



Center for Ethics
and the Rule of Law
UNIVERSITY of PENNSYLVANIA

BEYOND GUANTÁNAMO:

RESTORING THE RULE OF LAW TO THE LAW OF WAR

A REPORT RECOMMENDING
CLOSING THE GUANTÁNAMO BAY
DETENTION FACILITY

Working Group Chairs

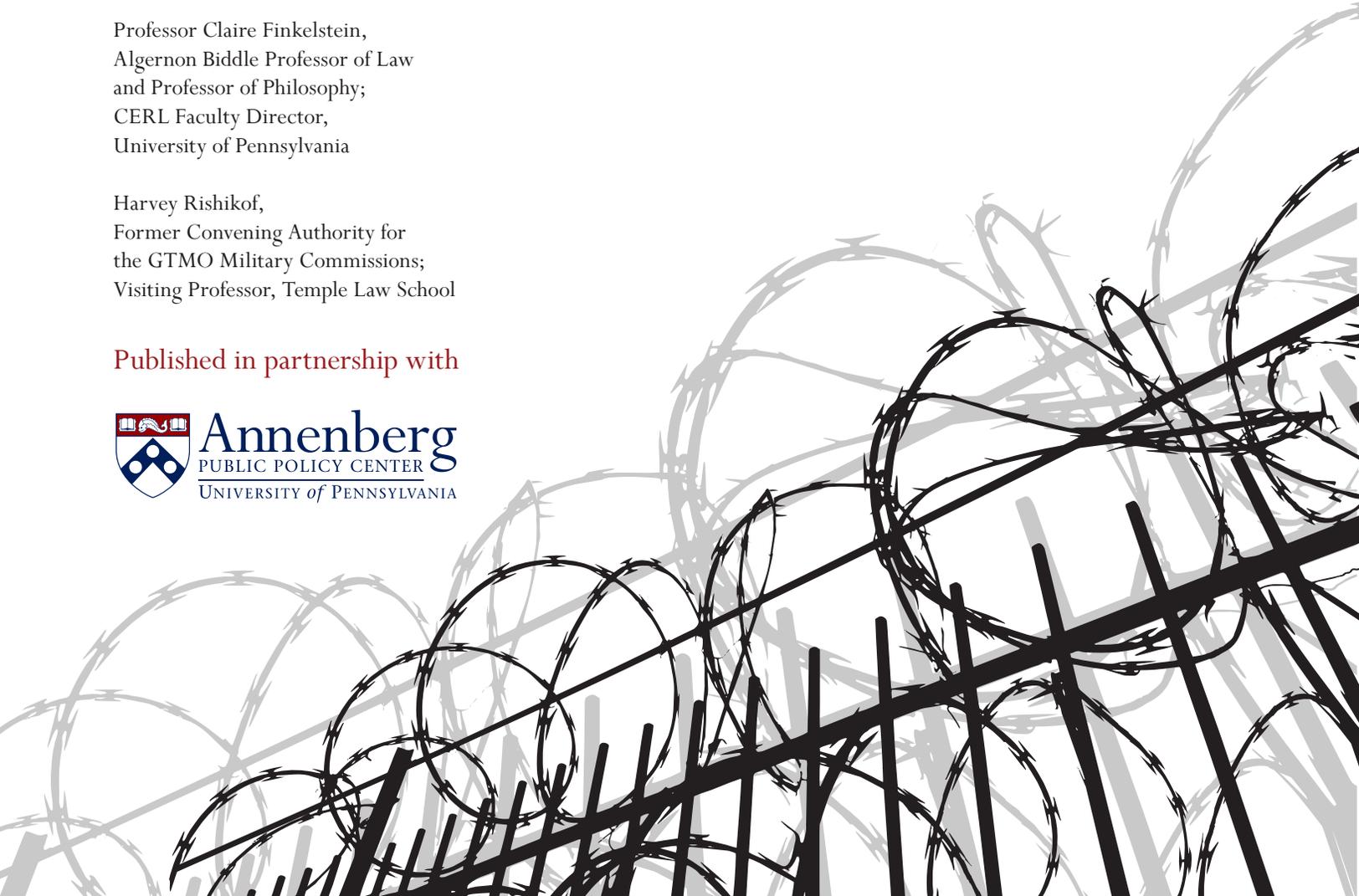
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The views expressed in this Report are those of its authors and do not necessarily reflect the views of CERL, APPC, or the organizations with which the authors are affiliated.

FOREWORD

On September 10, 2001, “Guantánamo Bay” or “GTMO” meant nothing to most people. With the exception of service members familiar with the U.S. naval base and movie fans with a perhaps vague recollection of *A Few Good Men*, many had never heard of the base, much less been aware that it was a detention facility for Haitian and Cuban migrants in the mid-1990s. But after September 11, 2001, GTMO became widely known as a symbol of abusive U.S. interrogation practices in the country’s decades-long campaign to neutralize the threat to the nation posed by Al Qaeda and associated groups. While several U.S. presidents, including President Joseph Biden, vowed to close detainee operations and military commission trials at GTMO, the situation has fundamentally not changed. Detention continues for captives the United States classifies as unprivileged enemy belligerents; some are awaiting criminal prosecution before the commission for alleged war crimes, while others have been cleared for transfer awaiting host countries that will accept them, and others are held based on the assumption that they will return to hostile activities against the United States if released.

The Report that follows is the product of a concerted effort by the Center for Ethics and the Rule of Law affiliated with the Annenberg Public Policy Center of the University of Pennsylvania to bring together diverse experts to analyze several issues and concerns directly related to GTMO, including detention authority, detainee treatment, interrogation policy, options for imposing criminal accountability (to include military commissions and courts-martial), incarceration options, and related human rights and fiscal concerns. The composition of the Working Group casts a wide net. Some contributors have long been advocates for GTMO closure, a view informed by their ardent opposition to U.S. policies related to the treatment of these and other detainees in what is commonly referred to as the war on terror. Others are more inclined to acknowledge the immense challenge of balancing fundamental fairness and human rights considerations with genuine national security imperatives. The ultimate goal of this diverse group was to produce a report that would offer meaningful insights into the complex legal challenges, and to a lesser extent policy challenges, associated with advancing the goal of closing GTMO detainee operations. In my view, they succeeded in this objective, although perhaps unsurprisingly complete consensus on all issues was elusive. Nonetheless, the differing perspectives of individual contributors does not compromise the value of this Report for those who seek to deepen their knowledge of GTMO generally and the military commissions process specifically.

The Report also illuminates significant executive branch mistakes in 2001 and 2002 leading to the creation of a flawed detention and military commission process to prosecute war crimes, as well as a misguided belief that abusive

interrogation tactics—tactics clearly inconsistent with a long U.S. tradition of ensuring the humane treatment of all detainees during conflict and peacekeeping operations—would prove effective in leading to reliable intelligence. While we rightly critique these decisions now through a *post-hoc* lens, we must remember the challenges confronted by national security decision makers based on the situation before them twenty years ago. By choosing to characterize the situation as an armed conflict, those policy makers set the conditions for the nation to leverage the immense powers associated with subduing or neutralizing a wartime enemy. This included the power to employ lethal force as a measure of first resort; the power to detain captives based on status determinations during hostilities in order to prevent return to hostile operations; the power to subject these individuals to interrogation outside the context of normal criminal procedure safeguards; and the power to use military tribunals to adjudicate alleged violations of the laws of war. While still considered controversial by many, the consistent and ongoing U.S. view is that the nation was and remains engaged in an armed conflict within the meaning of international law against Al Qaeda and other associated armed groups, and that as a result the actions of Al Qaeda and associated entities—especially those deliberately directed against civilians and civilian property—qualified as war crimes subject to military criminal jurisdiction.

From the standpoint of law of war theory, the invocation of military criminal jurisdiction for war crimes committed by the enemy during an armed conflict should not be controversial. However, largely because policy drove law rather than law driving policy, the military commission process began in 2003 with actions handicapped by dysfunction. The 1950 Uniform Code of Military Justice (UCMJ), which replaced both the Articles of War (Army and Air Force) and the Articles for the Government of the Navy (Navy and Marine Corps), did not address either of the exclusively war-related tribunals (military commissions and provost courts) in coherent statutes as it did with the more comprehensively used tribunals—courts-martial and courts of inquiry. Most notably, the authority for invoking military tribunal jurisdiction provided by the UCMJ included only incomplete procedural and evidentiary guidelines, and the UCMJ did not enumerate the offenses subject to military tribunal jurisdiction.

This oversight regarding wartime tribunals might have been corrected in the wake of the Korean War or the Vietnam War if decisions then to use military commissions or provost courts had provided the impetus. When the executive branch in 2001 decided to use military commissions to prosecute war crimes by members of Al Qaeda and associated entities, it could have researched, developed, and recommended a military commissions statute (similar to UCMJ Article 135, Courts of Inquiry) implemented by what could have been a newly drafted executive order. Ironically, such a military commission statute is exactly what Congress enacted in 2006 on the recommendation of the Judge Advocates General of the Services, all of whom broke with the Bush administration's recommendation that Congress simply enact a statute resurrecting the flawed military commission invalidated by the Supreme Court in *Hamdan v. Rumsfeld*. Instead, the Department of Defense in 2002–2003 had created ad hoc military commission regulations that failed to account for developments in military law after 1950 and military law developments even more dramatic after 1975. In short, by demanding the re-creation of a military criminal process last used in the 1940s—a process that was clearly antiquated and legally defective when compared to contemporary military courts-martial process—senior policy makers set the conditions for failure. When combined with interrogation methods that violated law of armed conflict rules and customs regarding the treatment of enemy belligerents in times of war, GTMO and everything that took place there quickly became associated with a perception of illegitimacy.

This failure undermined the worthwhile goal of reinforcing the wartime authority of the U.S. commander in chief to convene war crimes trials to impose criminal accountability for captured enemy personnel whose precapture conduct violated the laws and customs of war; not because such authority is per se invalid, but because the means to that end failed to comply with the rule of law. Instead of a balanced and legally credible military commission process, the

result was a process largely inspired by policy considerations that took neither national security nor fundamental rights of the accused into account. Looming ominously, for example, was the unwritten objective to achieve rapid war crimes convictions. The administration's urgency to move to trial in 2004 has never been explained. That urgency led directly to the ad hoc process, the classification issues, the institutional hesitancy of non-law enforcement agencies to cooperate in the production of evidence, especially potentially exculpatory evidence sought by military prosecutors for the discovery process. With the exception of *Quirin* in 1942, military commissions in the Europe and Pacific theaters occurred after the war ended, and in this way they avoided numerous classification and intelligence issues. By contrast, these trials took place in the midst of ongoing operations involving sensitive intelligence sources and methods, which thrust counsel and judges into a morass of complications surrounding discovery.

As the Report notes, there were other options. One alternative approach would have updated the scattered UCMJ statutes that reference military commissions with a single, coherent military commission UCMJ statute, and then implemented by executive order through a newly drafted *Manual for Military Commissions* (MMC), similar in format to the *Manual for Courts-Martial* (MCM). This effort would have included a paragraph-by-paragraph analysis of the MCM to determine which provisions could also be applicable to military commissions, rather than creating a DOD-driven process from scratch, minimizing the differences between courts-martial and military commissions. Where research and analysis revealed an unworkable MCM provision, then any modified provision would include separate analysis of why the Courts-martial provision was unworkable and how the new MMC provision would enhance the war crimes prosecution process while protecting individual rights and the rule of law. Another was to invoke existing general courts-martial jurisdiction, which includes the authority to prosecute *any* person who, by the law of war, is subject to trial by military tribunal. As the Report suggests, the possibility still exists of moving detainees who are in the commission system into the general courts-martial process, but such a move would now, unlike in 2002, be mired in controversy.

Either of these options could have emerged from a decision to prioritize the rule of law over the policy demand of rapid and guaranteed convictions; by acknowledging the immense value of the expertise of senior military lawyers in this response-development process; and by ensuring that the legitimate ends of using military criminal sanctions as a tool in the arsenal of the response to the attacks against the nation did not compromise the means to achieving those ends. In short, allowing the law to drive the policy rather than the policy to drive the law could have protected the integrity of the military commissions, and ironically, would almost certainly have contributed to producing the prosecutorial efficiency the administration sought to achieve through the ad hoc process it demanded. Such a process would have ensured compliance with rule of law values while simultaneously addressing the serious national security concerns in the uncertain era of the post-9/11 attacks.

When I assumed the responsibilities of “appointing authority” (convening authority) for the military commissions in 2004, the military commission process was viewed (abstractly) as a uniquely wartime process that would produce rapid, fair trials of those accused of war crimes. Military commissions had been employed by the United States most recently after World War II in both the European and Pacific theaters of war. But more than five decades had elapsed since the United States and its allies had employed military commissions. An array of external forces and distractions—not the least of which was the 2002–2003 ad hoc development of DOD regulations. The confusion inherent in creating military commissions procedures in 2001 and 2002 was almost inevitable considering it was based on a process created pursuant to a 1942 presidential order under the articles of war. These procedures may have been considered fair in 1942 but they deviated substantially from the touchstone of military justice fairness reflected in the UCMJ and the *Manual for Courts-Martial* since that time. The simultaneous shift of government attention and resources to military operations in Iraq slowed the process and allowed the sensational worst-case-scenario fears of human rights groups—namely enhanced

interrogation and practices designed to keep such abuses out of the public eye—to overshadow processes that had been widely accepted in the laws of war for generations. In the many years of GTMO military commission litigation since 2004, advocacy for the perfect has thwarted efforts to advance the common—and lawful—good.

The United States finds itself nearly twenty years later embroiled in political debates concerning the relatively small group of men remaining at GTMO who were accused of taking up arms against the United States, were captured and detained, and have ever since awaited disposition of their fates. As military commanders learn quickly on the modern battlefield, the *perception* of illegitimacy is often a decisive factor in strategic failure, whether or not that perception is completely aligned with reality. As noted above, while there are aspects of this Report and its recommendations that do not reflect complete consensus among the group, there is an understandable consensus that the perception of illegitimacy now indelibly associated with GTMO necessitates closing the facility and pursuing alternate approaches to the challenge of the remaining detainees. With that I agree.

This is one of the more important aspects of the Report. Anyone can call for the closure of GTMO but doing so without acknowledging the need to address the complexity of the national security issues at play is unrealistic. As the Report makes clear, the issue is adherence to the rule of law in an already flawed system, and that is a complex and nuanced matter. Had more trials been completed and subsequently been subject to appellate review, many other issues could have been resolved by the judicial system long before now. Instead, debates endure about detention, detainee treatment, interrogation policy, and countless other issues—all worthy of debate, but rendered essential particularly because there has been only minimal judicial review at best. Thus ironically, it is adherence to the rule of law that has caused the most prominent delays. While that in itself may speak well for the military commissions, the need for such interlocutory appeals should have been avoided in the first place.

The Report addresses all these issues extensively and comprehensively. In fact, the Report is unprecedented in its uniquely comprehensive accomplishment. It will be a useful guide to anyone struggling to clarify the multiple and various legal issues raised by GTMO's existence in the context of national security considerations. Ideally, the Report will contribute to our nation achieving a credible balance between the imperatives of national security and the actual *and perceived* commitment to the rule of law and respect for fundamental human rights.

Major General John D. Altenburg Jr.

EXECUTIVE SUMMARY

Questions Addressed

January 11, 2022, marked the twentieth anniversary of the arrival of the first detainees to the Guantánamo Bay (GTMO) detention facility at the U.S. naval base in Cuba, an anniversary that followed the twenty-year anniversary of the 9/11 attacks themselves. In two decades of operation of the Guantánamo prison and creation of the military commissions, no detainee has yet been brought to trial. The extreme delay in reaching closure on existing cases means a lack of justice for the families of the 9/11 victims and the detainees alike. Some of the 9/11 families have joined with defense teams to call for the closing of the prison facility and to demand a swift resolution to the stalled commissions process.⁵

The base is also the site of the U.S. military commissions for trying detainees alleged to have committed offenses subject to military trial in the context of armed conflict with the United States. Closing this facility has been a stated goal of several administrations, including the Biden administration, yet to date four administrations have chosen to maintain the facility and have remained passive in the face of its many failures. The GTMO detention facility has a sordid history involving the infliction of brutal methods of interrogation on detainees, full details of which remain classified or unexplored. In the view of numerous experts, these methods have produced no appreciable intelligence benefits to date.¹ Indeed, abuse of detainees and the failure to grapple honestly with this history have imposed grave costs on U.S. national security. In addition, GTMO is a highly inefficient operation, one that costs taxpayers \$540 million per year to operate, or \$13 million per prisoner annually, sums far in excess of comparable detentions in federal facilities.² These costs will increase disproportionately as time passes, given the growing need for medical personnel and updated infrastructure. Yet with three dozen detainees remaining in U.S. custody in Guantánamo, and most of the cases before the military commissions still in pretrial proceedings, the United States has made only incremental progress toward the goal of winding down the center's operations two decades after the detention began. Thus far, the Biden administration has announced no plans for shuttering the facility and bringing closure to this ignominious chapter in U.S. history.

¹ See generally STEVEN J. BARELA, ET AL., INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY (2020).

² Carol Rosenberg, *The Cost of Running Guantánamo Bay: \$13 Million Per Prisoner*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html>.

The Center for Ethics and the Rule of Law (CERL) affiliated with the Annenberg Public Policy Center of the University of Pennsylvania is a nonpartisan, interdisciplinary institute dedicated to preserving and promoting ethics and the rule of law in national security, warfare, and democratic governance. Among its various activities and publications, CERL issues periodic reports representing the views of independent experts in the national security field.

In June 2021, CERL assembled a working group to address the difficult legal and policy questions that arise in anticipation of renewed attempts to close the Guantánamo detention facility. The CERL 2021 Working Group on Guantánamo Bay is co-chaired by Claire Finkelstein, a professor of criminal and national security law at the University of Pennsylvania and CERL’s faculty director, and Harvey Rishikof, former convening authority for the commissions and a visiting professor of national security law at Temple University. The group comprises over thirty national security and counterterrorism experts, retired military officers, lawyers, former Department of Justice officials, psychologists, psychiatrists, academics, ethicists, and experts in the law of armed conflict. Members of the group are Republicans, Democrats, and Independents, and the recommendations of the group reflect the views of both current and former defense attorneys in the commission and former Guantánamo prosecutors. The views of the Working Group are intended to be nonpartisan in nature and based on an objective assessment and application of facts and law.

The Working Group set out to study the current legal and policy challenges associated with closing the Guantánamo Bay detention facility. While it is unrealistic to expect complete agreement among the members of such a diverse group, a broad consensus has emerged on several critical points regarding the objective of closing Guantánamo and identifying alternative mechanisms to address the national security concerns related to such closure. As reflected in the drafting process there were sharp disagreements over several issues. What has emerged is a consensus document that does not fully satisfy all participants. Nevertheless, the central conclusions of the Working Group are set out below.

Summary of Principal Findings

The Working Group unanimously concludes that closing the Guantánamo Bay detention facility is both feasible and desirable and that such closure would better advance the national security objectives of the United States than continuing detention of the small number of individuals captured in the war on terror that remain at this facility. As of the closing date of this Report, namely July 1, 2022, Guantánamo is home to thirty-six detainees: on July 1, 2022, nineteen are recommended for transfer, ten are in the military commission prosecution process, five are being held in indefinite law-of-war detention and not recommended for transfer, and two are serving penal sentences as the result of conviction by the military commissions.³ Many of these individuals suffer from the psychological and physical consequences of abusive treatment, practices that federal judges, convening authorities, and even two U.S. presidents have referred to, or characterized as “torture.”

This history of cruel and degrading treatment of detainees has permeated the legal, medical, and political decisions the federal government has made relating to Guantánamo Bay. It has complicated the prosecutorial process by creating issues related to the admissibility of both confessions and direct and derivative evidence, classification of evidence, and access to potentially favorable information held by the government. At the same time, the option of simply releasing all remaining detainees remains both unrealistic and undesirable from the standpoint of national security. The essential

³ *The Guantánamo Docket*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>.

question is how to balance legitimate U.S. national security concerns against the need to restore both the reality and the perception of U.S. commitment to the rule of law values in the wake of many years of problematic conduct on the part of the U.S. government, conduct that likely violated the international law of armed conflict, federal law, and the U.S. Uniform Code of Military Justice (UCMJ).

Information continues to emerge regarding the methods and extent of interrogational abuses of detainees at Guantánamo Bay and in other detention facilities and black sites around the globe. With each revelation, the legitimacy of the commissions and continued detention is undermined. For the first time, for example, a detainee at Guantánamo, Majid Khan, was able to publicly describe his black site torture in a court of law—a message he delivered in a commission courtroom while holding up his shirt to reveal the physical scars of torture for the entire courtroom to see. The impact was immediate and significant. A jury of military officers recommended clemency for Khan and described the treatment he sustained in U.S. custody as “a stain on the moral fiber of America” and “a source of shame for the U.S. government.”

Under the law of armed conflict, there is a duty to repatriate prisoners of war (POWs) upon cessation of hostilities, a duty that the Fourth Geneva Convention applies to those interned in war more generally.⁴ For example, international law does not recognize a right on the part of the United States to detain on grounds of dangerousness alone, when such an assertion continues past the cessation of hostilities. The tradition of repatriation of belligerent detainees when war ends is long-standing and is one the U.S. should readily embrace. For Taliban detainees, this principle is clearly implicated by the U.S. withdrawal of troops from Afghanistan in August 2021. Although these detainees have never qualified for POW status, the end of hostilities between the U.S. and the Taliban raises a legitimate question as to whether the underlying principle of post-hostilities repatriation applies in their case. Furthermore, it would be consistent with the withdrawal of the United States from active hostilities in Afghanistan to resolve the indefinite detention of those who are detained based on their involvement in this aspect of the war on terror, other than those presently awaiting trial. Matters are obviously different for those detainees who are in the commission system. Any argument regarding cessation of hostilities does not affect them, given that they are awaiting trial for alleged war crimes. However, with regard to this group of detainees, other problems beset their current captivity.

The Working Group unanimously concludes that the military commissions are dysfunctional, and that the system is unlikely ever to produce meaningful trials and impartial verdicts. Whatever the original intention, the military commissions have failed to provide either the promised transparency or justice, and most of the pending cases continue to languish in pretrial proceedings, showing little hope of resolution. The start of the earliest trial is at least a year off, and the Department of Defense is building a new courtroom at the facility,⁵ both of which suggest that the Biden administration is not planning to close Guantánamo any time soon. A number of factors have conspired to produce the delays in trial: the geographic location, the lack of a governing body of law, the involvement of multiple bureaucracies and agencies that render procedures cumbersome and inefficient, multiple judges, the felt need on the part of the U.S. government to maintain high levels of secrecy, and repeated instances of governmental misconduct and interference with the process. These factors, and the delays they have produced, have created an indelible taint that calls into question the

⁴ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 133, 6 U.S.T. 3516, 75 U.N.T.S. 287, which establishes that “[i]nternment shall cease as soon as possible after the close of hostilities.” An exception exists for penal proceedings or sentences handed down pursuant to such proceedings.

