 607 F.2d 286, 289 (9th Cir. 1979).

(U) In Diacolios, a Greek citizen apparently living in Greece was indicted in the Southern District of New York. See 837 F.2d at 81. The extradition treaty with Greece did not permit the extradition of Greek citizens to the United States, leaving no means by which the United States could formally seek the defendant from Greece. See id. at 81. Arguing that this did not preclude the United States from requesting his presence as a matter of comity, however, the defendant moved, through his attorney, to dismiss the indictment on the ground that the failure to do so violated his right to a speedy trial. See id. at 81-82; cf. United States v. Blanco, 861 F.2d 773, 778 (2d Cir. 1988) (holding that dismissal of an indictment may be appropriate where the Government failed to work assiduously enough to capture a defendant while he was a fugitive). The District Court granted the defendant's speedy trial motion, see 837 F.2d at 82, but the Second Circuit reversed.

(U) The Second Circuit reasoned that the Speedy Trial

Clause did not permit a court to second-guess a decision of the Executive Branch where its judgment was owed proper deference. As the Court of Appeals explained:

> Notwithstanding the "general" policy of the United States not to request extradition as a matter of comity, Diacolios would require the government to consider making an exception to the general rule in his case. While it is true that United States policy does not "preclude requests for surrender not based on the extradition treaty," [United States v.] Salzmann, 548 F.2d [395,] 403 [2d Cir. 1976)], we think that compelling the government to consider making such an exception in every case would vitiate the policy and render meaningless "our traditional deference to the judgment of the executive department in matters of foreign policy." Id.; see First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972). . . .
>
> Given the deference we must give to a coordinate branch of government, particularly to the executive branch in matters of foreign policy, we therefore hold that the speedy trial clause does not prevent the government from adhering to its general policy not to seek extradition as a matter of comity.

Diacolios, 837 F.2d at 83-84. The Court then quoted from the Ninth Circuit's decision in Hooker:

> We do not think that it would be proper for us to adopt a rule . . . that would, in substance, require the Attorney General or his agents to embark on [negotiations for the release to this country of a defendant not subject to extradition by treaty], or require [the Attorney General] to try to persuade the Department of State to do so.

Id. (quoting Hooker, 607 F.2d at 289) (alterations in original).

(U) Thus, the Diacolios Court held that the Government was not required by the Speedy Trial Clause to spend diplomatic