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The War Crimes Act: Current Issues

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Summary

The War Crimes Act of 1996, as amended, makes it a criminal offense to commit certain violations of the laws of war when such offenses are committed by or against U.S. nationals or Armed Service members. Among other things, the Act prohibits certain violations of Common Article 3 of the 1949 Geneva Conventions, which sets out minimum standards for the treatment of detainees in armed conflicts of a non-international character. Common Article 3 prohibits protected persons from being subjected to violence, outrages upon personal dignity, torture, and cruel, humiliating, or degrading treatment. In the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court rejected the Bush Administration's long-standing position that Common Article 3 was inapplicable to the present armed conflict with Al Qaeda. As a result, questions have arisen regarding the scope of the War Crimes Act as it relates to violations of Common Article 3 and the possibility that U.S. personnel may be prosecuted for the pre-*Hamdan* treatment of Al Qaeda detainees.

Pursuant to the Military Commissions Act of 2006 (S. 3930; P.L. 109-XX [public law number not yet assigned]), approved by Congress in September 2006, the War Crimes Act criminalizes only those Common Article 3 violations labeled as "grave breaches." Previously, *any* violation of Common Article 3 constituted a criminal offense under the War Crimes Act. This report discusses current issues surrounding the War Crimes Act, including amendments made to it by the Military Commissions Act.

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The 1949 Geneva Conventions proscribe certain conduct by High Contracting Parties toward specified categories of vulnerable persons during armed conflict.[1] High Contracting Parties are also required to provide effective penal sanctions against any person who commits (or orders the commission of) a "grave breach" of one of the Conventions, which is defined to include the wilful killing, torture or inhuman treatment, and the causing of great suffering or serious injury to body or health of protected persons.[2] Congress approved the War Crimes Act of 1996 (P.L. 104-192) specifically to implement the Conventions' penal requirements.[3]

The War Crimes Act (18 U.S.C. § 2441)

The War Crimes Act imposes criminal penalties against persons who commit certain offenses under the laws of war, when those offenses are either committed by or against a U.S. national or member of the U.S. Armed Forces. The Act applies regardless of whether the offense occurs inside or outside the United States. Offenders are subject to imprisonment for life or any term of years and may receive the death penalty if their offense results in death to the victim.

At the time of enactment, the War Crimes Act only covered grave breaches of the 1949 Geneva Conventions. During congressional deliberations, the Departments of State and Defense suggested the Act be crafted to cover additional war crimes, but

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[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 [*hereinafter* "Third Geneva Convention"]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516. All four Conventions entered into force for the United States on Feb. 2, 1956.

[2] *E.g.*, Third Geneva Convention, *supra* note 1, at Articles 129-130.

[3] When the Conventions were ratified in 1955, the Senate Foreign Relations Committee believed that the obligations imposed by the Conventions' "grave breach" provisions were met by existing federal law and no further legislation was required. H.Rept. 104-698, at 3-4 (1996) (*quoting* Sen. Exec. Rep. No. 9, at 27 (1955)). However, in 1996 the House Committee on the Judiciary found that in some cases the United States was legally unable to prosecute persons for the commission of grave breaches of the Conventions, including when members of the armed forces were found to have committed war crimes only after their military discharge. *Id.* at 5.

these recommendations were not immediately followed.[4] However, Congress amended the War Crimes Act the following year to cover additional war crimes that had been suggested by the State and Defense Departments, including violations under Article 3 of any of the 1949 Geneva Conventions (Common Article 3). Common Article 3 is applicable to armed conflicts "not of an international character" and covers persons taking no active part in hostilities, including those who have laid down their arms or been incapacitated by capture or injury. Such persons are to be treated humanely and protected from certain treatment, including "violence to life and person," "cruel treatment and torture," and "outrages upon personal dignity, in particular, humiliating and degrading treatment."

Implications of *Hamdan v. Rumsfeld*

There has been controversy concerning whether activities by military and intelligence personnel relating to captured Al Qaeda suspects might give rise to prosecution under the War Crimes Act, particularly in light of the Supreme Court's ruling in the 2006 case of *Hamdan v. Rumsfeld*.[5] The following sections provide relevant background and briefly discuss possible implications that the Court's ruling may have on issues relating to the War Crimes Act.