⁵ Karen J. Greenberg, *Are We Any Closer to Shutting Down Guantánamo?*, NATION (Jan. 27, 2022), <https://www.thenation.com/article/world/guantanaomo-courthouse-closure/>.

likelihood these tribunals will be capable of producing impartial verdicts or outcomes perceived as legitimate. Accordingly, the Working Group proposes to disband the Guantánamo Bay facility over the course of the next twelve plus months and to abandon any hope of conducting trials before the U.S. military commissions as currently composed.

Resolving cases by guilty plea, wherever possible, is the preferred option, whether the pleas are effectuated in the commission system or in federal court. In either case, the desired outcome is most likely to be achieved by taking the death penalty off the table for those who are willing to plead guilty. The Working Group strongly supports the use of video teleconferencing in order to resolve a number of the outstanding commission cases, particularly where guilty pleas are concerned, since the 2022 National Defense Authorization Act (NDAA) and other restrictions on the use of federal funds to bring detainees into federal court can be obviated by conducting guilty pleas by video with the detainee's consent. In addition to guilty pleas, teleconferencing could prove useful in resolving some of the remaining cases through the use of the concurrent military jurisdiction over war crimes vested in general courts-martial authority pursuant to Article 18 of the UCMJ. Even the military commissions have allowed proceedings conducted entirely through video teleconferencing, including arraignments and sentencing proceedings. Needless to say, a full criminal trial could not be conducted by video.

With respect to detainees who are currently uncharged, the most promising resolution is repatriation, release, or transfer to other legal systems for resolution. It is unlikely we will see new charges for detainees who have been detained for many years without charge, given the insufficiency of evidence to make the charging decision to date. Moreover, the legality of such delayed charges would be questionable, particularly given the history of torture and the concern that any evidence used to make new charging decisions will be tainted by illegal collection. Stuck between being charged and being released, a number of detainees have been detained indefinitely with no clear conditions for release. Such has been the situation of Zayn al-Abidin Muhammad Husayn, better known as Abu Zubaydah. Held in Guantánamo since 2006 without charge, he was tortured extensively by the Central Intelligence Agency (CIA).⁶ He has recently petitioned the U.S. District Court for the District of Columbia for release on the ground that the war in Afghanistan is over.⁷ Under sound principles of international and domestic law, if there is no basis for charging a detainee with either a war crime or a domestic offense, and if the United States is not currently engaged in active hostilities against the organization of which the detainee was a member, that individual should be released or repatriated. This is especially true if the only evidence against him was either obtained under torture or represents the “fruit of the poisonous tree,” namely was the product of illegally obtained evidence, which is presumptively inadmissible in all Article III U.S. courts.

Although the number of detainees who have been cleared for transfer or release keeps growing, transfers are stalled because of the failure to coordinate with foreign partners who might accept them. The federal government has not yet dedicated the personnel needed to effectuate transfers to foreign jurisdictions, particularly within the Department of State, where the Office of the Special Envoy for Guantánamo Closure was shuttered in 2017. The Working Group recommends that this office be restored.

In addition, the reduction in Guantánamo's detainee population would make little principled difference if 1) the pretrial facility remains open, and 2) the administration fails to clarify the principles on which the commissions operate and justify the indefinite detention of uncharged detainees. Even closing Guantánamo at the present moment in time

⁶ See, e.g., Senate Select Committee on Intelligence Study for the Central Intelligence Agency's Detention and Interrogation Program at 40–47.

⁷ Husayn v. Austin, No. 08-CV-1360 (EGS), available at Sur Sur Reply - End of War - Abu Zubaydah - DocumentCloud.

would be insufficient to ensure that the abuses of the detainee program in the war on terror do not recur with a future possible terror attack on U.S. soil.⁸

Though the Working Group does not believe impartial justice can be achieved by prosecution before the currently composed military commissions, it nevertheless maintains that if trials are to move forward in the facility, due process rights must apply to all military commission proceedings at Guantánamo. Of particular importance is the right of each defendant in the commission process to be granted discovery access to favorable and material information in the government's possession—if necessary, as authorized pursuant to the Classified Information Procedures Act (CIPA)—a right applicable to defendants in federal courts even when the information is highly classified. This access is equally critical for determining whether continued detention is justified. A recent case argued before the U.S. Circuit Court for the District of Columbia, *Al-Hela v. Biden*, considers whether *ex parte* filings, hearsay, and other evidence used to justify Abdulsalam Ali Abdulrahman Al-Hela's detention should in fact be admissible in court. The oral arguments before the en banc court occurred on September 30, 2021. Developments in this case may have important implications for the application of due process rights at GTMO and could possibly open different avenues for detainees to challenge the basis of their detention. The case could also necessitate a revision of current government procedures regarding evidence and transfers.

Another bar to the ability to hold fair trials and legitimate detention process at GTMO before the commissions stems from what appears to be an over-classification problem in the military commission process. The government's ability to censor and approve every piece of information given to cleared defense counsel poses a serious impediment to the legitimacy of both detention review proceedings and criminal trials. Because of the substantial risk to relationships with allies resulting from full disclosure of the details of the CIA interrogation program, its review of information is inherently conflicted, creating a genuine risk of unjustified classification. Moreover, in the context of commission trials, most detainees and their lawyers are never able to see a substantial portion of the evidence available to the prosecution (though this feature is not unique to commission proceedings and is, in theory, consistent with CIPA and provisions of the *Manual for Courts-Martial*). Indeed, the discussions of the Working Group made clear that unjustified classification and the government's desire to protect against public disclosures involving the use of torture have contributed more than any other factor to the paralysis in the military commissions and the inability of the prosecution and the defense to move into the trial phase of the commission process.

Improved clarity regarding the categorization of the remaining GTMO detainees is critical, not only for resolving current cases, but also for avoiding the legal confusion surrounding detainee status in future conflicts, especially against non-state organized armed groups. Some members of the Working Group believe that the detainees should be identified as civilians who directly participated in hostilities against U.S. forces or their allies; others believe they should be considered unprivileged enemy belligerents—i.e., members of enemy organized armed groups who fail to qualify for prisoner of war/lawful combatant status—on the grounds that as fighting members of such groups it is illogical to characterize them civilians, even as civilians who directly participated in hostilities. Importantly however, this difference does not impact the broader recommendations related to closure, alternative criminal prosecution options, and due process rights. The full Report discusses the background and history of the status question and articulates several recommendations relating to this question.

⁸ See Claire Finkelstein, *Closing Guantanamo Is Only the First Step*, SMERCONISH (Feb. 10, 2022), <https://www.smerconish.com/exclusive-content/closing-guantanamo-is-only-the-first-step>.

Furthermore, courts, including the Supreme Court, have recently directed renewed attention to the indefinite detention of Guantánamo detainees. On March 3, 2022, the Supreme Court decided *United States v. Zubaydah*, a case relating to a Polish proceeding in which Zubaydah’s lawyers, at the request of Polish prosecutors, sought to have two psychologists who were responsible for developing the methods under which Zubaydah and other detainees were tortured (as determined by the court). The Department of Justice asserted the state secrets privilege to block the testimony, and the case turned on the question of whether the state secrets doctrine can be used to block testimony relating to the location where the events took place.⁹

Many were struck by a question Justice Neil Gorsuch asked the government’s lawyer, namely why Zubaydah could not testify about the treatment he had received in a U.S.-run Polish black site. Several of the justices echoed his puzzlement. Gorsuch and the other justices learned that Zubaydah was not permitted to speak with anyone but his own lawyers, and thus that he could not testify publicly about his treatment without the permission of the Justice Department. The Ninth Circuit opined that the state secrets privilege could not be asserted by the government to block testimony regarding matters that were widely known and with regard to which the government had in fact allowed significant declassification. The Ninth Circuit also suggested that the state secrets privilege should not be invoked for the purpose of covering up illegality.¹⁰ The Supreme Court overturned the Ninth Circuit and held that the government’s ability to invoke the privilege could not be meaningfully evaluated by an Article III court, if that meant exposing the facts over which the government was asserting secrecy in the first place. Thus, federal courts had to accept the government’s asserted need to assert the privilege, including with respect to information that had largely been exposed to public view, known as the Glomar position.

The *Zubaydah* case set federal law back significantly with regard to government transparency, not only because of the precedent it set with regard to already-disclosed information, but also because of the Supreme Court’s acceptance of its own inability to evaluate governmental assertions of the secrecy privilege.¹¹ Despite Justice Stephen Breyer’s portrayal of the case as involving a “narrow evidentiary question,” the case undermines attempts to force the government to submit to the need to make an objective showing of necessity with regard to secrecy, though the dissents hint of a greater willingness. Had the Ninth Circuit opinion been upheld, it would have imposed an important limitation on the ability of the executive branch to shroud illegal government conduct in the mantle of national security. Such a limitation might have applied to other contexts.¹²

While the Supreme Court’s ruling in this case permits the government to invoke the privilege, it does not require

⁹ *United States v. Husayn*, 595 U.S. — (2022).

¹⁰ *Husayn v. Mitchell*, 938 F.3d 1123 (9th Cir. 2019). However, the Ninth Circuit returned the case to the district court to disentangle unprivileged from privileged information.

¹¹ For criticisms of this decision, see Mark Fallon, *State Secrets and the Blinding of Justice*, SPY TALK (Mar. 24, 2022), <https://www.spytalk.co/p/state-secrets-and-the-blinding-of?s=r>; Claire Finkelstein, *How the State Secrets Doctrine Undermines Democracy*, BLOOMBERG LAW (Mar. 28, 2022), <https://news.bloomberglaw.com/us-law-week/how-the-state-secrets-doctrine-undermines-democracy>.

¹² Note that it would apply, for example, to former President Trump’s assertion of executive privilege with regard to documents relating to the January 6 attack on the Capitol building, though in that case Trump’s position is already defeated by the fact that he has no standing to assert the privilege. In general, however, a rule that barred assertions of executive privilege when presented for the purpose of covering up illegal conduct would take the wind out the sails of many such assertions and act as a deterrent with regard to future instances of government illegality.

it to do so. Indeed, a blanket invocation of the state secrets privilege by the government may “facilitate the loss of liberty and due process,”¹³ as noted by the dissents. Moreover, the Supreme Court’s ruling does not limit the president’s authority to issue an executive order mandating widespread declassification of the rendition, detention, and interrogation (RDI) program, as recommended by the Working Group.

Adding to the foregoing, there are significant political and military developments relating to the changing situation in Afghanistan that suggest the possibility of momentum toward closing Guantánamo. Many members of the group feel that the withdrawal of troops from Afghanistan and President Biden’s statements regarding the end of the war upon the occasion of withdrawal from the region should serve as an official marker of the end of the U.S. engagement in the war in Afghanistan. The essential question regarding termination of hostilities is whether the termination of hostilities against the Taliban indicates a termination of hostilities against Al Qaeda and other associated armed groups. Accordingly, a nuanced approach may be needed to assess which detainees, if any, should be considered eligible for repatriation based on both a failure to continue to fall within the scope of statutory detention authority and/or customary international law principles related to termination of hostilities.

With this heightened awareness of the level of abuse of Guantánamo detainees, combined with the withdrawal of U.S. troops from Afghanistan and the stated commitment on the part of the current administration to close the detention facility, the moment seems propitious to undertake a thorough examination of the opportunities and obstacles to close the Guantánamo Bay detention facility. As we have just passed the twentieth anniversary of the opening of the detention center at Guantánamo Bay, and against the background of the dramatic changes in the landscape in Afghanistan and the war on terror, the Working Group believes that resolution of the situation of the thirty-six remaining detainees currently interned at GTMO should be a high national security priority. The Working Group sees the treatment of Guantánamo detainees as continuing to cast a dark shadow over the integrity of the United States and believes the facility inflicts continuing damage to the country, undercutting our international standing and reputation and damaging our relationships with our allies. The Working Group believes, in addition, that the continued operation of Guantánamo poses an unjustified and unnecessary fiscal burden on the United States that will continue to grow as the medical needs of the Guantánamo defendants increase and daily care requires increasing medical and psychological support.

Finally, the Working Group sees the continuation of the detention facility as an ongoing threat to U.S. national security. The history of abuse and the failure on the part of the United States to acknowledge and make amends for its treatment of detainees in the war on terror has accelerated radicalization among Middle East terror groups and has degraded the ability of the United States to act as a leader with regard to the law of armed conflict and international humanitarian law. Thus, as the moral, financial, and security costs of indefinite detention continue to mount, the Working Group calls on the Biden administration to take immediate action to draw the commissions, as well as the indefinite detention of detainees outside the commission process, to a close.

The Working Group, however, also recognizes an opportunity in the present moment. Recent legal developments suggest increased receptivity to acknowledging the history of torture with respect to Guantánamo and elsewhere as part of the war on terror. There is a new level of openness to addressing past wrongs and to attempting to achieve justice, both for the families and the detainees, unlike at any time since the detention facility was first opened.

¹³ *United States v. Husayn*, 595 U.S. — (2022) (Gorsuch, J., dissenting) (slip op., at 16–17).

Working Group members brought their expertise to bear on eight research areas: 1) the history and current state of Guantánamo, 2) the authority of the military commissions, 3) the authority for continued detention, 4) critical questions of law that arise in the commissions, 5) the role of federal courts, 6) the transfer or release to foreign jurisdictions or international tribunals, 7) the effects of U.S. government classification practices and claims of privilege, 8) and the status of Guantánamo detainees and implications of categorization. Within these areas, the Working Group researched over thirty specific areas of inquiry in order to make transparent the challenges associated with closing GTMO. This Report is a comprehensive overview of GTMO—one that is historically informed, attuned to developments in counterterrorism, and forward-looking in its recommendations to senior national security leaders in the Biden administration, the Department of Justice, the Department of State, and members of Congress, particularly the House and Senate Armed Services Committees. The Report details the Working Group’s collective reflections on these topics, as well as its joint recommendations in light of these findings.

Principal Findings

The Working Group is unanimous in several broad conclusions. First, the group is unanimous in its condemnation of the continued operation of the Guantánamo Bay detention facility under present legal guidance and parameters and favors an expeditious resolution of the cases of the thirty-six individuals who remain in that facility, both within and outside the commission system. The group is also unanimous in seeing the military commissions as highly dysfunctional, and generally rejects the idea that there could be a just resolution to cases in which the expectation is that the defendants will proceed to trial within this existing system. The group is largely of the opinion that resolving cases by guilty plea, wherever possible, is the preferred option for those in the commission system, and through release, repatriation, or transfer to other legal systems of detainees who have not been charged before the commissions. The group is unanimous in its conclusion that the military commission system, however well-intended, has failed to provide either transparency or credible justice, with pending cases continuing to languish in pretrial proceedings, with little promise of timely or credible resolution. Notably, this conclusion is supported both by former and current defense team members who are either principal authors or consultants to the Working Group, *and* by former commission prosecutors involved with the Working Group. The rationale for this conclusion is well summarized by a rhetorical question posed by one legal scholar who wrote: “Given how long these cases are taking, given how much money and time and labor hours are being invested into them, and given how poorly the military commissions’ decisions are faring when subjected to meaningful Article III judicial review, why is it in *anyone’s* interest at this point to continue this enterprise?”¹⁴

The takeover of Afghanistan by the Taliban during the summer of 2021 had significant implications for the deliberations of the Working Group as well. In light of these developments, many in the group feel that it would now be appropriate for Congress to rescind the 2001 and 2002 authorizations for the use of military force (AUMFs), or, alternatively, for the Biden administration to declare the authorizations moot. Those who do not agree with this *do* believe that amending the 2001 AUMF to indicate the scope and duration of the authorization more clearly is long overdue. The group has also discussed the implications of the U.S. withdrawal from Afghanistan and notes an important development: the Biden administration has deemed it feasible to repatriate Guantánamo detainees to that country. This has bearing on

¹⁴ Steve Vladeck, *It’s Time to Admit That the Military Commissions Have Failed*, LAWFARE (Apr. 16, 2019, 10:40 PM), <https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed>.

the prospects for transfer of uncharged Guantánamo detainees who are citizens of Afghanistan. For instance, Assadullah Haroon Gul, who was among the detainees approved for transfer when security conditions were met, was repatriated to Afghanistan on June 23, 2022.¹⁵ On the other hand, Muhammad Rahim, also from Afghanistan, is among the five detainees still being held in indefinite detention as law of war detainees as of the closing date of this Report, and thus no change of status is imminent in his case.

The Working Group also recognizes that the extreme delays in the commission process are due to a number of factors, such as the difficulty posed by GTMO's geographic location; the lack of an established, tested, and legally validated foundation of governing law; the involvement of multiple bureaucracies and agencies that render procedures cumbersome and inefficient; and repeated instances of U.S. government misconduct and interference with the administration of justice. The Working Group is unanimous in its view that the federal government has not yet dedicated the personnel needed to effectively resolve the cases of the detainees, both charged and uncharged, at GTMO. This is particularly true where the Department of State is concerned. Such engagement is critical not only in order to the international diplomacy necessary to transfer detainees and to liaise with the Department of Defense to ensure that these transfers occur with as little risk as possible to the United States and to the host countries, but also to ensure that such transfers do not strain our relationships abroad. It is therefore troubling that the Office of the Special Envoy for Guantánamo Closure at the State Department tasked with the job of detainee transfer has been shut down and not reopened.¹⁶ It is the recommendation of the Working Group that this office be reopened with a revised and robust mandate—coupled with necessary resources—to facilitate timely detainee transfers under conditions that satisfy U.S. national security interests.

The Working Group finds that GTMO is a highly inefficient operation, one that costs taxpayers sums vastly in excess of comparable detentions in federal facilities. Past financial data suggest that that through fiscal year 2021 GTMO operations have cost U.S. taxpayers at least \$8 billion. The need for medical personnel and updated infrastructure means that these costs will continue to escalate.

Moreover, it is the conclusion of the Working Group that continued operation of GTMO presents a risk, rather than a benefit, to U.S. national security. Documented instances of detainee abuse and torture at it and other detention centers around the globe have engendered the anger and animosity of other nations. At the same time, the indefinite detention and isolation in which most detainees are placed have opened the U.S. to international criticism from even close U.S. allies.

The Working Group feels strongly that detainees at GTMO are entitled to invoke the protections of the Fifth Amendment due process clause, which would include the right to view the government's evidence against them and the impropriety of using unreliable information for a determination about whether detention is justified.¹⁷

¹⁵ Carol Rosenberg, *U.S. Repatriates Afghan Whose Guantánamo Detention Was Unlawful*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/politics/guantanamo-afghan-prisoner-released.html>.

¹⁶ Charlie Savage, *Office Working to Close Guantánamo Is Shuttered*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/us/politics/state-dept-closes-office-working-on-closing-guantanamo-prison.html>.

¹⁷ *Al-Hela v. Biden* both contemplates whether the due process clause requires any greater protection than those already afforded by the suspension clause and questions the reliability and credibility of the ex parte filings, hearsay, and other exculpatory evidence used to justify Abdulsalam Ali Abdulrahman Al-Hela's detention. The oral arguments before the en banc court occurred on September 30, 2021, and seemed to indicate the court's reluctance to extend due process rights to detainees. Developments in this case may have important implications for the general application of due process rights at GTMO, open different avenues for detainees to challenge the basis of their detention and necessitate a revision of current government procedures regarding evidence and transfers.

The Working Group is unanimously concerned about the degree of over-classification involved in the military commissions process. The government's ability to censor and approve every piece of information given to defense counsel reduces the likelihood that a detainee will receive a fair trial. Because the government has an interest in keeping the details of the CIA torture program secret, its review of information is inherently biased and arguably results in unjustified classification. Moreover, most detainees and their lawyers are never able to see a substantial portion of the evidence that has been reviewed by the prosecution. They have only received summaries of the evidence, which is unprecedented in cases involving the death penalty. Indeed, the discussions of the Working Group made clear that excessive classification motivated by the government's desire to protect against public disclosures about detainee treatment, including the use of torture, has contributed more than any other factor to the paralysis in the military commissions and the inability of the prosecution and the defense to move into the trial phase of the commission process.

The Working Group strongly supports the use of video conferencing in order to resolve a number of the outstanding commission cases. For example, the NDAA and other restrictions on use of federal funds to bring detainees into federal court can be obviated by conducting guilty pleas by video.¹⁸ In addition to guilty pleas, teleconferencing could also prove useful in resolving some of the remaining cases by courts-martial. The precedent for such uses of video exists given that the military commissions have already allowed proceedings to be conducted entirely through video teleconferencing, including arraignments and sentencing proceedings.

With regard to the status of detainees, the Working Group believes that improved clarity regarding the legal identity of the remaining GTMO detainees will be critical, not only for resolving current cases, but also for avoiding the legal confusion surrounding detainee treatment in future conflicts. The end of hostilities against the Taliban and the accompanying uncertainty about which detainees fall within the scope of the various statutory authorities for detention necessitates a clear statement by the government about the legal basis for every individual subject to continued detention.

In addition, in view of the controversies surrounding torture and the unreasonable delays in the commission process, not to mention the length of detention for those who are being held but have never been charged, the Working Group believes that the United States should consider acknowledging an obligation to care for detainees, a duty that has not yet been identified by the U.S. government. First, in accordance with international law and basic principles of human rights, the United States should assume responsibility for attempting to rehabilitate detainees who were tortured by the United States. Medical repatriation provisions, such as would apply to prisoners of war during an international armed conflict, would be appropriate to extend to GTMO detainees. Releasing and repatriating those detainees who are sick or wounded and unlikely to recover would not prejudice U.S. efforts to mitigate the risk of reengagement. In addition, the United States has a duty to ensure that detainees' standard of care does not deteriorate as a result of transfer.

Recommendations

To redress the long-standing legal obstacles and political inertia surrounding GTMO, the Working Group articulates a series of recommendations divided into two categories: those directed to the executive branch and those directed to Congress. The recommendations, which are set out in full in Part X of this Report, are listed below. Most recommendations are directed to the executive branch, and in each case the Working Group identifies specific action items for several

¹⁸ Steve Vladeck, *Can Detainees Plead Their Way Out of Guantánamo?*, LAWFARE (May 17, 2016), <https://www.justsecurity.org/31104/detainees-plead-guantanamo/>.

different executive branch agencies and departments within the federal government. The Working Group's thirteen recommendations range from general to fairly specific actions. It should be noted, however, that the Working Group was not constituted to study the very specific modalities of closure, but rather to address the legal complications and objections that currently stand in the way of embarking upon such a more specific plan.

Recommendations for the Executive Branch:

1. President Biden should rescind Executive Order (EO) 13823 and make closing Guantánamo Bay detention facility a national priority. He should give the Secretary of Defense the overall authority and responsibility to close the Guantánamo prison and end the military commissions process. He should direct the Department of Defense (DOD) to close the military commissions and the detention facility no later than the end of the 2022–23 fiscal year—September 30, 2023.
2. DOD should attempt to resolve as many cases as possible by guilty plea, whether by pleas conducted in the commissions or in federal court by videoconference. In order to facilitate such pleas, DOD should eliminate the death penalty from the range of possible sentences for defendants willing to plead guilty.
3. If bringing detainees into federal court remains foreclosed, DOD should consider invocation of general courts-martial jurisdiction to prosecute any individual whose case is not resolved through guilty plea or repatriation or release.
4. The president should restore the Office of the Special Envoy for Guantánamo Closure within the Department of State (DOS) to work exclusively on closing Guantánamo as a national priority.
5. The Secretary of Defense (SecDef) should direct the Periodic Review Board (PRB) to conduct a thorough review of the status of each detainee currently interned at Guantánamo and to release publicly the findings of such review. The PRB's review should identify a mechanism of resolution for each ongoing case as well as to assess the detainees' health and physical conditions as needed to conduct successful repatriation or transfer. The SecDef should also work with the Department of Justice on case resolutions and DOS or other agencies/departments to identify countries that are willing to accept detainees for transfer or release and then serve as a coordinating body to facilitate such transfers to be completed no later than the end of the 2022–23 fiscal year.
6. Any currently uncharged individuals should either be charged or transferred to other countries, at least to the extent that hostilities with that detainee's nation of origin have ceased. This recommendation does not purport to make any assessment of the president's authority to detain uncharged individuals past the end of hostilities, but rather constitutes a recommendation that is specific to the current Guantánamo detainees and the history and length of their incarceration.
7. President Biden should issue an EO to mandate widespread declassification of the RDI program and direct the attorney general to issue a memorandum imposing presumption of declassification of all government documents relating to torture or other forms of illegal treatment of detainees in U.S. custody associated with the war on terror. This presumption should be rebutted only based on legitimate, specific, and concretely described classification concerns and not for the purpose of concealing illegal or improper government conduct.
8. The federal government should revise its position to explicitly affirm that due process does apply to Guantánamo detainees. Accordingly, the Office of Legal Counsel (OLC) should make clear that due process applies to all American tribunals capable of adjudicating detention as a punishment as well as to habeas proceedings.
9. OLC should issue an opinion advising that the state secrets privilege cannot be legitimately invoked when doing so would serve to obscure U.S. involvement in inappropriate or potentially unlawful activity.

Recommendations for Congress:

10. In order to allow the president to make use of the broadest range of options in attempting to close the Guantánamo prison, Congress should remove the prohibition on using federal funds to transfer detainees to other U.S. jurisdictions from Guantánamo Bay from future NDAAAs, starting with the 2023 NDAA.
11. Congress should mandate that evidence derived from any illegal activity, including torture, cruel, inhuman, or degrading treatment, or the use of interrogation practices prohibited by U.S. law, be excluded from all stages of military tribunal proceedings and for all purposes, except as evidence of the illegal activity.
12. Congress should repeal the Military Commissions Act (MCA) of 2009. In the event that Congress is unwilling to repeal the MCA, Congress should consider a variety of amendments to that statute, including but not limited to reevaluation of the status distinctions for detainees; revision of the MCA Punitive Articles to remove offenses that are not closely aligned with widely accepted war crimes; and integration of a “fruit of the poisonous tree” exclusionary rule pertaining to admissible evidence.
13. The Senate Judiciary Committee should conduct hearings and issue a report, comparable to the Senate Armed Services Committee and Senate Select Committee on Intelligence reports, to consider and set future standards for the role of members of the legal profession in facilitating policy decisions related to the detention and interrogation practices that were and remain inconsistent with prevailing legal standards.

Closing Guantánamo and Restoring U.S. Integrity in War _____

The Working Group is of the unanimous opinion that it is critical not only to close the Guantánamo Bay detention facility, but also to take steps to restore the integrity and international standing of the United States by ending an ignominious chapter in U.S. history. Repairing the actual and perceived damage caused by the failed experiment of the commissions and protracted extraterritorial detention will require a more refined and credible legal framework. This framework must effectively provide for the capture and detention of individuals engaged in hostilities against the United States and coalition partners in the context of armed conflicts in the future, as well as a legal process for adjudicating their alleged precapture criminal misconduct that not only is consistent with U.S. standards of due process, but also enables swift resolution and justice for the victims and their families. Four different administrations have pledged to close or resolve the Guantánamo “problem”—a clear acknowledgment that the existing framework has failed to achieve these vital national security objectives. It is time for the relevant actors to step up and take bold and decisive action to resolve this “problem” and end this stain on our collective political and legal consciousness for the surviving family members, our nation, and our reputation as a people that believe in and uphold the rule of law.

I. REPORT OF THE WORKING GROUP REGARDING THE CLOSURE OF GUANTÁNAMO BAY

INTRODUCTION

A. Purpose of the Report

The original goal that led to the establishment of the military commissions at Guantánamo Bay (GTMO) was to provide timely and credible justice for the thousands of victims and families who were killed or injured or who suffered the loss of a loved one as a result of the vicious 9/11 attacks on the United States and its citizens, and to hold accountable captured enemy personnel whose precapture conduct violated the laws and customs of war. After twenty-plus years of operation, however, the commissions have failed to achieve these objectives, and in fact the process has undermined the legitimacy of U.S. efforts to advance valid national security objectives. This is the clearest indication that Guantánamo and the effort to bring captives suspected of such violations to justice is a failed experiment. As Colleen Kelly, whose brother Bill Kelly, Jr., was killed in the North Tower of the World Trade Center on 9/11, testified before the Senate Judiciary Committee on December 7, 2021, “The rule of law is a bedrock principle of our nation, and after 9/11 we expected our government to uphold the rule of law in seeking accountability for our relatives’ deaths. It failed to do so and as a result we still are awaiting justice twenty years later.” The fact of delay and the near-total inability to secure credible resolutions of cases brought before the commissions has reinforced the extremely negative perception of Guantánamo. This has badly damaged the standing of the United States in the international arena. To highlight these profound adverse consequences, the Working Group submitted a letter with the recommendations contained in this Report to the Judiciary Committee in advance of the December 7 hearings that are now incorporated into the congressional record.

The failure to close the Guantánamo prison, despite many years of problematic practices, abuse, expense, and failed attempts to bring captives to justice, has many different explanations. For purposes of this Report, three such explanations are especially worthy of highlight. First and foremost, the specter of the violations of what the government labeled its “enhanced interrogation” program—and what many experts considered a torture program—hangs over the commission process and the prison as a whole and compromises any claim of meaningful justice. While debate over the treatment of detainees continues to divide the legal community, there is no credible denial that the methods employed to interrogate detainees in Guantánamo violated Common Article 3 of the Geneva Conventions, the Uniform Code of Military Justice, the law of armed conflict (LOAC), and long-standing U.S. jurisprudence prohibiting coercive interrogations and government conduct that “shocks the conscience.” Such violations have bedeviled the commissions and tainted the legitimacy of the U.S. detention authority. Particularly in light of the history of interrogational abuses of those currently detained, the length of time that has passed, and the advanced age and poor state of health of many detainees, as

well as the lack of clear legal authority for continued detention outside of the commission process, the legal, moral, and national security justifications for continued detention remain highly controversial.

Second, in large part as a response to their complicated history, the commissions lack the transparency analogous to an Article III criminal trial or even a general court-martial. The Working Group believes that this is a direct consequence of often unjustified invocation of classification authority related to all aspects of the commissions process. This over-classification in turn hampers the ability to conduct forthright, transparent, and fundamentally fair and just legal proceedings and undermines the legitimacy of both the commission and the continuing detention of uncharged captives. The secrecy surrounding all aspects of the operation of the prison camp suggests an obsessive government effort to obscure public scrutiny of the abuses that occurred at Guantánamo and in other U.S. black sites and detention centers around the globe. Because this government interest is incompatible with the type of open access to information central to ensuring all criminal defendants are afforded the “process due” before being criminally condemned, the criminal trial process has been effectively paralyzed by the government’s own determination to obscure the treatment of the detainees in U.S. custody.

Third, there is an absence of any meaningful assignment of robust and effective authority in the U.S. government to shutter the facility. For example, even though nineteen detainees have now been cleared for transfer or release, the office in the Department of State (DOS) responsible for negotiating transfer to foreign jurisdictions that was closed by President Donald Trump has not been restored as of this date. Based on public reporting, the Department of Justice (DOJ) does not appear to be taking active steps to resolve this present paralysis. The Biden administration has recently reiterated its commitment to closing the Guantánamo prison, yet it appears it has yet to put in place the governmental framework necessary to effectuate such a significant undertaking.

This Report addresses these and other challenges and offers concrete guidance for how to overcome obstacles to closure. Specifically, it offers the analysis and recommendations of a Working Group convened by the Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania for the purpose of contributing to the efforts of the Biden administration, members of Congress, and other governmental entities in their stated goal of closing the Guantánamo Bay prison facility; resolving ongoing litigation, pending cases, and the detention status of the remaining detainees; and restoring the actual and perceived legitimacy of U.S. efforts to secure vital national security interests. The Working Group comprises over thirty national security and counterterrorism experts, retired military officers, lawyers, former DOJ officials, psychologists, psychiatrists, academics, ethicists, and experts in the law of armed conflict who have significant expertise in diverse fields of relevance to the current legal proceedings and detentions in GTMO. With the assistance of student interns in the 2021 CERL Summer Internship program and support from the Annenberg Public Policy Center at the University of Pennsylvania, Working Group members researched and assisted in the drafting of the Report. The chairs of the Working Group, Professor Claire Finkelstein and Harvey Rishikof, identified eight broad research topics, which included over thirty specific areas of inquiry, and assigned Working Group members and interns to each of these sections.

The Report was occasioned by four recent developments. First, there is renewed support in the federal government to examine the question of the continued operation of Guantánamo. President Joseph Biden, Secretary of Defense Lloyd Austin, and other members of the administration have indicated their strong support for closing GTMO. This support signals a return to the goals of the Obama administration, which aspired to close the facility but lacked the forward movement to effectuate the necessary policies. With the current administration, there appears to be a realistic possibility of achieving this objective. The population of detainees is at the lowest point of any time since 9/11, and the Biden administration has already cleared eleven individuals who have never been charged for transfer.

Second, under the chairmanship of Senator Richard J. Durbin (D-IL), the Senate Judiciary Committee has once again taken the lead in addressing the question of Guantánamo’s closure. The committee held hearings in December 2021 on this topic, for which the Working Group submitted a statement.¹⁹ Several weeks prior to the hearing, Chairman Durbin delivered a forceful speech on the Senate floor, saying that what happened at GTMO should not have happened and should not happen again: “In the wake of 9/11, the Bush administration tossed aside our constitutional principles as well as the Geneva Conventions. By condoning torture, they dishonored our nation and actually endangered our service members.”²⁰ As Chairman Durbin emphasized, closing Guantánamo is essential if the United States is to begin to recover our integrity and as a country find a path back to actual *and perceived* commitment to the rule of law in the development and implementation of national security policy. Chairman Durbin also said:

Since the first group of detainees was brought to Guantánamo in January of 2002, four different presidents have presided over the facility. In that time, the Iraq war has begun and ended. The war in Afghanistan, our nation’s longest war, has come to a close. A generation of conflict has come and gone. Yet the Guantánamo detention facility is still open, *and every day it remains open is an affront to our system of justice and the rule of law*. It is where due process goes to die. That is precisely why military officials, national security experts, and leaders on both sides of the aisle have demanded its closure for years.

Chairman Durbin concluded his speech saying, “The families who lost loved ones on [9/11] deserve better. America deserves better.” With the focus of Chairman Durbin on this question, and the stated desire of the Biden administration to close Guantánamo, there is a chance that 2022 will be the year that the detention center at Guantánamo Bay finally closes its doors.

A third development concerns the changed defense posture of the United States in Afghanistan and the surrounding area. Pursuant to an agreement made with the Taliban by President Donald Trump, since August 2021, the United States no longer has troops deployed to Afghanistan. As President Joseph Biden announced on August 31, 2021,

[T]he war in Afghanistan is now over. I’m the fourth president who has faced the issue of whether and when to end this war. When I was running for president, I made a commitment to the American people that I would end this war. And today, I’ve honored that commitment.²¹

The question of the end of U.S. military operations in Afghanistan and the cessation of hostilities is critical for understanding the position of the current Guantánamo detainees. If indeed the armed conflict with the Taliban is over, the legal basis for continued detention of Guantánamo captives detained as the result of their association with the organized armed group who have not been charged or convicted of criminal offenses has dissipated. Accordingly, pursuant to both a lack of statutory detention authority and respect for fundamental principles of the LOAC, repatriation seems

¹⁹ Claire Finkelstein et al., *Statement for the United States Senate Judiciary Committee Hearing on “Closing Guantánamo: Ending 20 Years of Injustice,”* Center for Ethics and the Rule of Law (Dec. 6, 2021), <https://archive.law.upenn.edu/live/news/11412-cerl-working-group-statement-for-us-senate>.

²⁰ Senator Durbin, *Durbin Calls for Closure of Guantánamo Bay in NDAA*, YouTube (Nov. 30, 2021), <https://www.youtube.com/watch?v=703xUyCNP8>.

²¹ Joseph Biden, “Remarks by President Biden on the End of the War in Afghanistan” (2021), White House Briefing Room, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/>.

the only credible course of action. Of course, President Biden never indicated a complete termination of the ongoing armed conflict between the United States and transnational terrorist organizations such as Al Qaeda. Indeed, in the same speech he emphasized a U.S. commitment to continue operations to defend the nation and our vital interests against these ongoing threats. Thus, while this arguably justified the continued law of war-based detention of a number of captives, the complications resulting from this change of circumstances necessitate a clear statement by the government identifying the statutory and international law basis for the continued detention of all captives. Perhaps most importantly, these developments indicate it is now essential to reconsider the status of all uncharged detainees. Moreover, the Biden administration's stated commitment to international law, to include the LOAC, suggests that renewed attention to the authority for the military commissions, the compliance of the commissions with international law, and the apparent challenges of the commissions process is warranted and indeed long overdue.

Fourth, the world has recently commemorated the twentieth anniversary of the 9/11 attacks, a moment that has engendered much collective reflection in the United States and elsewhere on the war on terror. Methods of fighting terrorism, including detention and interrogation, have been subjected to renewed and extensive scrutiny in recent years. The continued operation of GTMO is viewed by many as a legacy of an earlier era, one that presupposed the war on terror was a war of information and regarded interrogation as an essential tool for information acquisition. The program known as rendition, detention, and interrogation (RDI), which was the United States' leading approach to preventing another terrorist attack, has by most accounts been a failure. Indeed, no president since George W. Bush has regarded internment at GTMO for the purpose of interrogation as an effective means of countering terror. Multiple administrations have steadily reduced the population in GTMO, while the military commission process has stagnated. Even for the small number of cases that have resulted in guilty verdicts, this process has largely failed to achieve any retributive or general deterrence objectives.

In contrast, the cost of this two-decade-long diversion from long-standing U.S. commitment to ensuring the humane and fundamentally fair treatment of captured enemies during armed conflicts has been immense. In the nearly twenty years of operations at Guantánamo, detention and legal proceedings have cost the United States in terms of damaged moral standing, reduced ability to engage in international leadership, and lost goodwill with allies. Of less strategic significance but easier to quantify, the United States has spent vast sums of money on detainee and military commission operations at GTMO. These costs will continue to increase as long as the detention facility remains open.²²

On August 4, 2021, seventy-five members of Congress signed a letter in strong support of President Biden's stated goal to close the detention facility at Naval Station Guantánamo Bay, citing their conclusion that after nearly two decades and numerous efforts at reform, the military commission process has failed to cure its inherent dysfunction. The letter expressed support to act immediately to further reduce the population at GTMO, ensure detainees are treated humanely, and increase the transparency of military commission proceedings.

The Working Group offers an analogous unequivocal recommendation to close the detention facility at Guantánamo Bay. This Report seeks to facilitate that objective by addressing in detail a number of the legal obstacles to shuttering the facility and transferring all remaining detainee criminal cases to other military courts or federal court, to foreign

²² On February 2, 2021, more than 100 human rights organizations signed a letter to the Biden administration calling for the closure of detention operations on Guantánamo Bay. Because of its history of torture and detainee abuse, as well as the failed and ineffective nature of the commissions, GTMO is a stain on America's global image and continues to damage U.S. national security and the security of U.S. troops abroad.

jurisdictions, or simply releasing them to other countries. As noted above, a preliminary version of the recommendations in this Report was forwarded to the Senate Judiciary Committee, as part of its December 2021 hearings in connection with the hearings on closing the Guantánamo Bay prison facility. The full Report presented here was finalized on July 1, 2022, reflecting roughly twelve months of effort on the part of the Working Group.

B. Methodology

The Working Group met virtually on a weekly basis from May 13 to August 6, 2021. CERL summer interns prepared research reports to assist the Working Group in its efforts, meeting virtually on a daily basis with CERL staff and weekly with the Working Group to discuss in-progress findings and receive further guidance. Co-chairs Claire Finkelstein and Harvey Rishikof led the Working Group meetings, and breakout rooms were organized to give interns the opportunity to converse with Working Group members whose subject matter expertise related to the interns' research assignments. Interns prepared written memoranda for members of the Working Group and presented those sections in online meetings with the full group. With the assistance of the work product of their assigned interns, each member of the Working Group prepared a section of this Report, and the interns' preliminary research findings were expanded upon, refined, and incorporated into the final version. Co-chairs Finkelstein and Rishikof then organized, edited, and amplified the combined sections of members of the Working Group. The joint product was subsequently reviewed by the Working Group and discussed in a conference held on November 11 – 12, 2022 at the University of Pennsylvania. Several months thereafter, members of the group were asked to vote on the final recommendations of the Report. A number of interns stayed on after the end of the internship to help prepare the Report for release.

In the early stages of this project, it became clear that Working Group members had very different perspectives on a number of issues. Such divisions within the group were to some extent expected given the individuals' different backgrounds. In convening the members, the chairs sought representation from both prosecution and defense, as well as from members of the human rights community and those with expertise in national security law and practice. What emerged is a consensus around certain key issues, one that suggests consensus in the broader landscape of U.S. politics might yet be achieved. Significant disagreements among the various members of the Working Group remain and are reflected in the Report. Nevertheless, the key recommendations and findings are supported by a majority of Working Group members and are indicated as such in the section devoted to these issues.

The Report addresses the following topics: Part II presents background on the history of the military commissions, the history of the U.S. Naval Base at Guantánamo Bay, the history of the detention center, the structure of the military commissions, the costs of continued operation of the detention center, and a discussion of the proper role of the DOJ in a potential shutdown of the detention facility and the commissions proceedings. Part III addresses the question of the continuing authority for the military commissions as well as for continued detention at GTMO, particularly in light of the withdrawal of all U.S. troops from Afghanistan, a declared end to U.S. involvement in the war on terror in August 2021, and the resurgence of the Taliban. Part IV addresses continued detention. Part V provides an overview of several particularly difficult issues that arise in the military commissions and recommends possible solutions. Part VI considers the thorny question of whether detainees can be, or should be, transferred to federal court for trial or other legal proceedings. Although the idea of such transfers is highly controversial and has been forbidden by successive Congresses since the 2011 National Defense Authorization Act, there are reasons to think the current moment would be unique as far as restoring the moral authority of the United States. Part VII addresses the transfer or release of detainees to foreign jurisdictions or international tribunals. Part VIII addresses the effects of U.S. government classification practices and claims of privilege. Part IX addresses the status of detainees at Guantánamo and the implications of their categorization.

C. The Roles of Governmental Agencies in Resolving Detentions

1. Senior National Security Leaders in the Biden Administration

This Report takes the perspective that closing the detention facility at Guantánamo Bay is a matter of not only efficiency and justice, but also national security. The Inquiry into the Treatment of Detainees in U.S. Custody of the Senate Armed Services Committee and the Senate Select Committee on Intelligence Report on Torture established clear linkage between Central Intelligence Agency (CIA) black site abuses and those that occurred in Guantánamo Bay, Afghanistan, and Iraq. Abu Ghraib and Guantánamo Bay became catalysts of terrorist recruitment and financing, bringing foreign fighters to the battlefield. After twenty years of offensive military operations, the Taliban now controls Afghanistan, with former Guantánamo Bay detainees in positions of authority within the government. The continued operation of a facility to detain uncharged captives indefinitely without trial diminishes the moral authority and the standing of the United States internationally and undermines the actual and perceived legitimacy of U.S. national security efforts.

The contention that those subjected to the family of interrogational abuses within the CIA RDI program could remain a compartmented state-secret was misguided, along with the efficacy of such practices. Those policy decisions have resulted in international condemnation and diminished standing for a nation that prides itself on adherence to the Constitution and the rule of law. The restoration of the United States as a beacon of democracy is within the power of the Biden administration with the closure of the Guantánamo Bay prison, which remains a symbol of torture, injustice, and oppression.

2. Department of Justice

The DOJ must play a critical role in guiding the administration toward closure of the detention facility at Guantánamo Bay and assuring that U.S. detention of foreign nationals present and future is conducted according to the rule of law.