Application of Common Article 3 to Al Qaeda. At least since early 2002, the Bush Administration had taken the position that the Geneva Conventions did not apply to members of Al Qaeda. Specifically, the Administration argued that the Conventions are applicable to international armed conflicts between High Contracting Parties and States that abide by Convention provisions, and therefore do not cover non-State actors such as Al Qaeda. The Administration further alleged that the conflict with Al Qaeda is international in scope, and Common Article 3 accordingly was inapplicable to the conflict because it only covers armed conflicts "not of an international nature."[6]

The issue in *Hamdan* primarily concerned military tribunals convened by Presidential order to try detainees for violations of the laws of war. The Court held that such tribunals did not comply with the Uniform Code of Military Justice or the laws of war, including the Geneva Conventions. However, the Court's interpretation of Common Article 3 had broader implications for U.S. policy towards captured Al Qaeda suspects. The Court rejected the Administration's interpretation of Common Article 3 as not covering Al Qaeda members, concluding that the provision affords "some minimal protection, falling short of full protection under the Conventions, to [any] individuals ... who are involved in a conflict in the territory of a signatory."[7]

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[4] *Id.* at 12-16.

[5] *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

[6] *See* White House Memorandum, *Humane Treatment of Taliban and Al Qaeda Detainees* (Feb. 7, 2002), available at [http://www.justicescholars. org/pegc/archive/ White_ House/ bush_memo_ 20020207ed.pdf].

[7] *Hamdan*, 126 S.Ct. at 2796 (internal quotations omitted). In interpreting Common Article 3 as ensuring *de minimis* protections of Al Qaeda members captured by the United States

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In the aftermath of the Court's ruling, the Department of Defense issued new treatment guidelines concerning military detainees (including Al Qaeda members) that required, at minimum, application of the standards articulated by Common Article 3.[8] Subsequently, fourteen high-level Al Qaeda operatives who had been held abroad by the CIA and subjected to aggressive interrogation techniques were transferred to DOD custody in Guantanamo Bay, Cuba.[9]

Scope of Prohibited Conduct under the War Crimes Act Relating to Common Article 3 Violations. The United States has apparently never prosecuted a person under the War Crimes Act. Perhaps as a result, there is some question concerning the Act's scope. In the aftermath of the Court's ruling in *Hamdan*, some suggested that the War Crimes Act be amended to specify that certain forms of treatment or interrogation violate the Act. They argued that the scope of the War Crimes Act was ambiguous, particularly as it related to offenses concerning violations of Common Article 3. In a September 2006 address, President Bush suggested that some provisions of Common Article 3 provided U.S. personnel with inadequate notice as to what interrogation methods could permissibly be used against detained Al Qaeda suspects, and requested legislation listing "specific, recognizable offenses that would be considered crimes under the War Crimes Act."[10] On the other hand, some argued that amending the War Crimes Act to cover specific acts would overly restrict the Act's scope, making certain unspecified conduct legally permissible even though it was as severe as conduct expressly prohibited by the Act.

Although some types of conduct prohibited by Common Article 3 are easily recognizable (e.g., murder, mutilation, the taking of hostages), it might not always be obvious whether conduct constitutes impermissible "torture," "cruel treatment," or "outrages upon personal dignity, in particular humiliating and degrading treatment." For discussion of U.S. and international jurisprudence and agency interpretations concerning the scope of these terms, particularly as they relate to interrogation techniques, see CRS Report RL32567, *Lawfulness of Interrogation*

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[7] (...continued)
in Afghanistan, the Court noted that the official commentaries accompanying Common Article 3 made clear that "the scope of the Article must be as wide as possible." *Id.* (*quoting* Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 36 (1960)). In dissent, Justice Thomas (joined by Justice Scalia) disputed this reading, arguing that the relevant commentary indicated that the purpose of Common Article 3 was principally to furnish protections to persons involved in a civil war, rather than entities of international scope such as Al Qaeda. *Id.* at 2846 (Thomas, J., dissenting). However, the Court appeared to leave unresolved whether the Geneva Conventions apply with respect to Al Qaeda suspects captured in places where no armed conflict is occurring. For background on the *Hamdan* decision, see CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the 'Global War on Terrorism'*, by Jennifer Elsea.