First, the DOJ through the Office of Legal Counsel (OLC) should provide honest and unbiased legal advice to the White House, the Department of Defense (DOD), and other federal agencies about facility operations, treatment options, and detainee trials at GTMO. The OLC's duty is to assure that the U.S. government complies with federal statutes and the Constitution as well as international law binding on the nation. The OLC should provide clear statements of what it considers controlling statutory and international legal authority related to every aspect of the detention and trial of captives. Indeed, if there is one transcendent lesson learned from the entire GTMO experience, it is the profound damage to U.S. national security that results from permitting the OLC to serve as a legal stamp of approval for the president or White House staff and thus allowing policy to drive legal analysis instead of law driving policy development.²³

Second, the DOJ should explicitly affirm that due process protections apply to Guantánamo detainees. Indeed, the OLC should make clear that due process applies to all U.S. tribunals capable of adjudicating detention as a punishment as well as to habeas proceedings. The DOJ should also evaluate the criminal case the United States has against each detainee currently held at GTMO and determine if a criminal proceeding in federal district court or by general courts-martial is legally tenable, appropriate, and in the best interests of the United States. The DOJ will need to evaluate the quality and credibility of evidence in each case, whether evidence will likely be excluded at trial because it was obtained by illegal and unconstitutional means such as torture, and whether a plea bargain is the most appropriate disposition of each

²³ See generally Claire O. Finkelstein and Richard W. Painter, *Reforming the Department of Justice*, in *Overcoming Trumpery: How to Restore Ethics, the Rule of Law, and Democracy* (Norman Eisen, ed., Brookings Institution Press, 2022).

case. If trial of a detainee in an alternate criminal tribunal is not practical, the DOJ should advise the DOD and the White House on alternatives. These alternatives might include amending the Military Commissions Act (MCA) to cure existing impediments to fundamentally fair trials and convening trials at military installations in the United States, or rendition of the detainee to a foreign jurisdiction, repatriation, and/or appropriate measures to prevent mistreatment of the released detainee in another country as well as agreed upon undertakings by another country to prevent a released detainee from becoming a threat to the United States or to others.

Third, the DOJ should provide legal guidance now to assure that any future non-state belligerent operatives or other individuals suspected of terrorist activities or terrorist threats are apprehended, detained, treated, and interrogated in accordance with federal law and international law binding on the United States. Relatedly, the OLC should issue an opinion advising that the state secrets privilege cannot be legitimately invoked when doing so would obscure U.S. involvement in inappropriate or potentially unlawful activity. In the past, the White House, DOD, and intelligence community relied principally upon DOJ legal advice sought after a detainee is apprehended and the prospective invocation of state secrets privilege could mask legally questionable conduct; instead, moving forward, the basic parameters of acceptable measures should be established in advance and with the expectation of transparency, with only case-specific details related to legitimate national security interests (such as protection of sources and methods) influencing invocation of this privilege at a later stage. Such a comprehensive and anticipatory approach will mitigate the risk that events will unfold like they did immediately after 9/11, where the DOJ was asked to provide legal advice on matters of first impression in a moment of national crisis.

3. Department of State

As noted in Working Group member Ben Farley's thoughtful piece, "A Path for Renewing Guantánamo Closure,"²⁴ the DOS has multiple important tasks to accomplish in the path forward for closing Guantánamo Bay detention facility. The DOS must assume a leading role in resuscitating the repatriation agreements with Morocco and Algeria for all detainees approved for transfer; negotiating the repatriation and resettlement of all detainees not currently approved for transfer; creating an infrastructure to, among other things, monitor the treatment of foreign detainees after transfer; and prioritizing the closure of GTMO military commissions and the detention facility in international discourse.²⁵ Most importantly, the DOS must reestablish the Office of the Special Envoy charged with assisting the DOD to effectuate transfers to other countries for detainees who have been cleared for transfer or release.

4. Members of Congress

Congress will need to take important steps to expedite closure of the detention facility at Guantánamo Bay. The House and Senate armed services committees should hold hearings and propose legislation, including legislation addressing the following issues.

First, Congress should remove all obstacles to civilian trials in the United States of detainees believed guilty of serious crimes and encourage resolution of criminal cases through plea bargains in U.S. courts. This may require transfer of some detainees to the United States. As discussed later in this Report, use of military tribunals as currently composed pursuant to the MCA continues to reinforce the perception of defective procedures and invalid adjudications. Detainees

²⁴ Benjamin R. Farley, *A Path for Renewing Guantánamo Closure*, JUST SEC. (Nov. 17, 2020), <https://www.justsecurity.org/73311/a-path-for-renewing-guantanamo-closure/>.

²⁵ *Id.*

should be repatriated or tried for their crimes in U.S. courts subject to the procedural standards applicable to any other federal criminal defendant. As an alternative, Congress could encourage use of general courts-martial to adjudicate legacy cases by incorporating enumerated war crimes into the Punitive Articles of the Uniform Code of Military Justice. Congress could also amend the MCA to cure what are widely considered continuing defects in that law in order to facilitate credible military commission trials at a military installation in the United States.

Second, if the president does not do so by executive order, Congress should pass legislation directing the permanent closure of the detention facility at Guantánamo Bay, or, at a minimum, redirecting all appropriations currently set aside for GTMO to other federal purposes, which may include funding to protect against future terror attacks or transfer of detainees to alternate locations for trial in different courts. Congress should also provide for alternative procedures for future detention of persons suspected of being members of organized armed groups engaged in hostilities against the United States, with a clear mandate that detainees be treated humanely in accordance with Common Article 3 of the Geneva Conventions, with protection against coercion and abuse. What is critical is that future detainees not be allowed to fall into a humanitarian and fair trial gap generated by a status characterization that deprives them of prisoner of war status, and at the same time labels them as enemy belligerents subject to military authority who are not entitled to the civilian criminal process, a gap that enabled implementation of dubious and ultimately counterproductive treatment standards following 9/11. Because current military commission procedures are not fully a product of either legal framework, Congress should substantially narrow, if not eliminate, authorization for the United States to conduct trials before the currently composed military commission.

Third, Congress should consider legislation directed at other objectives discussed in this Report, provision of urgent medical care and psychiatric assistance for those who suffered torture or inhumane conditions in U.S. custody, and laws to ensure that such abuses never occur again.

II.

HISTORY AND CURRENT STATE OF GUANTÁNAMO

A. Naval Base

Long before Guantánamo Bay garnered international attention for its detention center, it operated as a United States naval base. The history of the naval base and its status as a refugee camp are important for understanding how GTMO became a detention facility in the early 2000s. The United States acquired control of GTMO as a result of the Spanish-American War, which ended on December 10, 1898.²⁶ Except for a few years in the mid-1700s when the British controlled Cuba, the island was under Spanish colonial rule from the time Christopher Columbus landed at Guantánamo Bay on his second voyage to the New World in 1494. Cubans began fighting for their independence from Spain in February 1895 as the Spanish empire began to weaken.²⁷ Following the sinking of the *U.S.S. Maine* in Havana Harbor in February 1898, the United States intervened and in June 1898 seized Guantánamo Bay, establishing a naval base to aid the war effort.²⁸ When the war ended in August 1898, Spain ceded control of many of its territories, including Cuba, to the United States.

The United States agreed to end its military occupation of Cuba in 1901 under certain conditions, as outlined in the Platt Amendment, a provision in the 1901 U.S. military appropriations bill.²⁹ The rationale behind the Platt Amendment was for the United States to maintain some type of permanent presence in Cuba without occupying the entire island.³⁰ The amendment's conditions permitted the United States to intervene militarily to defend Cuban independence and prohibited the Cuban government from entering into any international treaty that would allow foreign powers to use

²⁶ History.com Editors, *Spanish-American War*, HISTORY (Feb. 21, 2020), <https://www.history.com/topics/early-20th-century-us/spanish-american-war>.

²⁷ Lily Rothman, *Why the United States Controls Guantánamo Bay*, TIME (Jan. 22, 2015), <https://time.com/3672066/guantanamo-bay-history/>.

²⁸ Chris Suellentrop, *How Did the U.S. Get a Naval Base in Cuba?*, SLATE (Jan. 18, 2002), <https://slate.com/news-and-politics/2002/01/how-did-the-u-s-get-a-naval-base-in-cuba.html>.

²⁹ Cong., *Transcript of Platt Amendment (1903)*, OUR DOCUMENTS, <https://www.archives.gov/milestone-documents/platt-amendment#transcript> (last visited July 1, 2022).

³⁰ *The United States, Cuba, and the Platt Amendment, 1901*, U.S. DEP'T OF STATE ARCHIVE, <https://2001-2009.state.gov/r/pa/ho/time/ip/86557.htm> (last visited Oct. 24, 2021).

the island for military purposes. Importantly, the amendment included the following requirement: “[T]he government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the president of the United States.”³¹ It was through this condition that the United States maintained control of Guantánamo Bay after the Spanish-American War. Today, nearly 124 years after U.S. troops first arrived, GTMO is the oldest overseas U.S. military installation.³² The U.S. Navy had an interest in GTMO for its topographic features and strategic location, which enabled the United States to exert military and economic power in the region.³³ Cuba adopted the Platt Amendment, word for word, as an amendment to its constitution.

In 1903, Cuba and the U.S. entered into the Cuban-American Treaty of Relations, which included the same requirements as the Platt Amendment.³⁴ President Theodore Roosevelt then signed a deal in February 1903 with the new government of Cuba to lease forty-five square miles of Guantánamo Bay for 2,000 gold coins a year, now valued at approximately \$4,085.³⁵ The U.S. government continued to pay the lease every year, although the Cuban government reportedly stopped cashing the checks out of protest when Fidel Castro was in power.³⁶ In 1934, the U.S. and Cuban governments renegotiated the lease and agreed that the land in Guantánamo Bay would revert to Cuban control only if abandoned or by mutual consent.

The U.S. Navy used the base at GTMO for a variety of activities, including fleet sustainment, training, ship repair, refueling and resupply, and regional disaster assistance.³⁷ A report from U.S. Southern Command states, “U.S. Naval Station Guantánamo Bay serves as a strategic logistics base for the Navy’s Atlantic Fleet, allied, and partner navies; supports counternarcotic operations in the Caribbean; provides contingency logistics; and supports migrant operations.”³⁸ However, U.S. and Cuban relations declined significantly as a result of the Cuban Revolution in the late 1950s, when Castro aligned himself with the Soviet Union.³⁹ In June 1958, Castro’s brother, Raul, and some of their rebel forces kidnapped twenty-four U.S. sailors from a bus outside GTMO and held them captive in the nearby hills. In 1960, Castro threatened to expel the United States from the naval base if it continued to interfere with the Cuban economy. Then, in 1964, Castro cut off the water supply to the base.⁴⁰ The Navy responded by building its own water desalination and electrical power plants, and it has been entirely self-sustaining ever since.

³¹ Cong., *Transcript of Platt Amendment (1903)*, OUR DOCUMENTS, <https://www.archives.gov/milestone-documents/platt-amendment#transcript> (last visited July 1, 2022).

³² Nick Mirotta, *Why the U.S. Base at Cuba’s Guantánamo Bay Is Probably Doomed*, WASH. POST (May 15, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/05/15/why-the-u-s-base-at-cubas-guantanamo-bay-is-probably-doomed/>

³³ *History*, NAVAL STATION GUANTÁNAMO BAY, https://www.cnic.navy.mil/regions/cnrse/installations/ns_guantanamo_bay/about/history.html (last visited Oct. 24, 2021).

³⁴ Treaty Between the U.S. of Am. and Cuba Defining Their Rel., Cuba-U.S., June 9, 1934, 48 Stat 168.

³⁵ *Guantánamo Background*, CTR. FOR STUD. HUM. RTS. AM., <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/guantanamo-background> (last visited Oct. 24, 2021).

³⁶ Julian Hattam, *Gitmo Timeline: How We Got Here*, HILL (Feb. 24, 2016), <https://thehill.com/policy/national-security/270417-gitmo-timeline-how-we-got-here>.

³⁷ Naval Station Guantánamo Bay, *supra* note 33.

³⁸ *Mission and History*, JOINT TASK FORCE GUANTÁNAMO (July 2019), <https://www.hsdl.org/?view&did=820673>.

³⁹ Rothman, *supra* note 27.

⁴⁰ *Id.*

As military technology advanced, the importance of GTMO as a base of operations waned.⁴¹ GTMO became somewhat of a sleepy hollow. That changed when GTMO took on a new mission as a detention site.

B. Refugee Camp

For most of its history, the GTMO naval base did little to attract international attention. The base, however, assumed a new role in the early 1990s in the wake of the Haitian coup d'état. In September 1991, a military coup ousted Haiti's first democratically elected president, leading to a period of instability and political unrest throughout the country.⁴² Following the coup, thousands of Haitians fled to the United States by sea. Rather than allow them to seek asylum, President George H.W. Bush sent Coast Guard vessels into international waters to capture the refugees and transfer them to a makeshift camp at GTMO.⁴³ The U.S. Southern Command initiated Operation Sea Signal and established JTF-160 to care for the migrants in makeshift facilities at Naval Station GTMO. At its peak, GTMO held 12,000 Haitian refugees who were allowed to apply for political asylum while detained at the camp. Immigration and Naturalization Services denied the vast majority of Haitians asylum, deeming most "economic migrants" who fled their home country for financial reasons, rather than out of fear. By July 1992, only three hundred refugees were left at GTMO, and all of them had been granted asylum.

However, a dilemma emerged when it was discovered that nearly all of the three hundred refugees tested positive for HIV.⁴⁴ Returning them to Haiti would have violated the 1980 Refugee Act, and a law banning any HIV-positive individual from entering the United States precluded bringing them into the country.⁴⁵ Thus, the refugees were indefinitely detained at GTMO, which quickly became a quarantine camp staffed with only two doctors. While the DOD claimed that GTMO was a "humanitarian mission," the refugees were subjected to what a federal judge later described as horrible conditions and substandard medical care. The Haitians demanded their release from GTMO by organizing peaceful protests and a hunger strike that lasted for weeks.

In June 1993, Judge Sterling Johnson ruled in favor of the refugees, calling GTMO "nothing more than an HIV prison camp."⁴⁶ Judge Johnson ordered that the refugees be released anywhere but Haiti, and they were eventually transferred to the United States. Since the government did not file an appeal, however, Judge Johnson's ruling did not set a legal precedent against the indefinite detention of individuals at GTMO in the future.⁴⁷

In 1999, the White House developed a plan to house 20,000 Kosovo refugees at GTMO, and Navy logistics

⁴¹ Miroff, *supra* note 32.

⁴² Research Directorate, Immigration and Refugee Board, Canada, *Impact of the September 1991 Coup*, UNHCR (June 1992), <https://www.refworld.org/docid/3ae6a81018.html>.

⁴³ A. Naomi Paik, *US Turned Away Thousands of Haitian Asylum-Seekers and Detained Hundreds More in the 90s*, CONVERSATION (June 28, 2018), <https://theconversation.com/us-turned-away-thousands-of-haitian-asylum-seekers-and-detained-hundreds-more-in-the-90s-98611>.

⁴⁴ *Id.*

⁴⁵ Refugee Act of 1980, Pub. L. N. 96-212, 94 Stat. 102 (1980).

⁴⁶ *Haitian Ctr. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1038 (E.D.N.Y. 1993).

⁴⁷ Paik, *supra* note 43.

officers began preparations for a tent city at the base.⁴⁸ However, the Clinton administration abandoned the idea because of the intense Cuban heat and the base's distance from the Balkans.⁴⁹

C. Detention Facility

After the Haitian refugees were transferred from GTMO, the detention camp remained an empty facility until just after the 9/11 terrorist attacks. Officials from the George W. Bush administration selected GTMO as the ideal place to hold war on terror prisoners based on the premise that it was outside the reach of American law and American courts, and thus was an apt location for indefinite detention.⁵⁰ At its peak, GTMO housed 680 alleged enemy captives and a total of 779 men were held there over the past two decades.⁵¹ Today, just thirty-six detainees remain. During the Bush and Obama administrations, approximately 540 and 200 men were released, respectively. President Trump released only one detainee.⁵² President Biden approved three detainees for transfer in May 2021, two in October 2021, and five in January 2022, but it is not yet clear where some of them will go.⁵³ Another detainee was approved for transfer in February 2022, and has been repatriated to Saudi Arabia.⁵⁴

One day after the 9/11 attacks, the Bush administration began creating contingency plans for prisoners captured in what was euphemistically labeled the “war on terror.”⁵⁵ On November 13, 2001, President Bush signed a military order directing the secretary of defense to hold non-U.S. citizens in detention, but there was no decision on where to detain them.⁵⁶ The number of prisoners being held by the United States was accelerating rapidly, and the military was unprepared to detain and process them. Then, on December 27, 2001, Defense Secretary Donald Rumsfeld announced that war on terror prisoners would be sent to GTMO, later referring to it as a prison for the “worst of the worst.”⁵⁷

⁴⁸ Philip Shenon, *U.S. Chooses Guantánamo Bay Base in Cuba for Refugee Site*, N.Y. TIMES (Aug. 20, 1970), <https://archive.nytimes.com/www.nytimes.com/library/world/europe/040799kosovo-bases.html>.

⁴⁹ George Gedda, *Guantánamo Plan May Be Scrapped*, WASH. POST (Apr. 9, 1999), <https://www.washingtonpost.com/wp-srv/inatl/daily/april99/cuba040999.htm>.

⁵⁰ Todd Purdum, *An Oral History of the Guantánamo Bay Detention Center*, VANITY FAIR (Jan. 11, 2012), <https://www.vanityfair.com/news/2012/01/guantanamo-bay-oral-history-201201>.

⁵¹ *Id.*

⁵² *Guantánamo Docket*, *supra* note 3.

⁵³ Carol Rosenberg, *Biden Administration Clears 3 Guantánamo Detainees for Release*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/2022/01/11/us/politics/guantanamo-releases-approved.html>.

⁵⁴ Carol Rosenberg & Charlie Savage, *Panel Backs Transfer of Mentally Ill Guantánamo Detainee Suspected of 9/11 Role*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/guantanamo-detainee-transfer.html>; Carol Rosenberg, *“20th Hijacker” Is Returned to Saudi Arabia for Mental Health Care*, N.Y. TIMES (Mar. 7, 2022), <https://www.nytimes.com/2022/03/07/us/politics/saudi-arabia-911-hijacker.html>.

⁵⁵ *Id.*

⁵⁶ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

⁵⁷ Katharine Q. Seelye, *Threats and Responses: The Detainees; Some Guantánamo Prisoners Will Be Freed, Rumsfeld Says*, N.Y. TIMES (Oct. 23, 2002), <https://www.nytimes.com/2002/10/23/world/threats-responses-detainees-some-guantanamo-prisoners-will-be-freed-rumsfeld.html>.

In early January 2002, the military quickly prepared GTMO for an influx of detainees, the first twenty of whom arrived on January 11.⁵⁸ These twenty prisoners were housed in open-air cages in an area of the base known as Camp X-Ray.⁵⁹ A photograph taken by a U.S. Navy photographer and distributed by the DOD showing detainees clad in orange jumpsuits and in shackles kneeling in front of wire cages with U.S. military personnel keeping watch became the iconic image of GTMO detention.⁶⁰ Detention at GTMO was never intended to be permanent, and Camp X-Ray was a remnant of the Haitian refugee crisis in the 1990s. More prisoners arrived at GTMO and on February 7, 2002, President Bush issued a memorandum indicating his decision that Al Qaeda captives were not protected by any provisions of the Geneva Conventions because their conflict fell outside the scope of either Common Article 2 (inter-state) or Common Article 3 (according to the president a provision applicable only to non-state conflicts confined to U.S. territory). Taliban captives were not qualified for prisoner of war status and protections because of the failure of that group to satisfy the qualification requirements of Article 4 of the Third Convention.⁶¹ Bush added that detainees should be treated humanely “consistent with the dictates of military necessity,” a qualification that remains perplexing to this day.⁶²

On March 21, 2002, the DOD released Military Commission Order No. 1, which prescribed procedures for trying detainees by military commission.⁶³ Under this order, a military commission was to be composed of three to seven members, two-thirds of whom must vote to convict an individual. A two-thirds vote was also required to determine an appropriate sentence, but a unanimous vote was required to impose the death penalty. While the order required a “fundamentally fair” process and provided any defendant with a presumption of innocence, it was clear that the procedures implemented by the secretary of defense reflected process last used in the aftermath of World War II, which was substantially deficient compared to military criminal process that had evolved since then and had been used for trials by courts-martial. This reality was not lost on the Supreme Court, which relied heavily on this disparity to strike down this version of the commission in June 2006 in the landmark case *Hamdan v. Rumsfeld*.⁶⁴

In April 2002, the detainees were moved from Camp X-Ray to Camp Delta, a more permanent facility constructed by military engineers. The new camp was composed of 720 individual steel and mesh cells, with slots in the doors to pass in food.⁶⁵ No detainees are currently housed there. Today, high-value detainees live in Camp 5, a two-story facility that cost

⁵⁸ Purdum, *supra* note 50.

⁵⁹ Charlie Savage, *Camp X-Ray: A Ghost Prison*, N.Y. TIMES (Sept. 1, 2014), <https://www.nytimes.com/interactive/2014/09/01/us/guantanamo-camp-x-ray-ghost-prison-photographs.html>.

⁶⁰ Carol Rosenberg, *Pentagon Plans to Raze Camp X-Ray, Guantánamo’s Eyesore and Enduring Symbol of Torture*, MIA. HERALD (Mar. 6, 2018), <https://amp.miamiherald.com/news/nation-world/world/americas/guantanamo/article203645719.html>.

⁶¹ President George W. Bush to Vice President et al., *Humane Treatment of Al Qaeda and Taliban Detainees*, NAT’L SEC. ARCHIVE (Feb. 7, 2002), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.02.07.pdf>.

⁶² On February 19, 2002, lawyers filed a habeas petition, *Rasul v. Bush*, on behalf of three detainees to challenge the legality of indefinite detention. Two years later, the Supreme Court ruled that U.S. courts have jurisdiction to consider habeas appeals from foreign prisoners held at GTMO. The premise that led to the selection of GTMO for detention—that it was outside the reach of U.S. law—proved false.

⁶³ Sec’y of Defense, Mil. Comm’n Order No. 01 (Mar. 21, 2002), <https://biotech.law.lsu.edu/blaw/dodd/corres/mco/mco1>.

⁶⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁶⁵ Carol Rosenberg, *Guantánamo Prison: A Primer*, MIA. HERALD (Oct. 26, 2016), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1939250.html>.

\$17 million to build in 2004.⁶⁶ Although Pentagon planners once envisioned a facility with end-of-life care capabilities, Camp 5 has only a modest health clinic and a psychiatric ward.⁶⁷ The rest of the detainees live in Camp 6, a two-story prison built in 2006 that includes day rooms and exercise areas.⁶⁸ Camps 5 and 6 are in the same compound surrounded by razor wire.

Before being moved to Camp 5 in April 2021, high-value detainees lived in Camp 7, the most mysterious prison whose exact location and price tag are both classified.⁶⁹ Opened in December 2006, Camp 7 housed prisoners previously held in Central Intelligence Agency (CIA) black sites, including five individuals charged for their roles in the 9/11 attacks. However, conditions at Camp 7 have worsened significantly over the past year, as tropical rains swamped the naval base, causing flooding and power outages.⁷⁰ The situation worsened because the COVID-19 pandemic prohibited contractors from coming to the base to work. Prisoners were moved to Camp 5 in an effort to “increase operational efficiency and effectiveness,” according to U.S. Southern Command.⁷¹ A Southern Command spokesman said that Camp 7 “will be sanitized, shut down and locked” in the short term.⁷²

Since it opened in January 2002, the detention facilities at GTMO have been operated by a U.S. military Joint Task Force (JTF), starting with JTF-160 and then in November 2002, JTF-GTMO, following the merger of JTF-160 and JTF-170 to give those with the intelligence collection mission (JTF-170) control over the conditions of confinement. JTF-160 processed and detained the combatants, and JTF-170 handled interrogation operations.⁷³ JTF-GTMO comprises military members, government employees, and civilian contractors⁷⁴ and is part of U.S. Southern Command. The task force was created during the Haitian refugee crisis and reactivated in December 2001 when the Bush administration selected GTMO as the location to house enemy captives.⁷⁵

The Criminal Investigation Task Force (CITF) was established in early 2002 as the primary investigative agency for the military commissions process. The CITF had responsibility for the investigation of war crimes and acts of terrorism, in accordance with President Bush’s military order of November 13, 2001. With a mandate from the secretary of defense,

⁶⁶ Carol Rosenberg, *Military Closes Failing Facility at Guantánamo Bay to Consolidate Prisoners*, N.Y. TIMES (Apr. 4, 2021), <https://www.nytimes.com/2021/04/04/us/politics/guantanamo-bay-prisoners.html>.

⁶⁷ *Id.*

⁶⁸ A.P., *Halliburton Gets Gitmo Contract*, FOX NEWS (June 21, 2005), <https://web.archive.org/web/20100824222521/http://www.foxnews.com/story/0,2933,159930,00.html>.

⁶⁹ Carol Rosenberg, *Inside the Most Secret Place at Guantánamo Bay*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2020/03/14/us/politics/guantanamo-bay-camp-7-911.html>.

⁷⁰ Carol Rosenberg, *Charlie Savage & Eric Schmitt, “In Bad Shape and Getting Worse,” Guantánamo Poses Headaches for Biden*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/us/politics/guantanamo-biden.html>.

⁷¹ Ben Fox, *Biden Will Try to Close Guantánamo After “Robust” Review*, AP (Feb. 12, 2021), <https://apnews.com/article/joe-biden-biden-cabinet-prisons-taliban-jen-psaki-b751784fdb5c29de907057cc7833ec1f>.

⁷² *Id.*

⁷³ *Joint Task Force GTMO*, GLOB. SECURITY, <https://www.globalsecurity.org/military/agency/dod/jtf-gtmo.htm> (last visited Oct. 27, 2021).

⁷⁴ Joint Task Force Guantánamo, *supra* note 38.

⁷⁵ Global Security, *supra* note 73.

the secretary of the Army formally tasked the U.S. Army Criminal Investigation Command (CID) with the responsibility of establishing an investigative capability to execute this military order. As a result, the DOD CITF was established as a joint Military Criminal Investigative Organization (MCIO) task force, for the sole purpose of conducting criminal investigations against suspected terrorists detained by U.S. forces. The CITF included members from Army CID, the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (OSI). The CITF was supported by other DOD law enforcement and intelligence components. Other U.S. government law enforcement and intelligence agencies had liaison officers at the CITF and CITF placed liaison officers within key components.

The MCIO was represented in the leadership of the CITF, with the commander from Army CID, the deputy commander, and special agent-in-charge (SAC) from NCIS and the deputy SAC from OSI. Investigative units included criminal investigators, intelligence analysts, military lawyers, and operational psychologists. The resident agent-in-charge of the CITF Guantánamo Element was an NCIS special agent detailed to the CITF, and CITF-Afghanistan and CITF-Iraq Elements were generally supervised by CID or OSI special agents. The CITF deputy commander/SAC was the chief investigator for the military commissions process. The CITF manning was over one hundred for Operation Enduring Freedom and increased to over two hundred following Operation Iraqi Freedom.

With global investigative jurisdiction, the CITF headquarters was located on Fort Belvoir, to be near its reporting chain, the Office of General Council of the Secretary of Defense, and the Office of Military Commissions prosecutors, as well as to other seats of government organizations. The CITF established forward deployed elements in Afghanistan, Guantánamo Bay, Cuba, and later in Iraq. The CITF's independent reporting chain direct to the Pentagon allowed investigative independence and mitigated any command interference from military commanders who sought to employ tactics that amounted to torture.

It was the CITF that discovered the plan for the military to adopt the same survival, evasion, resistance, and escape (SERE)-based “interrogation” tactics the CIA had been employing and reported concerns up their chains of command as unlawful. The CITF investigators discovered Mohammed al-Qahtani was being tortured by DOD personnel at Guantánamo Bay, which rendered him unsuitable for prosecution.⁷⁶ CITF investigators determined the allegations against Mohamedou Ould Slahi were spurious and his “confession” under torture was useless and a fabrication. While CITF investigators and OMC prosecutors determined that cases could not be pursued against al-Qahtani or Slahi in 2003 due to their torture, al-Qahtani remains an uncharged prisoner at GTMO in indefinite detention without trial. In 2009, Military Commissions Convening Authority Susan Crawford stated al-Qahtani could not be prosecuted due to his torture. A federal judge granted his writ of habeas corpus and ordered Slahi's release in 2010, which was appealed by the DOJ, and later vacated by the D.C. Circuit Court of Appeals. Slahi was released in 2016, after fourteen years imprisoned at Guantánamo Bay. In February 2022, the Pentagon announced a parole-like board recommended repatriating al-Qahtani to Saudi Arabia.⁷⁷

While the CITF operated in the Afghanistan and Iraq theaters, including conducting investigations and interrogations at Abu Ghraib, the Bagram Collection Point, and Guantánamo Bay, where there have been reports of

⁷⁶ Bill Dedman, *Can the “20th Hijacker” of Sept. 11 Stand Trial?*, NBC NEWS (Oct. 24, 2006, 4:29 AM) <https://www.nbcnews.com/id/wbna15361462>.

⁷⁷ Carol Rosenberg, *Biden Administration Approves 5 More Guantánamo Releases*, N.Y. TIMES (Jan. 11, 2022), <https://www.nytimes.com/2022/01/11/us/politics/guantanamo-releases-approved.html>.

widespread human rights abuses, there are no known reports of CITF personnel engaging in any harsh or coercive interrogational practices.

As of October 2021, there were about 1,800 military personnel assigned to detention operations. With thirty-six detainees still confined at GTMO in July 2022, that would result in an average of about fifty U.S. personnel per detainee. The estimated cost of operating the detention facility in fiscal year 2020 was \$540 million, an average of \$15 million per detainee.⁷⁸ In contrast, the federal maximum-security prison in Florence, Colorado, costs about \$78,000 per prisoner per year to operate. With a per-prisoner price tag that is over 190 times higher than the “supermax,” GTMO is often described as the most expensive prison in the world.⁷⁹ In addition to running the detention camp, some troops also stand guard at Camp Justice, a facility built on what once was a runway, where the military commission proceedings take place.⁸⁰ Staff members at GTMO have their own chapel, a movie theater, two dining facilities, access to McDonald’s and Subway restaurants, and a team of mental health staff.

In December 2021, the *New York Times* reported DOD is building a second \$4 million courtroom for war crimes trials at Guantánamo Bay.⁸¹ The new facility will exclude the public, such as 9/11 and *U.S.S. Cole* (DDG-67) victim family members, from the chamber. This will reportedly permit two military judges to hold proceedings simultaneously starting in 2023.

D. Military Commissions

Pursuant to the 2006 and 2009 Military Commissions Acts (MCA), as well as regulations published by the DOD implementing these statutes, the Guantánamo military commissions morphed into their present form. This system, however well intended, has failed to provide transparency or credible justice as the pending cases languish and trials become increasingly distant.

As of the closing date of this Report, there are five active cases: *United States v. al Iraqi*, which has no trial date set; *United States v. Encep Nurjaman et al.*, who were arraigned in October 2021 and are years away from trial; *United States v. Khan*, in which the defendant was sentenced in October 2021 as part of a plea deal; *United States v. Khalid Sheikh Mohammed et al.*, the most notorious of the cases that are part of the five-defendant 9/11 case; and *United States v. al-Nashiri*, the trial of the alleged mastermind of the bombing of the *U.S.S. Cole* that commenced more than ten years ago. While trials in these capital cases are nominally set to begin in 2022, realistically the trial in the 9/11 case will not commence before mid- to late 2023.

Colonel Matthew McCall, appointed in August 2021 as the new judge in the capital case involving Khalid Sheikh Mohammed, will have to review 850 different motion series (some of which have dozens/hundreds of pleadings within each series). Prior to the COVID-19 pandemic and the resulting halt in proceedings, the commission had commenced hearing a defense motion to suppress statements made to federal agents from the NCIS, CITF, and Federal Bureau of

⁷⁸ See Rosenberg, *supra* note 2.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Carol Rosenberg, *Pentagon Building New Secret Courtroom at Guantánamo Bay*, N.Y. TIMES (Dec. 29, 2021), <https://www.nytimes.com/2021/12/29/us/politics/pentagon-guantanamo-secret-courtroom.html?smtyp=cur&smid=tw-nytimes>.

Investigation (FBI). At least a dozen witnesses have not yet testified at all, and a handful of witness testimonies are not complete. All remaining testimony is estimated to take another year, given that hearings can last only two or three weeks every few months. And after those witnesses testify, the parties will have to brief and argue suppression hearings, a process that may take several additional months. Suppression is just one of the many complex issues that must be resolved before trial.

The long-serving chief prosecutor for the military commissions, Brigadier General Mark Martins, retired from the Army effective September 2021. On October 18, 2021, the DOD announced that Colonel George C. Kraehe had been serving as the acting chief prosecutor for the military commissions since October 1, 2021. As Colonel Kraehe is a reservist, he would not be eligible to assume the role of permanent chief prosecutor, causing additional delays. The chief prosecutor coordinates all investigative efforts, prepares charges, and proposes referral by the convening authority, and represents the United States before military commissions proceedings. The role of the chief prosecutor is particularly important, given that he or she must make important policy decisions and recommendations before cases can proceed to trial or resolution and review volumes of material gathered over two decades.

At present, *the earliest* the 9/11 case can realistically proceed to trial is in late 2023, and that is highly problematic. If the 9/11 trial begins in September 2023, the trial in the *U.S.S. Cole* case will not begin before mid- to late 2025 as numerous complex issues must be resolved prior to the commencement of the trial.

However, the foregoing estimate is dependent upon there being no impediments that cause further delay. The history of the commissions suggests that issues relating to turnover in counsel or discovery of governmental interference with the defense could cause significant additional delay. And while the 9/11 and *U.S.S. Cole* cases work very slowly toward possible resolution, the remaining cases, notably that of the 2002 deadly Bali bombing in Indonesia, will languish.⁸² The reason for the glacial progress of the pending cases is complex and well worth understanding in detail. We turn to that question in Part III below.

E. Current Status of Detainees

As of July 1, 2022, which is the closing date of this Report, the detainees fall into several different categories. The closest to resolution are those who have been cleared for transfer but await further action on the part of the Biden administration. As of the time of this writing, there are nineteen detainees being held in law-of-war detention but recommended for transfer if security conditions are met. Some cleared for transfer have been held for more than a decade since being classified as such. Clearing a detainee for transfer represents progress, yet the challenges to following through remain significant, and the administration has arguably devoted insufficient resources to enabling such transfers to occur. This Report details a number of recommendations to the administration if it is indeed serious about transferring the defendants who fit into this category. It must dedicate the personnel, primarily in the DOS, to engage in the diplomacy necessary to effectuate such transfers, as well as to liaise with the DOD to ensure that transfers occur with little risk to the United States or the host countries that have agreed to accept the detainees in question.

⁸² Carol Rosenberg, *Charges in Bali Bombing Case Are Delayed at Guantánamo*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/08/30/us/politics/guantanamo-bali-bombing-charges.html>.

Two detainees are awaiting further action to determine their final sentences. Ali Hamza Ahmad Suliman Al Bahlul was convicted in 2008 of providing material support for terrorism, solicitation, and conspiracy for serving as Osama bin Laden’s public relations director and personal secretary. He was sentenced to life imprisonment. Only his conviction for conspiracy has been upheld after multiple appeals. He currently awaits possible resentencing after the U.S. Court of Military Commission Review takes actions consistent with the upheld conviction. Majid Shoukat Khan pleaded guilty to multiple charges in 2012 but his sentencing has been repeatedly delayed. At his sentencing hearing, Khan described the dungeon-like conditions of his confinement and the torture he was subjected to. After less than three hours of deliberation, Khan was sentenced to twenty-six years in prison; however, his sentence could have ended as early as February 2021 based on his cooperation with the government.⁸³ Seven of the eight members of the jury rebuked Khan’s torture as “a stain on the moral fiber of America.”

As of the closing date of this Report, there are twenty-four detainees in GTMO who have not been charged with any crime, but instead are held in law-of-war detention; all have been given the status of “enemy combatant,” using the legal standard determined in the 2010 D.C. Circuit Court of Appeals case *Al-Bihani v Obama*.⁸⁴

Of the twenty-four law-of-war detainees, nineteen have been approved for transfer if security conditions are met.⁸⁵ However, even when detainees are approved for transfer, they must wait for the United States to find suitable countries that are willing to accept the detainees—a process that can take years.⁸⁶ Detainees can also be deemed as “unreturnable” to their home countries due to security or human rights concerns.⁸⁷ Currently, detainees cannot be transferred to Libya, Somalia, Syria, or Yemen.⁸⁸ Nine of the nineteen detainees approved for transfer are Yemeni citizens, complicating efforts to move them out of GTMO.

Third-party countries are not required to take in detainees that are deemed unreturnable, nor does there seem to be any intrinsic incentive for them to do so. That being said, the United States can incentivize third-party countries to accept detainees recommended for transfer and has done so. For instance, during negotiations, Bulgaria was told that it could expect around \$50,000 to \$80,000 in financial compensation for each detainee it was willing to take.⁸⁹

Even when a designated country agrees to accept a detainee, complications can arise. For example, detainee Ridah Bin Saleh al-Yazidi has been approved for transfer to Tunisia since 2010, but has refused to meet with Tunisian and

⁸³ Carol Rosenberg, *For First Time in Public, a Detainee Describes Torture at C.I.A. Black Sites*, N.Y. TIMES (Oct. 30, 2021), <https://www.nytimes.com/2021/10/28/us/politics/guantanamo-detainee-torture.html>

⁸⁴ *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

⁸⁵ Carol Rosenberg, *2 More Detainees Are Approved for Transfer Out of Guantánamo*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/10/13/us/politics/guantanamo-detainees-transfer.html>.

⁸⁶ Gaia Rietveld et al., *Who Wants “the Worst of the Worst”? Rationales for and Consequences of Third Country Resettlement of Guantánamo Bay Detainees*, 76 CRIME, LAW AND SOCIAL CHANGE, 35 (2021),

⁸⁷ *Id.*

⁸⁸ David Francis, *Senate Bans Transfer of Detainees Held at Guantánamo Bay*, FOREIGN POL’Y (Nov. 10, 2015), <https://foreignpolicy.com/2015/11/10/senate-bans-transfer-of-detainees-held-at-guantanamo-bay/>.

⁸⁹ Sofia, Bulgaria to Sec’y of Defense et al., *Bulgaria Responds Positively on Guantánamo*, WIKILEAKS (Dec. 7, 2009), https://search.wikileaks.org/plusd/cables/09SOFIA690_a.html.

U.S. officials regarding the transfer and has not spoken to his lawyer in years.⁹⁰ The fact that it is so difficult to release those who have been recommended and approved for transfer does not inspire confidence that efforts to close the facility can happen in an efficient manner without some major reforms.

The remaining five law-of-war detainees are not recommended for transfer as the Periodic Review Board has determined that these detainees pose a continuing “significant threat to the security of the United States.”⁹¹

F. Monetary Costs of Detention

The monetary cost of detainee operations at GTMO is vast, and some argue a “gross waste.”⁹² According to the DOD’s fiscal year 2013 report to the Senate Select Committee on Intelligence, GTMO costs from 2002 to 2014 totaled nearly \$5.2 billion.⁹³ Those costs have risen significantly since 2014 and will increase more rapidly in the coming years as described below. The DOD stated that the fiscal year 2015 cost for GTMO was \$445 million.⁹⁴ In 2018, the *New York Times* estimated the total cost of GTMO rose to \$540 million annually, excluding undisclosed classified costs.⁹⁵ In 2019, National Public Radio obtained an estimate of \$380 million annually from DOD, but that excluded the cost of military personnel who support detainee operations, such as the 1,500 guards stationed at the GTMO detention facility.⁹⁶ These figures suggest that through fiscal year 2021 detainee operations on Guantánamo Bay have cost U.S. taxpayers at least \$8 billion.⁹⁷

The \$540 million annual cost is surprising standing alone, but even more startling is that the cost is for operations for a mere thirty-six detainees. Even subtracting the \$100 million that military commissions cost annually, as discussed below, that is over \$10 million every year to hold each Guantánamo detainee.⁹⁸ The same number of inmates held in a U.S. supermax prison, at \$78,000 annually, would cost under \$2.9 million each year, less than 1 percent of the cost for maintaining the GTMO detention facility.⁹⁹

⁹⁰ Paik, *supra* note 43.

⁹¹ Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (2011).

⁹² USAF Col. (Ret.) Gary Brown, former legal adviser to the head of Guantánamo’s military commissions, filed a complaint with the United States Office of Special Counsel, alleging “gross financial waste” and “gross mismanagement.” Sacha Pfeiffer, *Guantánamo Has Cost Billions; Whistleblower Alleges “Gross” Waste*, NATIONAL PUBLIC RADIO (Sept. 11, 2019), <https://www.npr.org/2019/09/11/759523615/guant-namo-court-and-prison-have-cost-billions-whistleblower-alleges-gross-waste>.

⁹³ See Rosenberg, *supra* note 2.

⁹⁴ Guantánamo Bay: The Remaining Detainees: Hearing Before H. Subcomm. on Nat’l Sec. of Comm. on Oversight and Gov’t Reform, 114 Cong. 119 (2016) (statement of Stephen F. Lynch, Ranking Member).

⁹⁵ See Rosenberg, *supra* note 2.

⁹⁶ See Pfeiffer, *supra* note 92.

⁹⁷ See Rosenberg, *supra* note 2.

⁹⁸ This apparently includes the cost of the roughly 1,500 military members assigned to the detention facility, but likely does not include personnel costs of the intelligence community.

⁹⁹ *The Detention Facility at Guantánamo Bay: A Dark Chapter*, FRIENDS COMM. ON NAT’L LEGIS. (June 9, 2021), <https://www.fcnl.org/updates/2021-06/detention-facility-guantanamo-bay-dark-chapter>.

The 1,500 troops assigned to the detention center make for an exceptionally high ratio of over forty-one military personnel per detainee. This is mostly a function of the U.S. decision to locate the detention facility on a remote Caribbean island. Guards are needed not only for normal detention duties, but also for perimeter security and for any other contingencies that arise at small, remote facilities like Guantánamo Bay Naval Station. For example, GTMO cannot rely on the surrounding community to provide food or medical services in the event of delayed shipments or natural disasters.

Although \$540 million annually for thirty-six detainees is extraordinary, it is not clear whether that figure captures all the costs of providing medical treatment to the detainee population. For example, medical teams have been flown to the island for detainee emergency medical treatment, and an MRI machine and supporting personnel were sent for detainee use, at a reported cost of \$370,000.¹⁰⁰ Whatever the costs, they will increase significantly in the coming years. For example, detainees even now suffer from liver disease, heart problems, and cognitive failure.¹⁰¹ As these conditions worsen as the detainee population ages, the United States will be required to construct specialized medical facilities and elder care facilities, and provide qualified personnel. A nursing facility will ultimately be required, as detainee health declines as a natural result of aging.¹⁰²

It is not just detention operations that drive the cost of GTMO detainee operations. Guantánamo military commissions are the most expensive criminal trials ever conducted by the United States.¹⁰³ The Office of Military Commissions (OMC) reported to Congress in 2018 that “operating the Office of Military Commissions costs approximately \$100 million per year (salaries for translators, contractor support, flights, other travel costs, experts, consultants, learned counsel).”¹⁰⁴ This annual expenditure represents the pretrial expenses for the ten detainees facing trial by military commission, as well as the trial expenses for the two detainees who have been convicted by military commission.¹⁰⁵

Several factors contribute to the high cost of military commissions but, as with detention operations, most of the excess cost can be traced directly to the decision to hold the commissions at Guantánamo. All necessary material, supply, and personnel require transportation by air or ship to the island. Required travel contributes significantly to the cost of pretrial proceedings and will increase if cases go to trial.

¹⁰⁰ Carol Rosenberg, *The Pentagon Paid \$370,000 to Rent an MRI for Guantánamo. It Doesn't Work*, MIA. HERALD (Nov. 14, 2017), <https://www.miamiherald.com/article184624408.html>.

¹⁰¹ Guy Davies, “*Degrading*: Aging Detainees Describe Health Care Woes at Guantánamo 18 Years After 9/11”, ABC NEWS (Dec. 1, 2019), <https://abcnews.go.com/International/degrading-aging-detainees-describe-healthcare-woes-guantanamo-18/story?id=66611133>.

¹⁰² Former JTF-GTMO Commander Admiral John Ring was dismissed in 2019 for mishandling of classified information, with the New York Times reporting it has been denied that he was let go for his comments on the need for a facility that can provide end of life care. Carol Rosenberg, *Guantánamo Prison Commander Was Fired for Mishandling Classified Information*, N.Y. TIMES (Aug. 28, 2019), <https://www.nytimes.com/2019/08/28/us/politics/guantanamo-commander-john-ring-fired.html>.

¹⁰³ The *McMartin* Preschool abuse trial, considered the most expensive criminal trial in U.S. history, unsuccessfully prosecuted seven defendants and cost \$15 million. Douglas Linder, *The McMartin Preschool Abuse Trial*, SSRN ELEC. J., Nov. 2007, <https://doi.org/10.2139/ssrn.1030559>.

¹⁰⁴ Report of Military Commissions Activity, OFF. OF MILITARY COMMISSIONS (2018).

¹⁰⁵ These numbers exclude those whose convictions were overturned on appeal. See Rosenberg, *supra* note 2.