[8] Dept. of Defense Detainee Directive, *Definitions, Treatment Policy, and Compliance with Laws of War*, Sept. 5, 2006, *available at* [http://news.findlaw.com/hdocs/docs/dod/detainee90506directive.html].

[9] Presidential Address Creation of Military Commissions to Try Suspected Terrorists, Sept. 6, 2006, *available at* [http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html].

[10] *Id.*

Techniques under the Geneva Conventions, by Jennifer Elsea; CRS Report RL33655, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia; and CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

Liability under the War Crimes Act for U.S. Personnel on Account of Pre-*Hamdan* Activities. Prior to the Court's ruling in *Hamdan*, the Bush Administration did not apply Common Article 3 protections to captured Al Qaeda agents. In some cases, such persons were allegedly subject to harsh treatment, especially in the context of interrogation, that might not have complied with Common Article 3 requirements. As a result, some have raised questions as to whether U.S. personnel might be criminally liable under the War Crimes Act for the pre-*Hamdan* treatment of some Al Qaeda detainees.

Although not immune from prosecution, U.S. personnel who could be charged with violating the War Crimes Act would have several possible defenses to criminal liability, so long as their activities were conducted with the authorization of the Administration and under the reasonable (though mistaken) belief that their actions were lawful. Section 1004(a) of the Detainee Treatment Act of 2005 (DTA, P.L. 109-148), enacted several months prior to the *Hamdan* decision, provides that

> In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States ... and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that ... [the] agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available ... or to provide immunity from prosecution for any criminal offense by the proper authorities.[11]

In addition to this statutory defense, a number of other legal defenses could be raised by U.S. personnel charged with War Crimes Act offenses based on conduct that had been authorized by the Bush Administration, assuming the defendants acted with government sanction and/or had been erroneously informed by responsible

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[11] Prior to the enactment of the Military Commissions Act of 2006 (109-), it was arguably unclear whether a reviewing court would have interpreted this defense to apply retroactively to conduct occurring before the DTA's enactment in December 2005. The Military Commissions Act specified that this defense was available to U.S. persons charged with an offense under the War Crimes Act on account of conduct committed between September 11, 2001 and the enactment of the DTA.

authorities that their conduct was legal.[12] Similar defenses may exist for military personnel in courts martial proceedings.[13]

Recent Legislative Activity

A number of bills were introduced in the 109th Congress in response to the *Hamdan* decision, particularly as the decision related to the establishment of military tribunals to try detainees for violations of the laws of war. Some of these bills contained provisions amending the War Crimes Act to more fully protect U.S. personnel from criminal liability. One such bill, the Military Commissions Act of 2006 (S. 3930; P.L. 109-XX, [public law number not yet assigned]) was passed by Congress in September 2006.[14]

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[12] Although "mistake of law" defenses are generally rejected, such defenses have been recognized by courts in certain cases where defendants have acted with government sanction or after being erroneously informed by responsible authorities that their conduct was legal. These defenses can be divided into three overlapping categories: (1) *defense of entrapment by estoppel*, available when a defendant is informed by a government official that certain conduct is legal, and thereafter commits what would otherwise constitute a criminal offense in reasonable reliance of this representation; (2) *defense of public authority*, available when a defendant reasonably relies on the authority of a government official to authorize otherwise illegal conduct, and the official has actual authority to sanction the defendant to perform such conduct; and (3) *defense of apparent public authority*, which is recognized by some (but not all) federal circuits, and is similar to the defense of public authority, except that the official only needs to have apparent authority to sanction the defendant's conduct. United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n. 18 (11th Cir. 1994). Unlike the other defenses, the defense of entrapment by estoppel stems from the due process notions of fairness, rather than from common law concerning contract, equity, or agency. United States v. Austin, 915 F.2d 363, 366 (8th Cir. 1990).

[13] While ignorance or mistake of law, including general orders or regulations, is not generally available as a defense, "mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency." Manual for Courts Martial, Rules for Courts-Martial rule 916(l) (discussion). In the case of war crimes, a defense based on superior orders is available only with respect to direct and specific orders to commit an act constituting a war crime, and the defendant must demonstrate both the existence of the order and his sincere and reasonable belief that the order was lawful. *See* DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE § 2-4(F) (5th ed. 1999)(*citing* United States v. Huet-Vaughn, 43 M.J. 105 (1995)).