When hearings occur at GTMO, lawyers, judges, witnesses, court employees, support personnel, media, and any other individuals attending all fly to the base. There are very few—and during some periods zero—commercial flights to GTMO. DOD must contract out flights to the base. These flights are “often Boeing 737s operated by commercial airlines that bid for the routes” and cost taxpayers \$185,000 round trip.¹⁰⁶ Because of scheduling challenges, weather issues, and last-minute changes in the court docket, the flights are often quite empty. GTMO defense lawyer Wyatt Feeler said, “[A] former colleague told me one time he was on a flight with two people. That’s the fewest I’ve heard. I’ve certainly been on flights where the vast majority of seats were empty.”¹⁰⁷ Lawyers must travel to GTMO even to conduct routine meetings with clients because they are not allowed to speak to prisoners via telephone since CIA officials argue that this would risk the interception of classified information by a third party.¹⁰⁸

Travel may also be necessary for lawyers if they need access to classified information. For example, if classified information is included in a letter sent by a client, attorneys “would have to travel to a secure facility in the Washington area to see the letter.”¹⁰⁹ In fiscal year 2017, the OMC spent around \$6.6 million on transportation costs, \$4.5 million of which was associated with government air transportation (known as MILAIR).¹¹⁰ These exorbitant transportation costs are driven by GTMO’s hard-to-access location and are expected to double if and when trials begin at GTMO because of the need to transport many more court personnel and jury members for what is expected to be quite lengthy proceedings.¹¹¹

In addition, six of the ten detainees pending trial by military commission face the possibility of capital punishment.¹¹² Under U.S. law, capital cases require extraordinary procedures, including the assignment of death penalty-experienced defense counsel—called “learned counsel”—to each defendant.¹¹³ While two judges prohibited the disclosure of fees paid to learned counsel at the military commissions, National Public Radio reported that some of the attorneys bill \$500,000 annually.¹¹⁴ According to a 2018 government document, “[L]earned counsel [and] defense experts alone have cost \$17.5M for capital cases since 2011.”¹¹⁵

The costs set out above will keep increasing if Guantánamo Bay detainee operations continue. One of the clearest areas that will drive a spike in costs is the aging detainee population. As the age of the detainee population increases, the

¹⁰⁶ See Pfeiffer, *supra* note 92.

¹⁰⁷ *Id.*

¹⁰⁸ Josh Gerstein, *Judge Mulls Bringing Guantánamo Prisoner to U.S.*, POLITICO (May 29, 2020), <https://www.politico.com/news/2020/05/29/showdown-looms-over-guantanamo-virus-measures-288467>.

¹⁰⁹ *Id.*

¹¹⁰ Gov’t Combined Mot. and Response at 60, *United States v. Mohammad*, No. AE555P (June 6, 2018), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE555P\(Gov\)\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE555P(Gov)).pdf).

¹¹¹ *Id.*

¹¹² Mia. Herald Staff, *Who’s Still Held at Guantánamo*, MIA. HERALD (Aug. 24, 2016), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2203501.html>.

¹¹³ *Appointment of Counsel & Role of Federal Defender*, FED. DEATH PENALTY RES. COUNS. (2017), <https://fdprc.capdefnet.org/overview/appointment-counsel>.

¹¹⁴ See Pfeiffer, *supra* note 92.

¹¹⁵ Gov’t Combined Mot. and Response, *supra* note 110.

type of medical care required by the detainees will change. The oldest detainee, Saifullah Paracha, is seventy-four. Even the youngest detainee, Hassan Mohammed Ali Bin Attash, is approximately forty.¹¹⁶ During the early years of the Guantánamo Bay detention facility, the average detainee age was twenty-nine, but now it has increased to almost fifty.¹¹⁷ Many detainees are already dealing with health conditions typically associated with aging, such as sleep apnea, joint pain, diabetes or pre-diabetes, high blood pressure, and high cholesterol.¹¹⁸ These health issues are exacerbated by continued detention, as are health conditions unrelated to aging such as any condition that predates their detention at GTMO or any injuries sustained while in detention.

The Pentagon estimates for the cost of constructing an elder care facility on Guantánamo range from \$11 million to \$88 million.¹¹⁹ Construction of the specialized facility, however, is only the beginning. Absent a change in the security protocols governing detainee communications, medical personnel, including orderlies with regular access to detainees, will require a top secret, SCI clearance.¹²⁰ Even if the required dozens of medical professionals with appropriate clearances are available and willing to work at GTMO, they are certain to be expensive.

In addition to the increased care and medical needs of the detainees, the detention facility itself needs maintenance. In 2017, Congress rejected multiple requests for a new “high-value detainee prison” that would have included the ability to provide hospice care.¹²¹ At the same time, Congress approved a request to build new, dormitory-style military barracks to house roughly 850 guards.¹²² The new barracks cost \$124 million. The proposed upgraded prison would have cost \$88.5 million in 2017, but both the cost and the need have risen significantly since then. Problems such as poor water pipes, cracks in the floors and ceilings, power outages and flickering, overflowing toilets, and burning hot water have been reported.¹²³ The tropical environment is hard on infrastructure, particularly when it was never intended to be anything other than a temporary holding facility. If the Guantánamo detention facility is to be maintained into the future, it will require significant additional investment to maintain safety and security for both the detainees and facility personnel.

The cost of military commissions will also increase if they continue. The \$100 million annual budget is the cost for *pretrial* procedures. If the cases ever go to trial, expenses will spike. Trials would require the transport of full trial, defense, and judiciary teams, as well as support personnel. Jury members and alternates, who would be military officers, would be transferred to duty on GTMO with the expectation of a lengthy trial. There would also be a need to transport witnesses, experts, trial observers, media members, and others. As discussed above, there is little or no

¹¹⁶ Guantánamo Docket, *supra* note 3.

¹¹⁷ Bridge Initiative Team, *Guantánamo Bay Military Prison: Narratives and Numbers*, BRIDGE (Nov. 4, 2020), <https://bridge.georgetown.edu/research/guantanamo-bay-data-project/>.

¹¹⁸ Carol Rosenberg, *Guantánamo Bay as Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html>.

¹¹⁹ *Id.*; see also Gov’t Combined Mot. and Response, *supra* note 110.

¹²⁰ Uri Friedman, *When the U.S. Government Classifies People’s Memories*, ATLANTIC (June 12, 2015), <https://www.theatlantic.com/politics/archive/2015/06/cia-torture-classified-memory/395657/>. All utterances of detainees, as well as any other communications they produce, are presumed to be classified top secret until cleared for release under presumptive classification.

¹²¹ Rosenberg, Savage & Schmitt, *supra* note 70.

¹²² *Id.*

¹²³ *Id.*

commercial transportation to Guantánamo Bay, so these frequent movements of personnel and equipment would be part of the expanding commissions budget. In addition to travel, all the people transported to the island would require accommodation, food, and other necessities over a period of months. It is not possible to know what the cost will be, only that it will be much more than the current \$100 million spent annually.

It is not just the ever-growing budget that suggests a re-evaluation of the Guantánamo detention facility is needed. There are political and strategic costs associated with continuing detainee operations at Guantánamo. There is evidence that enemy belligerents and terrorists have been using images and news of Guantánamo as a recruiting tool for over a decade.¹²⁴ The continuing operation of the facility is a reminder of U.S. excesses in the aftermath of 9/11. Moving on from those unpopular activities of the United States could help rebuild the country's international standing.¹²⁵

Continuing military commissions would also come at a strategic cost. Guantánamo military commissions are a bespoke construct, designed for the prosecution of those who planned or participated in the *U.S.S. Cole* and 9/11 attacks.¹²⁶ After nearly two decades of commissions, the result has been ten detainees charged for trial, two convicted, and billions of dollars spent.¹²⁷ The prospects for future successful prosecutions against aging defendants grow more remote by the month. During this same period, dozens of alleged terrorist operatives have been convicted and sentenced to penal incarceration in federal courts, including a number of suspect Taliban and Al Qaeda operatives such as John Walker Lindh and Jose Padilla.¹²⁸

There is little reason to continue commissions in the hope of providing justice in a manner seen as appropriate within the United States and international communities. Some, however, argue that the commissions must continue in order to preserve the option of commissions for future U.S. conflicts.¹²⁹ Even if the Biden administration views this as a compelling interest, it does not mean the commission *as currently composed and located* must continue. Amendments to the MCA and relocation of trials to a military installation in the United States could, in theory, accommodate this interest without continuing to corrode the perception of U.S. commitment to the rule of law. Guantánamo military commissions as they stand—roughly \$100 million annually that average one conviction per decade and publicly demonstrate the inability of the United States to prosecute terrorists—provide a good argument *against* continuing to use *this* military commission. The best hope for preserving the military commissions option for future conflicts is to end the failed Guantánamo commissions as soon as possible and look for other options to prosecute the remaining defendants.

¹²⁴ *The Detention Facility at Guantánamo Bay: A Dark Chapter*, *supra* note 99.

¹²⁵ Felicia Schwartz, *International Body Calls on U.S. to Close Guantánamo Bay: Report Says Detention of Prisoners Is in Violation of International Standards of Law*, WALL ST. J. (Nov. 10, 2015), <https://wsj.com/articles/international-body-calls-on-u-s-to-close-guantanamo-bay-1447177486>.

¹²⁶ Further discussion can be found in Part IV.C of this Report.

¹²⁷ *Id.*

¹²⁸ See, e.g., *Try Suspected Terrorists* (humanrightsfirst.org); Carol Rosenberg, *John Walker Lindh, Known as the “American Taliban,” Is Set to Leave Federal Prison This Week*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/us/politics/american-taliban-john-walker-lindh.html>; Kirk Semple, *José Padilla Sentenced to More Than 17 Years in Prison*, N.Y. TIMES (Jan. 22, 2008), <https://www.nytimes.com/2008/01/22/world/americas/22iht-22padilla.9409539.html>.

¹²⁹ A.B.A. Standing Comm. on L. & Nat'l Sec. and Geo. Wash. Univ. L. Sch., *The U.S. Military Commissions: Looking Forward Law and Policy Workshop* (A.B.A., 2018), https://www.americanbar.org/content/dam/aba/administrative/law_national_security/ABAMilitaryCommissionsWorkshopFINAL.authcheckdam.pdf.

G. The Rendition, Detention, and Interrogation (RDI) Program

The origins of the so-called rendition, detention and interrogation (RDI) program, to which many post-9/11 Guantánamo detainees were subjected, remain somewhat opaque, as are many of the details of the program's implementation. The program remains classified. What is known of the origins of the RDI program to date has been the subject of a number of lengthy and detailed reports, including the *Senate Select Committee on Intelligence Study for the Central Intelligence Agency's Detention and Interrogation Program* (2014),¹³⁰ *CIA Office of Inspector General Report: Agency Access to the SSCI Shared Drive on RDINet* (2014),¹³¹ *Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody Report* (2008),¹³² special counsel investigation conducted by former U.S. Attorney John Durham,¹³³ report by General Antonio Taguba, officially titled *U.S. Army 15-6 Report of Abuse of Prisoners in Iraq*,¹³⁴ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2014),¹³⁵ Bureau of Investigative Journalism's *CIA Torture Unredacted* (2019),¹³⁶ and Center for Human Rights and Global Justice Report (2008).¹³⁷

A consistent theme across many of these reports is that the interrogation techniques used in the RDI program were intentionally designed to inflict physical suffering and psychological harm on subjects as primary methodologies for discovering information that would contribute to successful counterterrorism operations. While the history of the physical abuse inflicted at GTMO, other prisons, and black sites across the world has been by now reasonably well documented, the psychological abuse and the theory by which those abuses were supposedly going to help the United States in its intelligence operations are still emerging.

1. Use of Torture at Guantánamo

As has been well documented by the Senate Select Committee on Intelligence (SSCI) report, the Senate Armed Services Committee Inquiry into the Treatment of Detainees, and elsewhere, the use of enhanced interrogation techniques amounting to torture in interrogation was explicitly designed to induce psychological breakdown and severe mental and physical pain as will be described immediately below. The family of interrogational abuses employed by both the CIA and the DOD included long-term isolation, sleep deprivation, sustained used of shackling in awkward positions (that stress limbs and muscles), sensory deprivation, sexual and other forms of humiliation, threats to body and lives of detainees

¹³⁰ S. Rep. No.113-288 (2014).

¹³¹ CIA Inspector Gen., Agency Access to the SSCI Shared Drive on RDINet, 2014-11718-IG (2014).

¹³² S. Prt. No. 110-54 (2007-2008).

¹³³ See Press Release, Eric Holder, Att'y Gen., Dep't of Just., Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012), <https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>.

¹³⁴ Gen. Antonio Taguba, Article 15-6 Investigation of the 900th Military Police Brigade (2004).

¹³⁵ Juan E. Méndez, Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/25/60 (Apr. 10, 2014).

¹³⁶ Crofton Black, *CIA Torture Unredacted: Revealing What Was Hidden in the US Senate Torture Report*, BUREAU OF INVESTIGATIVE JOURNALISM (July 10, 2019), <https://www.thebureauinvestigates.com/blog/2019-07-10/cia-torture-unredacted-revealing-hidden-us-senate-torture-report>.

¹³⁷ CTR. FOR HUM. RTS. AND GLOB. JUST., ON THE RECORD: U.S. DISCLOSURES ON RENDITION, SECRET DETENTION, AND COERCIVE INTERROGATION (2008), <https://chrj.org/wp-content/uploads/2016/09/ontherecord.pdf>.

and their families, beatings, exposure to extreme temperatures, bombardment with loud noise, water dousing, and in the case of the CIA, waterboarding. The conduct of the interrogational abuses relied on setting conditions of confinement that sought to maximize the disorientation and vulnerability of detainees for the stated purpose of yielding intelligence, such as through isolation, bombardment with constant noise, sleep deprivation, and deprivation of reading and religious materials. On the other hand, investigations of these tactics have shown that the conditions of confinement also induce susceptible individuals to make false confessions and giving answers expected by interrogators. In other words, the “broken” captive in great distress will say what is expected.

The cumulative and synergistic impact of the conditions of confinement and tactics applied in interrogations were designed to produce disorientation and psychological breakdown. The theories regarding conditions of confinement and interrogation tactics were originally memorialized in the KUBARK manual (1963) and refined more than twenty years later in an interrogation manual for Central American military and intelligence organizations called the Human Resource Exploitation (HRE) Training Manual. The specific tactics used for this purpose include:

- Sleep deprivation: impact of altered sleep cycle is an independent factor affecting cognition, attention, concentration, and memory. Extended sleep deprivation and altered sleep cycles produce confusion, anxiety, and depression. Sleep deprivation exceeding ninety-six hours induces hallucinatory, illusory, and delusional symptoms and/or frank psychosis.
- Emotional stress, including hooding: cumulative impact over many years leading to psychiatric conditions including post-traumatic stress disorder and major depression. The programmed emotional stress of intense interrogations induces severe anxiety, fear, confusion, and uncontrolled shifts in mood.
- Shackling: impact on musculoskeletal injury and chronic pain. Chronic pain aggravates the consequences of emotional stress, impairments in cognition, and sleep disturbance.
- Forced urinary retention: cumulative impact leading to pain and discomfort and aggravating emotional stress, impairments in cognition, and sleep disturbance.
- Dietary manipulation: leading to gastrointestinal distress and malabsorption and aggravating emotional stress, impairments in cognition, and sleep disturbance.
- White noise: leading to and aggravating confusion, poor concentration, sleep disturbance, and emotional distress.

The specific tactics used in interrogations are applied in the settings and context that promote their effectiveness and achieve the purpose of psychological breakdown. Interrogators manage subjects and design approaches for setting the environment and parameters of the relationship to the subject that induce helplessness, disorientation, and psychological breakdown. Common elements in setting conditions for interrogation and context include:

- Intimidation and fear: statements and threats intended to block thoughts of escaping or resisting the interrogators and gaining safety and security.
- Dominance and authority: setting an environment of dominant authority and sweeping control over vulnerable subjects. The interrogators establish near-absolute authority, immense control, and dominance in conducting operations and interacting with the subjects.
- Deception: false pretenses and statements. Trickery and deception are widely used interrogation tactics for manipulating subjects and labeled as the tactic of “We Know All.” Deception has been practiced by law

enforcement for questioning and manipulating subjects for many years.

- Psychological manipulation: standard intelligence-gathering and interrogation tradecraft include a medley of tactics for psychologically manipulating subjects. These techniques constitute emotional approaches based on the subject's view of self and relationships with others. They include "emotion hate approach," "emotional fear-up approach," "emotional fear-down approach," and "emotion-pride and ego-up approach." These tactics have been documented in the interrogations of detainees at Guantánamo Naval Base and accused terrorists.
- Sexualization: sexualizing behavior gives the interrogator leverage for greater control over subjects.

The methods of interrogation inducing psychological breakdown and severe mental and physical pain prime subjects for coercion and false confessions. Interrogators commonly employ deception—"We know it all"—that involves suggesting answers to the captives or subjects. Interrogators suggest answers and make assertions to captives to psychologically coerce them to confirm the interrogator's claims. Subjects assume that they have no choice but to comply with the wishes and statements of the interrogators and make statements that become products of coercion. Individuals differ in their ability to withstand interrogation pressures and their susceptibility to making false confessions. The confirmations to suggested answers are used as confessions by the interrogators.

The cumulative and synergistic impact of the setting, conditions of confinement, and tactics produce psychological breakdown and mental state characterized by identifiable features, symptoms, and impairments. The features, symptoms, and impairments overlap and constitute elements of common and indistinguishable clinical presentations, including:

- Symptoms of anxiety, depression, sleep disturbance, sudden and unexpected panic, unexpected and intrusive memories and associations to distressing events, mood shifts, fatigue, weakness, somatic complaints (particularly gastrointestinal), multiple aches and pains, and headaches.
- Functional impairments of awkwardness and hesitance in social relationships (even with family and close friends), difficulty paying attention and concentrating (resulting in poor memory and comprehension), decreased libido, low interest in pleasurable activities, and shifting (often diminished) appetite.

The most common diagnoses consistent with these symptoms and impairments are post-traumatic stress, generalized anxiety, major depressive disorders, and post-concussion syndrome. The environment, conditions, and interpersonal dynamics inflict psychological and physical harm commonly observed in victims of abuse, rape, and prisoners of war. Subjects lacking the capacity to exercise effective protection from the noxious and threatening conditions and tactics feel traumatized and vulnerable to manipulation, coercion, and exploitation.

2. Origins and Methods of the Psychological Techniques of the RDI Program

As the full intent and impact of the RDI program begin to emerge, it is becoming ever clearer that the infliction of psychological distress was one of the primary techniques the United States used to break the will and secure the compliance of detainees in the war on terror. By reducing subjects to a state of hopelessness, terror, and despair, premised on the faulty belief that rendering subjects psychologically vulnerable would help produce effective intelligence,¹³⁸ the CIA and other interrogators hoped to achieve the pliability of detainees, both to secure confessions and to acquire other

¹³⁸ Senate Select Committee on Intelligence Study for the Central Intelligence Agency's Detention and Interrogation Program, *supra* note 6, at 12.

information that would contribute to the development of actionable intelligence to preempt future 9/11 type attacks against the United States. Despite the legal cover provided by the OLC and others for the use of techniques of enhanced interrogation, there is now broad consensus in the legal community that these techniques were inconsistent with the long-standing U.S. commitment to ensuring the humane treatment of all captured and detained personnel in the context of armed conflicts and that they violated domestic and international legal obligations related to the treatment of such individuals.¹³⁹ Due to their physical and psychological impact on detainees, the techniques in question constituted torture as well as cruel, inhuman, and degrading treatment.

The U.S. scientific forays into this field may have begun with researchers trying to understand how communist Chinese captors extracted false confessions of heinous conduct from American prisoners of war during the Korean War.¹⁴⁰ Psychiatrist Robert Lifton and sociologist Albert Biderman catalogued Chinese counter-resistance techniques and reconstructed a two-stage process. First, captors manipulated their subjects' environment (what Biderman called "monopolization of perception")¹⁴¹ to achieve a state of helplessness and despair (what Biderman termed "induced debilitation").¹⁴² Then, in Biderman's words, they "shape[d] compliance," by exploiting their "monopolization of perception" to not only extract false confessions, but also imbue in their captives an alternative, enduring system of belief, one in line with the content of the false confessions.¹⁴³

Study of these techniques led to an American effort, the survival, evasion, resistance, and escape (SERE) program, designed to inoculate American airmen and soldiers against such abuses by reverse-engineering them into a training experience that inflicted harsh treatment on trainees in simulated prison camps, with an eye toward building their ability to resist physical and psychological pressure from the enemy.¹⁴⁴ Psychologists oversaw SERE, studying how abusive methods could be sequenced to either break trainees' spirits or build their resistance.¹⁴⁵

When, after the 9/11 attacks, the CIA began to take and interrogate prisoners, the agency turned to two SERE psychologists, James Mitchell and Bruce Jessen, to oversee an interrogation strategy that borrowed and adopted SERE's harsh methods so as to reduce detainees to despair, terror, and exhaustion.¹⁴⁶ Mitchell drew explicitly upon Biderman's reconstruction of Chinese methods, mixing in ideas he borrowed from psychologist Martin Seligman's studies of what Seligman termed "learned helplessness."¹⁴⁷

¹³⁹ See, e.g., CTR. FOR ETHICS AND THE RULE OF L., *THE ETHICS OF INTERROGATION AND THE RULE OF LAW* (Apr. 23, 2018), <https://www.law.upenn.edu/live/files/7921-the-ethics-of-interrogation-and-the-rule-of-lawpdf>.

¹⁴⁰ M. GREGG BLOCHE, *THE HIPPOCRATIC MYTH: WHY DOCTORS ARE UNDER PRESSURE TO RATION CARE, PRACTICE POLITICS, AND COMPROMISE THEIR PROMISE TO HEAL* (New York: St. Martin's Press, 2011), 123.

¹⁴¹ Albert D. Biderman, *Communist Attempts to Elicit False Confessions from Air Force Prisoners of War*, 33 BULL. N.Y. ACAD. OF MED. 616 (1957).

¹⁴² *Id.*

¹⁴³ *Id.* at 617.

¹⁴⁴ Bloche, *supra* note 140, at 15.

¹⁴⁵ *Id.* at 16.

¹⁴⁶ *Id.* at 37–38.

¹⁴⁷ Martin Seligman, *Learned Helplessness*, 23 ANN. REV. OF MED. 407-412 (1972). See also Daily Dish, *Mayer on Seligman*, ATLANTIC (July 17, 2008), <https://www.theatlantic.com/daily-dish/archive/2008/07/mayer-on-seligman/214016/>.

Critical to Mitchell's model was the idea of sapping the subject's resistance by setting him against himself, rather than setting up a "battle of wills" between interrogator and detainee; the latter was thought to invigorate resistance. Techniques of physical abuse, like waterboarding and forced standing in stressful positions, were chosen with this end in mind. They set up, in Biderman's words, an "internal confrontation" of the victim against himself.¹⁴⁸ Once reduced to despair and paralytic fear, victims could then, Mitchell claimed, be psychologically remade to comply with interrogators' demands—demands not for false confessions but for truth-telling.