[14] On September 6, 2006, the Bush Administration submitted draft legislation to Congress authorizing military commissions to try detainees, amending the War Crimes Act, and specifying conduct complying with Common Article 3. White House Press Release, *Fact Sheet: The Administration's Legislation to Create Military Commissions* (Sept. 6, 2006), *available at* [http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html]; Draft Legislation, Military Commissions Act of 2006, *available at* [http://www.law.georgetown .edu/faculty/nkk/documents/MilitaryCommissions.pdf]. In response, several legislative proposals were thereafter introduced concerning these matters, including S. 3901, the Military Commissions Act of 2006, introduced by Senator John Warner; S. 3861, the Bringing Terrorists to Justice Act of 2006 and S. 3886, the Terrorist Tracking, Identification, and Prosecution Act of 2006, both introduced by Senator Bill Frist; and H.R. 6054, the Military Commissions Act of 2006, introduced by Representative Duncan Hunter.

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The Military Commissions Act of 2006 amends the War Crimes Act provisions concerning Common Article 3 so that only *specified* violations would be punishable (as opposed to *any* Common Article 3 violation, as was previously the case), including committing, or attempting or conspiring to commit

- torture (defined in a manner similar to that used by the Federal Torture Statute, 18 U.S.C. §§ 2340-2340A, in criminalizing torture);
- cruel treatment;
- the performing of biological experiments;
- murder;
- mutilation or maiming;
- intentionally causing serious bodily injury;
- rape;
- sexual assault or abuse; and
- the taking of hostages.

Prior to the enactment of the Military Commissions Act, there was some debate concerning the scope of cruel treatment that should be subject to criminal penalty under the War Crimes Act.[15] The Military Commissions Act defines "cruel treatment" prohibited by the War Crimes Act in a manner that largely mirrors the definition of "torture" contained in the Federal Torture Statute. However, whereas a person is criminally liable for torture if he *specifically intends* to cause *severe* mental or physical pain and suffering, pursuant to the amendments made the Military Commissions Act, a person is criminally liable for inflictions of cruel treatment if he

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[14] (...continued)
S. 3861, S. 3886, and H.R. 6054 were largely identical to the draft legislation proposed by the Bush Administration, while S. 3901 somewhat differed. Soon thereafter, three other bills were introduced: S. 3929 and S. 3930, which were both entitled the Military Commissions Act of 2006 and were introduced by Senator Mitch McConnell; and H.R. 6166, also entitled the Military Commissions Act of 2006, which was introduced by Representative Duncan Hunter. Reportedly, S. 3929/S. 3930 and H.R. 6166 reflected an agreement reached by the Bush Administration and certain lawmakers to resolve differences in the approach taken by S. 3901 and that taken by S. 3861, S. 3886, and H.R. 6054. Kate Zernike & Sheryl Gay Stolberg, *Differences Settled in Deal Over Detainee Treatment*, NY TIMES, Sept. 23, 2006, at A9. H.R. 6166 was passed by the House on September 27, 2006; S. 3930 was passed by the Senate on September 28, 2006 and by the House on September 29, 2006. Although the provisions of S. 3929/S. 3930 and H.R. 6166 were largely similar, there were initially some differences between the bills. However, the version of S. 3930 that was passed by the Senate (S.Amdt. 5085) and House was amended so that it contained the same provisions as House-passed H.R. 6166.

[15] Several of the bills considered by the 109th Congress would have amended the War Crimes Act to criminalize only some types of cruel treatment. For example, S. 3861, S. 3886, and H.R. 6054 would only have criminalized cruel treatment *rising to the level of torture*, while S. 3901 would have more broadly criminalized cruel treatment that *violated the standards of the McCain Amendment* (i.e., cruel, inhuman, or degrading treatment of the kind prohibited under the Fifth, Eighth, and Fourteenth Amendments). The scope of conduct criminalized by the Military Commissions Act of 2006 appears to fall somewhere between these two standards.

generally intended[16] to cause *serious* mental or physical pain and suffering to a person protected under Common Article 3.