The SERE-inspired interrogational approach based on Mitchell's model was intended to create conditions that would induce feelings of helplessness of detainees at black sites and at GTMO. Helplessness is induced to establish an environment and define the parameters of the relationships.¹⁴⁹ The underlying theory of learned helplessness is to induce a mental state of surrender, leaving the victim feeling defenseless, with no control over his environment.¹⁵⁰ Those subjected to it describe induced feelings of helplessness, manipulation into compliance, and exploitation of false confessions.¹⁵¹

Mitchell's book and subsequent 2020 testimony at Guantánamo offered an alternative conceptual framework: torture sequencing induced fear and increased despair to establish Pavlovian-like conditioning by associating noncompliance with extreme psychological distress.¹⁵² Mitchell claimed warm gestures and tones of voice, better living conditions, and other creature comforts established and reinforced compliance via operant conditioning. He contended that Pavlovian and operant conditioning worked hand in hand, as CIA exploiters sought to build up detainees' emotional distress so interrogators could relieve it when detainees cooperated.¹⁵³

The relative roles of these two psychological models in the torture program's design have yet to be disclosed. However, they rationalize the same extreme levels of abuse in both cause and effect. Mitchell offered justification that enhanced interrogation shows that detainee abuse was purposeful, not accidental or incidental, and that the extreme levels of mental suffering to bring about long-term psychological disruption were intentional.

Another potential explanation is even more enigmatic. In his Guantánamo testimony, Mitchell made vague reference to a pre-existing or parallel program of the family of interrogational abuses that he and Jessen oversaw. Mitchell testified that he had little influence over this rival program.¹⁵⁴ If such an even-more-covert program existed, it would be highly classified. It also raises questions about any authority, or lack thereof, this rival program may have operated under.

¹⁴⁸ Bloche, *supra* note 140, at 124 (statement of Albert Biderman).

¹⁴⁹ *Id.*

¹⁵⁰ Steven F. Maier & Martin E.P. Seligman, *Learned Helpless: Theory and Evidence*, 105 J. EXPERIMENTAL PSYCH. GEN. 3, no. 1 (1976).

¹⁵¹ Zahava Solomon et al., PTSD Among Israeli Former Prisoners of War and Soldiers with Combat Stress Reaction: A Longitudinal Study, 151 AM. J. PSYCHIATRY 554 (1994).n

¹⁵² M. Gregg Bloche, *Stopping Torture: Why Professional Governance Failed, and How It Can Do Better*, JUST SEC. (May 4, 2021), <https://www.justsecurity.org/75935/stopping-torture-why-professional-governance-failed-and-how-it-can-do-better/>.

¹⁵³ *Id.*

¹⁵⁴ David Luban & Katherine Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, 108 GEO. L. J. 333 (2019) (It is well-established that in the 1950s and 1960s, the CIA reverse-engineered, then embellished, with input from behavioral scientists, Chinese methods employed during the Korean War. ALFRED MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR (Holt Paperbacks, 2006). Proponents of the theory that the CIA executed a parallel program of interrogation by torture after 9/11 suggest that the agency maintained institutional memory of its 1950s and 1960s vintage methods of abuse into the 21st century.).

It is apparent that all of these approaches were intended to inflict devastating, long-lasting effects on the minds and morale of detainees, denying them of volition. The torture program or programs do appear to have achieved this purpose, as there is abundant evidence of current and former Guantánamo detainees' profound psychological distress lasting months, years, even decades.¹⁵⁵ Sustained cooperation or “compliance” was the intended outcome and the torture program purported to achieve the psychological transformation it was intended to bring about. Those remaining at GTMO, as well as those who were previously released, attest to the devastating and lasting impact of the torture to which they were subjected in memoirs, in artwork, and through their court filings. The long-term psychological and psychiatric disorders created by the treatment they received is not a matter of speculation. Despite the well-documented history and continuing shocking public revelations and declassification, the DOJ and other government agencies continue to assert the state secrets privilege over large portions of the program. This insistence on classification and redaction of the public record continues to interfere with the ability to bring the cases that are slated for trial in the military commissions to a conclusion.¹⁵⁶

3. *The “Clean Team” and the Continuing Taint of Torture*

Beginning in 2006, the military commissions chief prosecutor brought in a group of federal agents dubbed the “clean team” to set out to re-interview some of the Guantánamo detainees, this time using rapport-building techniques, in the hope of obtaining evidence not tainted by unlawful coercion.¹⁵⁷ This tactic was likely premised on federal civilian law enforcement interrogation tactics developed to “rehabilitate” confessions initially made in violation of the Miranda warning and waiver requirement—and therefore presumptively coerced—by securing a subsequent waiver and repeat of the inadmissible confession by agents different than those who originally violated the Miranda requirement. However, the efforts of the clean teams to purge the substantive due process violations brought about through the actual use of coercive methods is highly questionable. Certainly, the abuse inflicted on Guantánamo detainees was far more egregious than the consequence of a technical Miranda violation. Nonetheless the tactic was employed to produce an analogous evidentiary effect.

The nature of initial coercion is, therefore, an important consideration when assessing the impact of clean team interrogations. The pernicious nature of the abuse inflicted upon detainees during initial interrogations would, if inflicted on a criminal suspect in federal civilian custody, undoubtedly qualify as “conscience-shocking” government misconduct. The gravity of the initial coercive measures belies the claim that clean team interrogations bring military commission proceedings into compliance with the due-process standards applicable to civilian trials; and more specifically that re-interrogation of defendants, months or years after torture, by interviewers who did not participate in defendants' torture, attenuates the taint of that abusive treatment and yield admissible evidence. Many contend that testimony obtained by clean teams after torture is fatally tainted, as would be any convictions based in part on such testimony.

The Bush administration's attempt to rationalize the torture program underscored the clean team cure's implausibility. The OLC's “Torture Memos,” as the documents setting forth this rationalization have come to be called,

¹⁵⁵ See Sheri Fink, *Where Even Nightmares Are Classified: Psychiatric Care at Guantánamo*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/world/guantanamo-bay-doctors-abuse.html>; Matt Apuzzo, Sheri Fink & James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html>; James Risen, *After Torture, Ex-Detainee Is Still Captive of “The Darkness”*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/12/world/cia-torture-abuses-detainee.html>. See generally Amanda C de C Williams & Jannie van der Merwe, *The Psychological Impact of Torture*, 7 Brit. J. Pain 2 (2013).

¹⁵⁶ United States v. Zubaydah, No. 20-827 (2021).

¹⁵⁷ Josh White et al., *FBI “Clean Team” Re-Interrogated 9/11 Suspects*, NBC NEWS (Feb. 11, 2008, 11:59 PM), <https://www.nbcnews.com/id/wbna23120362>.

acknowledged that “the program is designed to dislodge the detainee’s expectations about how he will be treated in U.S. custody, to create a situation in which he feels that he is not in control, and to establish a relationship of dependence on the part of the detainee.”¹⁵⁸ This sense of dependence and lack of control hardly ceases when men confined indefinitely, under harshly restrictive conditions, are introduced to interrogators they have not previously met.

Long-established principles of due process preclude the use of evidence *for any purpose* (even impeachment) if obtained by actual government coercion—whether or not characterized as torture—in criminal tribunals.¹⁵⁹ This exclusion is motivated not only to avoid countenancing cruelty, but also because testimony obtained via coercion is unreliable.¹⁶⁰ However, it is important to note that reliability is not the primary rationale for this exclusion. Instead, it is the rejection of allowing the government to profit by violating the most fundamental notion of due process. As the Supreme Court noted in the seminal decision of *Spano v. New York*:

[T]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that, in the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. (360 U. S. 321).

Accordingly, it is the position of the Working Group that any use of evidence derived from interrogations pursuant to the torture program fatally infects the military commissions process at Guantánamo. Likewise, ongoing efforts to hide CIA black site abuses have greatly undermined the provision of medical care to Guantánamo detainees previously held at these sites. Military physicians and other caregivers who have served at Guantánamo report that they were discouraged, even prohibited, from asking detainees about their experiences of abuse while in CIA custody and urged to redirect conversation away from such topics if and when detainees brought it up.¹⁶¹ As a consequence, myriad mental and physical health problems caused by this abuse—from PTSD, depression, and anxiety to orthopedic and other injuries—have not been properly evaluated and treated, in breach of U.S. domestic and international law obligations to prisoners. Likewise, this don’t-ask-don’t-tell approach to torture has precluded provision of other post-torture rehabilitation services required by DOD Directive 2310.01E. And it has called upon military health professionals to violate their ethical obligations to their detainee-patients, obligations to which U.S. military law requires them to adhere.

The post-9/11 torture program has both discouraged U.S. allies from collaborating with the United States on counterterrorism and catalyzed violent extremist groups’ recruitment efforts around the world.¹⁶²

¹⁵⁸ Memorandum from Steven Bradbury, Principal Deputy Assistant Attorney General, to John Rizzo, Acting CIA General Council on Application of the War Crimes Act, Detainee Treatment Act, and the Common Article 3 of the Geneva Conventions to Certain Techniques that may be used by the CIA in the interrogation of HV Al Qaeda Detainees (July 20, 2007), 5–6.

¹⁵⁹ That “enhanced interrogation” constitutes psychological torture under U.S. law seems indicated by considering the plain text of the federal criminal prohibition against torture. Any act that is “specifically intended to inflict severe . . . mental suffering” under Section 2340A of Title 18, United States Code (18 U.S.C. § 2340A),¹⁵⁹ which “enhanced interrogation” did by design, constitutes torture. Notably, numerous detainees suffered severe and enduring bodily injuries from black site techniques such as “walling” (the hurling of detainees against supposedly flexible walls). Thus, there is compelling evidence that the abuse to which Guantánamo detainees were subjected constituted physical as well as psychological torture.

¹⁶⁰ *E.g.*, *Miranda v. Arizona*, 384 U.S. 436, 448 (1966) (citing *Blackburn v. Alabama*, 361 U.S. 199 (1960)).

¹⁶¹ Sheri Fink, *Where Even Nightmares Are Classified: Psychiatric Care at Guantánamo*, N.Y. TIMES (Nov. 12, 2016), <https://www.nytimes.com/2016/11/13/world/guantanamo-bay-doctors-abuse.html>.

¹⁶² Douglas A. Johnson et al., *The Strategic Costs of Torture: How “Enhanced Interrogation” Hurt America*, FOREIGN AFF.’S (Sept./Oct. 2016), <https://www.foreignaffairs.com/articles/united-states/strategic-costs-torture>.

III.

AUTHORITY OF THE MILITARY COMMISSIONS

Military commissions are wartime military tribunals, appointed by the president (often pursuant to authority acknowledged or vested by statute), for the trial of enemies accused of violating the laws and customs of war prior to their capture.¹⁶³ A state of armed conflict is a necessary predicate for military commission jurisdiction to arise, but confinement and trial may extend beyond the cessation of hostilities. Military commissions are not to be confused with courts-martial, which are trials convened pursuant to the Uniform Code of Military Justice (UCMJ) to try individuals subject to military law (most commonly service-members) for violations of the Punitive Articles of the UCMJ. Historically, courts-martial are used to adjudicate allegations of wartime misconduct by U.S. personnel (to include war crimes) while military commissions are used to adjudicate allegations of wartime precapture misconduct by the enemy. Notably, however, the UCMJ contemplates generally analogous rules of procedure and evidence for each variant of the military tribunal.

As of the closing date of this Report, ten detainees are preparing for trial and are in various forms of pretrial proceedings before the military commissions convened pursuant to the MCA of 2009.¹⁶⁴ There are five detainees held in indefinite detention, without trial, who are not recommended for release and nineteen who have been cleared for transfer if security conditions are met.

A. Legal Background and History of the Commissions

The authority to establish military commissions to try captured enemy personnel is shared between two branches of government. Article I, §8 of the Constitution grants Congress the power “[t]o define and punish... offenses against the Law of Nations” and “[t]o make Rules for the... Regulation of the land and naval forces.” These authorities have been invoked to enact laws authorizing trial by both courts-martial and military commission. The president is also vested with authority to establish military commissions based on Article II, clause 1, a power inherent to the role of commander in chief, which has in the past been invoked in the absence of legislative authorization.¹⁶⁵ The Supreme Court confirmed

¹⁶³ Index and Legislative History: Uniform Code of Military Justice 975 (Wash. DC: Gov’t. Printing Off., 1950).

¹⁶⁴ *Guantánamo Docket*, *supra* note 3.

¹⁶⁵ Timothy C. MacDonnell, Military Commissions and Court-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts, *Army Law.*, Mar. 2002 at 19, 20.

the president's authority to establish military commissions without express authorization from Congress in *Madsen v. Kinsella*.¹⁶⁶

Today, the UCMJ also expressly acknowledges the jurisdiction of military commissions in certain situations.¹⁶⁷ Article 18 of the *Manual for Military Commissions* vests general courts-martial with jurisdiction to try *any person* who, by the law of war is subject to trial by military tribunal, a shorthand for jurisdiction over those charged with violations of the law of war. Article 21 expresses Congress's intent to allow the president to exercise the discretion to choose between general courts-martial or military commission for the trial of such violations by acknowledging that the grant of jurisdiction to the courts-martial does not deprive military commissions of jurisdiction over the same offenses.

Military commissions processes have evolved over the years and are today convened pursuant to statute.¹⁶⁸ In keeping with congressional intent that military commissions be composed as tribunals generally analogous to general courts-martial, military commissions are composed of commissioned military officers. The number of military commission members (what civilians would refer to as "jurors") is indeterminate. There being no law fixing the number, a single-member military commission would technically be permitted. A U.S. general court-martial, by contrast, has a statutorily defined quorum of nine military members (twelve for any capital referral).¹⁶⁹

The current use of military commissions in Guantánamo is unlike most instances of commission use throughout U.S. history. Notably, previous commissions have been used to bring to trial members of an enemy force who were accused of acting unlawfully under the laws of war. The 1945 military commission trial of Japanese General Tomoyuki Yamashita, for example, put a high-ranking member of the Imperial Japanese Army on trial for war crimes allegedly committed by Japanese troops under his command in the Philippines in 1944.¹⁷⁰

In a similar vein, on June 12, 1942, eight Nazi saboteurs (two of whom were American citizens) landed by submarine, four on Long Island, New York, and four others at Ponte Vedra, Florida. Within one week, all eight were in U.S. custody, the Federal Bureau of Investigation (FBI) having been alerted by one of the saboteurs to their plot. On July 2, President Franklin Roosevelt issued a proclamation creating a military commission to try the eight enemy combatants. The trial was held in secret from July 8 to August 1 before seven Army generals. The trial was conducted in the Department of Justice Building in Washington, D.C. and the attorney general and judge advocate general of the Army jointly led the prosecution effort. Despite language in the proclamation prohibiting the involvement of any civil court, on July 23, the Army colonel appointed as military counsel for the accused personally delivered a petition for a writ of habeas corpus to Supreme Court Associate Justice Owen Roberts at his home. Six days later, the defense counsel's audacious act having succeeded, the Court heard argument on the writ. One day after that, on July 30, in a *per curiam* order, the Court discharged

¹⁶⁶ 343 U.S. 341, 348 (1952).

¹⁶⁷ See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.), pt. I, ¶ 2(b)(2); Rule for Courts-Martial 201(f)(1)(B); Article 21, Uniform Code of Military Justice, 10 U.S.C. § 821 (2006) (with some exceptions, civilians, including terrorists, are not generally subject to UCMJ jurisdiction).

¹⁶⁸ Note, Article 102 of the Third Geneva Convention requires that POWs be tried under the same charges, and by the same rules of procedure and evidence as troops of the holding state.

¹⁶⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES Rule 501 (2019).

¹⁷⁰ *United States vs. Tomoyuki Yamashita Record of Trial*, MIL. LEGAL RES., https://www.loc.gov/r/r/frd/Military_Law/Yamashita_trial.html (last visited Dec. 20, 2021).

(dismissed) the habeas application. The eight saboteurs were found guilty on August 1. On August 8, just fifty-seven days after they landed by submarine, six of the eight were executed by electrocution. The death sentences of the two saboteurs who had assisted in apprehending the others were commuted to imprisonment for thirty years and for life, respectively.¹⁷¹

On October 29, 1942, the Supreme Court issued its opinion denying the July writ of habeas corpus. History suggests the Court had difficulty reconciling the procedures applied in the saboteurs' trial with the law, and with the president's actions. But the Court was in a bind—the case was concluded and six of the petitioners had already been executed. Any result other than affirming the Court's denial of habeas and affirming the government's case would cast a harshly negative light on the Court and its post-trial procedure. The Court affirmed the decision it had earlier rendered from the bench. In 1942, in a besieged America with U.S. soldiers in combat with Nazi forces, few critics arose. Supreme Court Justice Antonin Scalia later wrote, “[*Quirin*] was not this Court's finest hour”¹⁷²—although it did settle the status of unlawful combatants, more correctly referred to as “unprivileged belligerents” later encountered in Vietnam, Iraq, and Afghanistan:

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.¹⁷³

After Germany's defeat in 1945, the Nuremberg International Military Tribunal convened, followed by Nuremberg's twelve “subsequent proceedings,” all twelve being military commissions. Individual military commissions were conducted by virtually all of the Allied states in World War II. The U.S. conducted roughly five hundred military commissions in the European theater of operations and another 450 in the Pacific theater.¹⁷⁴ The acquittal rate in Pacific theater commissions was typical for U.S. commissions, about 10 percent.

The prisoner of war (POW)/detainee distinction is significant because the POW designation brings the defendant under the protection of Article 102 of the Third Geneva Convention. Guantánamo military commissions, which try unprivileged belligerents rather than POWs, employ charges and rules of procedure and evidence specially structured for the Guantánamo trials and reject the applicability of the Geneva Conventions to the detainees.¹⁷⁵ Unprivileged belligerents—unlawful combatants, in the Court's words—are not subject to trial for their status, but for offenses enumerated in Part IV of the Military Commissions Act (MCA) such as murder in violation of the law of armed conflict, which, according to the *Manual for Military Commissions* would include virtually any killing by an enemy fighter who fails to qualify for the privilege lawful belligerents. This is one of the more dubious assertions of war crimes liability in the law; many other enumerated offenses reflect widely recognized war crimes.

¹⁷¹ In 1948, their sentences were again commuted, and they were released and deported to Germany. *History: Nazi Saboteurs and George Dasch*, FBI, <https://www.fbi.gov/history/famous-cases/nazi-saboteurs-and-george-dasch> (last visited Dec. 20, 2021).

¹⁷² *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

¹⁷³ Ex parte *Quirin*, 317 U.S. 1 (1942), 30–31.

¹⁷⁴ John Alan Appleman, *Military Tribunals and International Crimes* (Indianapolis: Bobbs-Merrill, 1954).

¹⁷⁵ John B. Bellinger III, *Obama, Bush, and the Geneva Conventions*, FOREIGN POL'Y (Aug. 11, 2010), <https://foreignpolicy.com/2010/08/11/obama-bush-and-the-geneva-conventions/>.

Common Article 3 of the 1949 Geneva Conventions has had a major harmonizing effect on military commissions. The article broadly defines principles of humane treatment for those taking no part in the conflict and those who are hors de combat. It also means to ensure captured rebels not be subjected to summary justice, but rather be tried by regularly constituted courts. Today, the humane treatment obligation—to include the fair trial guarantee—of Common Article 3 is considered reflective of customary international law applicable in all armed conflicts regardless of their characterization. In 2006, it was Common Article 3 that the U.S. Supreme Court looked to, inter alia, in striking down the original military commissions convened at Guantánamo.

Under Article 102 of the Third Geneva Convention, trials of POWs charged with precapture war crimes would be quite different. Article 102 mandates that, in international armed conflicts, POWs may validly be tried only if their sentences are pronounced by the same courts, and following trial by the same procedures, as applicable to members of the armed forces of the capturing state. Military commissions like those after World War II, with their “relaxed” rules of procedure and rules of evidence, are prohibited for POWs.¹⁷⁶ The high standards set by Article 102 for detainee treatment, however, reduce incentive to designate captured enemy fighters as POWs. In many cases, pretrial detention and interrogation techniques, the admissibility of incriminating pretrial statements, and other trial issues would be ripe for attack by defense lawyers employing well-settled UCMJ case law. This was a major reason why captured individuals who were Guantánamo-bound were denied POW status.

On November 13, 2001, President George W. Bush issued a military order titled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” authorizing the U.S. military commissions at Guantánamo.¹⁷⁷ Guantánamo was selected as the confinement facility and trial site for suspected terrorists because it was thought to place the commissions beyond the jurisdiction of American domestic and international courts and in effect created a law-free zone.¹⁷⁸ The Bush administration was unapologetic about the intent behind its choice. Then-President Bush wrote, “[H]olding captured terrorists on American soil could activate constitutional protections they would not otherwise receive. . . . The Justice Department advised me that prisoners brought [to Guantánamo] had no right of access to the U.S. criminal justice system.”¹⁷⁹

The first detainees arrived at Guantánamo Bay on January 11, 2002.¹⁸⁰ On February 7, 2002, President Bush declared in a memo that Taliban and Al Qaeda detainees were “unlawful combatants,” and as such that they were not entitled

¹⁷⁶ *Military Commission Jurisdiction over POWs*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/backgrounder/usa/gitmo0705/3.htm> (last visited Dec. 20, 2021).

¹⁷⁷ Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 66,222, 57831 (Nov. 16, 2001).

¹⁷⁸ KAREN GREENBERG, *THE LEAST WORST PLACE: HOW GUANTÁNAMO BECAME THE WORLD’S MOST NOTORIOUS PRISON 3* (Oxford University Press, 2009). (“Bush’s order enabled the Secretary of Defense not only to oversee the detention of alleged [terrorists] . . . but also to wield authority over the tribunals under which they would be tried . . . [I]t pushed domestic courts as well as international ones out of the picture . . . Even the Joint Chiefs of Staff were left out of the loop—a notable absence when it came to a so-called Military Order.”)

¹⁷⁹ GEORGE W. BUSH, *DECISION POINTS 166* (Crown Publishers, 2010).

¹⁸⁰ Carol Rosenberg, “First Guantánamo Prison Camps Commander Says It’s Time for Them to Close,” *MIA. HERALD* (Jan. 12, 2014) (Marine Corps Major General Michael Lehnert: “I think we did a poor job in the beginning of determining who we needed to go to Guantánamo . . . We relied pretty heavily on the Afghans to tell us who they were . . . A good chunk of them probably were of no value and should never have been there.”)

to Geneva Convention POW protections, including under Common Article 3.¹⁸¹ Two years later, the Supreme Court issued decisions in the cases of detainees Shafiq Rasul and Yaser Esam Hamdi that ruled otherwise. The question in *Rasul*, a British citizen captured in Afghanistan, was whether U.S. federal courts were open to Guantánamo detainees of any nationality. In *Rasul*, the Supreme Court held that U.S. courts did have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and held at Guantánamo.¹⁸² Rasul, however, had been released without trial and returned to his native England three weeks before the ruling in his case. No reason for his release has been announced. (He had been captured by Afghanistan's Northern Alliance and turned over to the United States in return for a cash bounty, a clue to unwarranted detention.)