The Military Commissions Act further defines "serious mental pain and suffering" and "serious physical pain and suffering" that rises to the level of cruel treatment subject to criminal penalty under the War Crimes Act. "Serious mental pain and suffering" is defined by reference to the Federal Torture Statute's definition of "severe mental pain and suffering" rising to the level of torture. Serious mental pain and suffering constituting cruel treatment refers to pain and suffering arising from

- the intentional infliction or threatened infliction of severe physical pain or suffering;
- the administration, application, or threatened administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- the threat of imminent death; or
- the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The type of mental pain and suffering constituting cruel treatment generally differs from the type rising to the level of torture, in that it only needs to be of a *serious* and *non-transitory nature which need not be prolonged*, as opposed to being of a *severe* and *prolonged* nature. However, the War Crimes Act, as amended, provides that with respect to conduct occurring *before* enactment of the Military Commissions Act, such pain and suffering must be of a prolonged nature.

The Military Commissions Act defines "serious physical pain or suffering" constituting cruel treatment as *actual bodily injury* involving

- a substantial risk of death;
- extreme physical pain;
- a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or
- significant loss or impairment of the function of a bodily member, organ, or mental faculty.

Under U.S. jurisprudence, most or all of these activities are likely considered to be of such severity as to constitute torture,[17] at least in certain contexts, and could give

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[16] Specific intent is "the intent to accomplish the precise criminal act that one is later charged with." General intent usually "takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)." BLACK'S LAW DICTIONARY 813-814 (7th ed. 1999)

[17] *E.g.,* Al-Saher v. I.N.S., 268 F.3d 1143 (9th Cir. 2001) (finding that regular, severe beatings and cigarette burns inflicted upon an Iraqi alien by Iraqi prison guards constituted (continued...)

rise to criminal prosecution if the offender *specifically intended* to cause such injury. However, such persons could be prosecuted under the War Crimes Act for such conduct (presuming it was directed against persons protected under Common Article 3), when they caused such injury through reckless or criminally negligent action.[18]

The amendments made by the Military Commissions Act to the War Crimes Act apply retroactively, possibly precluding prosecution of personnel for some (but not all) conduct falling under the more general scope of the earlier version of the War Crimes Act. The Military Commissions Act also provides that the statutory defense contained in DTA § 1004 covers any criminal prosecution under the War Crimes Act against U.S. personnel relating to the sanctioned treatment of detainees, if such conduct occurred between September 11, 2001, and December 30, 2005. It also amends the DTA to require the federal government to provide or employ counsel and pay fees related to any prosecution or civil action against U.S. personnel for authorized detention or interrogation activities. The Military Commissions Act also specifies that certain provisions of the War Crimes Act, as amended, are inapplicable with respect to collateral damage or a lawful attack. In addition, the provision of the War Crimes Act, as amended, relating to hostage taking does not apply to prisoner exchange during wartime. The Military Commissions Act also prohibits U.S. courts from using foreign or international sources to serve as the basis for interpreting the provisions of the War Crimes Act, as amended, defining "grave breaches" of Common Article 3.

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[17] (...continued)
"torture," qualifying the alien for relief from removal under immigration regulations implementing U.N. Convention against Torture requirements); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (finding that Bosnian-Serb soldier had committed "torture" against non-Serbian plaintiffs who brought suit under the Torture Victims Protection Act, 28 U.S.C. § 1350 note, as he had subjected them to acts of brutality including tooth-pulling and severe beatings resulting in broken bones and disfigurement). In a 2002 memorandum interpreting the Federal Torture Statute, the Department of Justice suggested that physical pain amounting to torture must be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Memorandum from the Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), *available at* [http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf], at 1. This memorandum was superseded by another DOJ memo in 2004. The 2004 DOJ memorandum rejected the earlier memo's findings to the extent that it treated severe physical suffering as identical to severe physical pain, and concluded that "severe physical suffering" may constitute torture under the federal torture statute even if such suffering does not involve "severe physical pain." Memorandum from the Office of Legal Counsel, Department of Justice, to James B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004), *available at* [http://www.usdoj.gov/olc/dagmemo.pdf], at 10.

[18] *See supra*, note 16.

Additionally, the Military Commissions Act prevents persons from invoking the Geneva Conventions as a source of rights in certain judicial proceedings. The Conventions are prohibited from being invoked in habeas or civil proceedings to which the United States or a current or former agent of the United States is a party.