Hamdi, by contrast, a dual citizen of Saudi Arabia and the United States, had been captured in Afghanistan and held in solitary confinement without charges for three years. In *Hamdi*, the Court ruled that U.S. citizens, even if designated enemy combatants, still retained the due process rights applicable to any U.S. citizen.¹⁸³ Hamdi was released without trial and returned to Saudi Arabia after renouncing his American citizenship, a condition of his release.

Two years later, in June 2006, the Supreme Court issued its decision in the *Hamdan* case, which was another loss for the government. Salim Ahmed Hamdan, a Yemeni citizen, was the first Guantánamo detainee brought to trial, charged with conspiracy to attack civilians in concert with an unnamed unlawful combatant, clearly referring to Osama bin Laden, for whom Hamdan had been a driver. Before his military commission trial was done, however, the Court of Appeals for the D.C. Circuit reversed the district court decision that had held the military commission in abeyance pending a decision as to whether Hamdan was entitled to POW status. It accordingly stayed military commission proceedings. The case, challenging the lawfulness of military commission jurisdiction, made its way to the Supreme Court. There, the Court held that Hamdan's military commission "lacks the power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions."¹⁸⁴ The Court also noted,

[T]here is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between [State] signatories. Article 3, often referred to as Common Article 3. . . . Prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁸⁵

The Court further held that military commissions established by the 2001 Military Order were inconsistent with the UCMJ and violated Common Article 3 in that they were not "regularly constituted courts." As author and attorney Allan A. Ryan has written,

Coming only a few months after its twin losses in *Rasul* and *Hamdi*, this was another bitter defeat for the administration. Three full years after the president's [military] order, it brought the entire military commissions process to a halt in its first case, without a witness being called.¹⁸⁶

¹⁸¹ Exec. Order No. 13440, 72 Fed. Reg. 40707 (July 20, 2007).

¹⁸² *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁸³ *Hamdi*, 542 U.S. 507 (2004).

¹⁸⁴ *Hamdan*, 696 F.3d at 561.

¹⁸⁵ *Id.* at 629–30.

¹⁸⁶ ALLAN A. RYAN, *THE 9/11 TERROR CASES* 94 (Univ. Press of Kan., 2015).

Congress reacted swiftly to the Hamdan decision.¹⁸⁷ As discussed in the next part of this Report, the military commission deficiencies found in Hamdan’s 2006 Supreme Court victory were addressed definitively in the MCA of 2006 when Congress cured the non-compliance with Common Article 3 and the violation of the UCMJ. In August 2008, under the newly amended military commissions rules, Salim Ahmed Hamdan was tried and acquitted of conspiracy to commit terrorism but convicted of material support of terrorism and sentenced to sixty-six months confinement. The military judge, consistent with U.S. courts-martial practice and Article 118 of the Fourth,¹⁸⁸ gave Hamdan sixty-one months’ credit for his pretrial confinement and allowed him to return to Yemen to serve his remaining five months’ confinement. Military commission rules were immediately changed to not allow pretrial confinement sentencing credit (which would seem contrary to G.C. IV, Article 118.)¹⁸⁹ Four years later, in 2012, the Court of Appeals for the D.C. Circuit vacated Hamdan’s conviction, finding that material support of terrorism was not a war crime at the time of his alleged misconduct.

In November 2008, Ali Hamza Ahmad Suliman Al Bahlul stood mute throughout his trial and was convicted of conspiracy and material support of terrorism and sentenced to confinement for life. In 2014, Al Bahlul’s material support conviction was vacated on the same grounds that the convictions of Hamdan and Australian David Hicks were set aside. Then began a long-running legal battle to decide whether conspiracy to commit terrorist acts, clearly not an internationally recognized law of war offense, could nevertheless be prosecuted by Guantánamo’s law of war military commissions.

In January 2009, President Barack Obama ordered military commissions halted pending the report of an interagency task force and directed that Guantánamo be closed within one year.¹⁹⁰ Meanwhile, demonstrating the efficacy of civilian federal courts trying terrorism cases, in November 2010, Ahmed Ghailani was convicted of conspiracy in U.S. District Court in New York and acquitted of all other charges arising from the bombing of the U.S. Embassy in Tanzania. In January 2011, a U.S. District Court judge sentenced him to imprisonment for life. Two years later, Ghailani’s sentence

¹⁸⁷ In 2007, an Australian, David Hicks, who had fought against U.S.-led allied forces in Afghanistan and was held at Guantánamo for four years, was brought to trial before a military commission. Holding a citizen of a strong U.S. ally was awkward. The United States entered into a pretrial agreement in Hicks’s case. In Guantánamo’s first military commission conviction, albeit in an uncontested case, Hicks pleaded guilty to providing material support to terrorism, was sentenced to nine months’ confinement, and was subsequently flown to Australia to serve his sentence. Eight years later, the Court of Military Commissions Review (CMCR) ruled that, at the time of Hicks’s plea, material support to terrorism was not a war crime. The CMCR vacated Hicks’s conviction, setting aside his guilty finding and sentence. *United States v. Hicks*, USCMCR 13-004 (Feb. 18, 2015). A year later, in 2008, the government’s asserted lack of Guantánamo judicial oversight was dealt a final blow by the Supreme Court’s *Boumediene* ruling, in which Guantánamo detainees were found to have a right to habeas corpus review of their detention. Released by court order, Boumediene was never tried. *Boumediene v. Bush*, 553 U.S. 723 (June 12, 2008) (there is a question whether this applies in a NIAC). As Allan Ryan wrote: “[T]he reasons that military commissions fell short . . . reflects a larger reality: they were a legal process created to advance an overtly political objective. . . . They assumed that what the Supreme Court had upheld in *Quirin*—the 1942 case in which German saboteurs captured in New York were tried by military commissions—it and lower courts would uphold again. They paid little attention and showed little interest in the significant postwar changes in the law . . . U.S. ratification of the 1949 Geneva Conventions, enactment of the Uniform Code of Military Justice, the Supreme Court’s expansion of habeas corpus rules.” Ryan, *supra* note 186, at 104–5.

¹⁸⁸ OSCAR M. UHLER ET AL., COMMENTARY, GENEVA CONVENTION IV 480 (Jean S. Pictet, ed., ICRC, 1958) (“...[I]n all cases detention while awaiting trial shall be deducted from any disciplinary or judicial penalty involving confinement.”).

¹⁸⁹ *Id.* (“The penal codes in general leave this matter to the judgement of the magistrate. The Convention has gone further by insisting in all cases detention while awaiting trial shall be deducted from any disciplinary or judicial penalty involving confinement.”).

¹⁹⁰ Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

was upheld on appeal.¹⁹¹ In 2013, Osama bin Laden’s son-in-law, Sulaiman Abu Ghaith, was captured in Turkey, returned to the United States, and tried in Manhattan’s Federal District Court and sentenced to life imprisonment for conspiring to murder Americans and for material support of terrorism. From capture to conviction, the entire process took just one year and nineteen days.¹⁹²

These cases are typical of civilian courts’ swift and sure prosecution of terrorism cases, albeit, excluding a death penalty charge. In roughly the same period that the eight contested and uncontested military commissions were completed, at least 509 terror-related cases were adjudicated in civilian courts, with an 89 percent conviction rate.¹⁹³ At least sixty federal district courts in thirty-seven U.S. states have successfully and safely convicted terrorists since 9/11.¹⁹⁴ Guantánamo is restricted to prosecuting violations of the laws and customs of war. Federal courts may try terrorists accused of violating *any* federal offense. So far, no one confined after conviction of a terrorism-related offense in a civilian court has ever escaped.

B. The Military Commissions Acts of 2006 and 2009

The initial military order’s version of military commissions having been found unlawful in *Hamdan*, President George W. Bush and Congress moved to cure the deficiencies specified by the Supreme Court. Enacted three months after the *Hamdan* decision, the 2006 MCA¹⁹⁵ was a new legislative blueprint for U.S. military commissions. “The MCA generally requires that the rules for military commissions mirror the rules for courts-martial. Departure from this general requirement is permitted only if explicitly provided for in the MCA or if military or intelligence operations require otherwise.”¹⁹⁶ Those UCMJ departures were sometimes substantial.

Under the 2006 MCA, no court, justice, or judge had jurisdiction to hear Guantánamo detainee habeas corpus applications. As to habeas applications already filed and pending resolution, the Supreme Court side-stepped the MCA’s jurisdictional roadblock through its *Hamdan* opinion. Subsequent requirements imposed by the Court of Appeals for the D.C. Circuit made the Supreme Court’s habeas ruling virtually unworkable.

The 2006 MCA omitted a speedy trial requirement analogous to that in applicable to courts-martial. It did include in the enumerated offenses inchoate conspiracy, but without reference to any underlying criminal act. It also enumerated material support for terrorism as well as solicitation of others to commit war crimes—new offenses said to be law of war crimes under the MCA. Classified “sources, methods, or activities” were protected from inquiry, a blow to defenders, although evidence derived from them would be admissible. Evidence obtained through cruel, inhuman, or degrading

¹⁹¹ Ghailani was the sole Guantánamo detainee to be transferred to the U.S. mainland for trial by a domestic court. Acquitted of 284 counts of murder and conspiracy, he was convicted of one count of conspiracy to destroy government buildings and property (two U.S. embassies). *United States v. Ghailani*, 733 F.3d 29, 54 (2d Cir., 2013).

¹⁹² Sari Horwitz, *Abu Ghaith Trial Is Proof for Some That Federal Courts Can Better Handle Terror Cases*, N.Y. TIMES, Mar. 26, 2014, at al.

¹⁹³ Clyde Haberman, *Vexed by Terrorism, Trials and Guantánamo, and Bearing Witness*, N.Y. TIMES (May 20, 2013), at A1 (the period referred to in the article is 9/11 2001 to May 2013. The number of domestic court convictions varies somewhat, according to the source consulted.).

¹⁹⁴ Human Rights First, *Trying Terror Suspects in Federal Courts*, Fact Sheet (July 2012).

¹⁹⁵ 10 U.S.C. § 950v (b)(28) (2006).

¹⁹⁶ Hicks, USCMCR 13-004 at 10 (Krauss, J., concurring).

treatment was admissible if found to be probative and reliable, a rule the Guantánamo court itself would later reverse.¹⁹⁷

The 2006 MCA directed that no court, justice, or judge had jurisdiction to hear any action against the United States relating to any aspect of the detention or treatment of a detainee.¹⁹⁸ Also, the president could interpret the meaning and application of non-grave breach violations of the Geneva Conventions, effectively allowing the executive branch to define away such violations, *including* Common Article 3 breaches. The 2006 act also created the military commissions' appellate court, the U.S. Court of Military Commission Review (CMCR). Appeals from that court would be decided by the Court of Appeals for the D.C. Circuit, with possible further appeal to the Supreme Court. The United Nations Special Rapporteur "directed scathing criticism at the [2006] Military Commissions Act, concluding that the military commission process 'utterly fail[s] to meet basic due process standards.'¹⁹⁹ Indeed, the basic question of whether Guantánamo detainees, as non-citizens, are granted any due process rights whatever, is still being reviewed and argued in late 2021 and is discussed extensively later in this Report.²⁰⁰

In October 2009, Congress amended the 2006 MCA. The 2009 act was not the major course correction the 2006 MCA had been. Neither was it as contentious. It somewhat enhanced defendants' rights before military commissions²⁰¹ and brought them a step closer to the UCMJ and U.S. court-martial procedures, while retaining the 2006 MCA's questionable inclusion of offenses in the enumeration of crimes subject to military commission jurisdiction. The 2009 act also categorically prohibited the use of statements made under torture or cruel, inhuman, or degrading treatment, a prohibition that would affect Guantánamo prosecutions eleven years later. However, the amendment did not indicate that evidence derived from such statements was presumptively inadmissible as fruit of the poisonous tree, an omission that would open the door for arguments that there is no exclusion of such evidence. Guantánamo military commissions were soon resumed.²⁰²

C. Challenges in the Military Commission Process

The current military commissions have been a failure from the standpoint of achieving speedy justice and imposing meaningful criminal accountability on captured enemy belligerents for precapture international law violations. The detainees awaiting trial, some for nearly twenty years, are years away from trial at best and have been left in limbo with no apparent hope even of the certainty that might result from conviction. That has left not only the defense in a protracted state of suspension, but also the families of the victims of 9/11 and other terrorism victims who have waited years for convictions and accountability. Ironically, the delays affecting the commission process are arguably irrelevant to the likelihood of release for most of the defendants. Given that most of the thirty-six detainees currently held at Guantánamo

¹⁹⁷ David Luban, *Torture Evidence and the Guantánamo Military Commissions*, JUST SEC. (May 26, 2021), <https://www.justsecurity.org/76640/torture-evidence-and-the-guantanamo-military-commissions/>.

¹⁹⁸ 10 U.S.C. § 948b (2006).

¹⁹⁹ Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to the United States of America, Addendum, U.N. Doc. A/HRC/11/2/Add.5 (2009).

²⁰⁰ Charlie Savage and Carol Rosenberg, *Justice Dept. Debates Due Process Rights for Guantánamo Bay Detainees*, N.Y. TIMES, July 9, 2021, at A11.

²⁰¹ John R. Crook, ed., *Contemporary Practice of the United States Relating to International Law*, 104-1 Am. J. Int'l L. 100, 117 (Jan. 2010).

²⁰² 10 U.S.C. §948r (2009).

have not been charged with any offense and hence are held apparently indefinitely, those being held who are awaiting trial in the military commissions have at least a fig leaf of a judicial process on which to rest their hopes. It is useful to consider the various reasons for the extreme delay within the military commissions process.

There are a number of reasons for the delays in the commissions, several of which are set out below.

1. Lack of a Clearly Defined Legal Framework Governing the Commissions

The second reason for the extreme delays associated with the military commissions is both the lack of a well-established and validated governing body of law and the complex and burdensome commission procedures, replete with multiple bureaucracies that control various aspects of the cases. There is little, if any, jurisprudence addressing military commissions generally or the MCA specifically. All of the World War II capital military commissions were held before the revision of the Articles of War into the 1950 Uniform Code of Military Justice and the decision in *Gregg v. Georgia* and subsequent decision related to capital case procedures. The military commissions look to federal criminal law, courts-martial law, the statute, and the Department of Defense (DOD) regulations purporting to illuminate interpretation and implementation of the MCA. In many cases, however, the regulations arguably undermine the intent of Congress and the judicially created manual of *procedures*. Add to this mix the prosecutorial position that constitutional criminal procedure jurisprudence does not apply to military commissions and the need to litigate all capital-related issues of first impression and it becomes clear why pretrial litigation is so cumbersome and time consuming. Each issue must be briefed, and in most cases argued, before the military commission and many are subject to subsequent interlocutory appeals.

Among the issues that have been addressed are whether the military commissions have subject matter and personal jurisdiction over allegations and defendants; whether the judicial and prosecutorial role of the convening authority—the senior official who oversees the military commissions decides if cases should be filed, selects the venire, and provides resources for counsel—is lawful and constitutional; the quality of health care provided to detainees who suffer from post-traumatic stress disorder stemming from physical and psychological abuse; and whether discovery about the Central Intelligence Agency (CIA) torture program should be provided to defense counsel. As is discussed more fully below, defense counsel have had to repeatedly litigate issues involving intrusions into their work, including litigation concerning the discovery of microphones and other listening devices concealed in the areas where counsel meet with their clients. Yet to be addressed are issues related to panel selection, the reliability and admissibility of hearsay statements that make up the majority of the prosecution’s case on guilt or innocence, whether torture inflicted on the defendants constitutes “outrageous governmental misconduct” and/ or precludes admissibility of statements given to the clean team and the potential institutional role of the FBI in the torture program, and whether evidence derived from inadmissible statements is subject to exclusion.

2. Military Commission Procedures

In an environment where the court can only convene every six weeks or so, efficient procedures are an obvious necessity. However, military commission procedures are enormously cumbersome and inefficient. This is especially true with respect to the production of witnesses for the numerous evidentiary hearings that are required. Despite the fact that the statute creating the military commissions provides that the defense shall have access to evidence similar to a traditional Article III court, the reality could not be more different. Of course, in a federal court counsel serves a subpoena on a witness, tenders the witness fee, the witness comes to court and testifies, and the process moves on. In the military commissions, however, the defense must first ask the prosecution to produce the witness and explain why the defense wants the witness and to what the witness will testify. While this procedure may work well in the courts-

martial context where witnesses usually come from a single unit or base, in the military commissions the use of this rule dramatically slows the process. The request to the prosecution to produce a witness frequently results in a denial by the prosecution, which has a very constrained view of relevance. For example, prior to a hearing challenging the convening authority's decision requiring that the judges live at Guantánamo, the prosecution argued that the testimony of the convening authority who had actually enacted the new policy was "not relevant."²⁰³

After a request for a witness is denied by the prosecution, the defense must file a written request to compel productions with the military judge and give the prosecution time to respond. As the briefing cycle is normally a month or more, it can be two hearing cycles—as much as twelve weeks—before the defense learns whether a particular witness will be produced. It can be another month or six weeks before the witness actually testifies. Three to four months from commencement of the process to the actual testimony is not unusual.

Requests for resources are similarly cumbersome as the defense must go to the convening authority with the request, and at the same time justify the request being *ex parte*. If either the request to proceed *ex parte* or the underlying request for resources is denied by the convening authority, the defense must petition the judge triggering the same cycle of delay.²⁰⁴ The same is true for *ex parte* expert witnesses defense counsel deem critical to their cases.

3. Lack of Central Control

Ten or more agencies, ranging from the convening authority to the CIA, have control over some aspects of the military commissions. These agencies often work at cross-purposes with each other and with the commissions. For example, Washington Headquarters Services (WHS) is responsible for obtaining necessary security clearances for counsel and experts. But WHS has no incentive to move quickly, understandably wanting to ensure information is accurate and clearances are properly granted. This conflicts with the commission interest in new personnel, especially counsel, being granted clearances quickly so that they can begin work on their case. Moreover, all leaks and security issues fall under WHS authority.

JTF-GTMO, which oversees the detention facility, may have an interest in limiting visits with clients since those visits are alleged to require significant resources. However, counsel need easy and frequent access to their clients. Moreover, the leadership of JTF-GTMO changes periodically and new leadership often means new perspectives and new rules. Thus, counsel have been forced to litigate rules that were randomly and arbitrarily imposed after years of client visits, such as prohibitions on spiral notebooks in meetings, whether lawyers can bring snacks to client visits, and whether the client must be shackled during visits.

The CIA repeatedly asserts an interest in preventing disclosure, even to cleared counsel, of the details of the CIA torture program. Yet the commission seeking to make progress toward trial has an interest in the speedy and proper grant of clearances, easy access by counsel to the client and robust discovery, including discovery about torture inflicted upon the defendants. Defense counsel receives only summaries of classified evidence, whose relevancy to the underlying documents remains to be tested on appeal. While this procedure is analogous to that used in federal courts pursuant to the Classified Information Procedures Act, the volume of classified information coupled with the limited experience and

²⁰³ Alex Sinha et al., *Government Attempt to Speed Up Guantánamo Trials (Rightfully) Backfires*, ACLU (Mar. 2, 2015), <https://www.aclu.org/blog/speakeasy/government-attempt-speed-guantanamo-trials-rightfully-backfires>.

²⁰⁴ Noah Feldman, *Justice Comes So Slowly to Guantánamo, It May Never Arrive*, BLOOMBERG OP. (Apr. 18, 2019), <https://www.bloomberg.com/opinion/articles/2019-04-17/terrorism-trials-at-guantanamo-are-challenged-by-extreme-delays>.

resources of the military judge responsible for making in camera comparisons between the actual classified information and the proposed unclassified substitute renders this process far more cumbersome at the commission. These examples and countless others occur because there is no central authority coordinating all of these agencies with a view toward resolution of the cases.

4. A Troubling Pattern of Governmental Interference with the Defense

In 2011, prior to arraignment, defense counsel in *United States v. al-Nashiri* asked the judge to require the defense be given a dedicated network connection that was reasonably secure from unauthorized intrusion. The government asserted that the DOD had little capability to monitor defense counsel's network activities, and the simple use of Microsoft Outlook encryption would shield defense emails from monitoring. The judge denied the defense's request.²⁰⁵ Defense counsel then challenged a ban on telephone communication with their clients and again lost. Defense counsel must continue to make arrangements to travel to Guantánamo for every in-person conversation with their clients, even on matters that could be settled quickly with a telephone call.

As a condition for attorney-client meetings, JTF-GTMO required defense counsel to give notice of the language counsel intended to use. In October 2011, guards seized every privileged document from the defendants' cells for review by JTF-GTMO's legal department.²⁰⁶ Defense counsel have no ability to independently investigate the extent of the disclosure of this privileged information or the role intelligence agencies may have played. Over time, JTF-GTMO personnel seized privileged materials in defendants' cells so often that defense counsel characterized the seizures as "systematic."²⁰⁷ "These materials include attorney-client notes written for the client's benefit as well as confidential letters delineating trial and motion strategy. The Staff Judge Advocate in charge of high value detainees has disavowed any knowledge of the purpose for the seizure or the identities of the persons responsible for directing the seizures."²⁰⁸

In November 2011, defense counsel sent the latest in a long series of requests to the deputy secretary of defense for detainee affairs to stop government agents from reviewing attorney-client privileged communications. Counsel predicts, "The review and censorship of legal materials will effectively grind litigation to a halt by barring legally required attorney-client communications."²⁰⁹

In December of that year, the commander of JTF-GTMO issued orders requiring military officials to review

²⁰⁵ Def. Motion to Continue Apr. 15th Hearings or Abate Proc.'s Until Dep't of Def. Provides Sufficient Prot.'s to Ensure Def. Commc'n's and Work-Prod. are Secured and Deletion of Def. Files Have Been Remedied, *United States v. Al-Nashiri*, AE153 (filed Apr. 8, 2013), available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(AE153\)_Part1.pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE153)_Part1.pdf).

²⁰⁶ Emma Cox, *In Guantánamo 911 Pretrial Hearings, Defense Attorneys Protest Obstacles to Effective Counsel*, ACLU (July 9, 2013), <https://www.aclu.org/blog/guantanamo-911-pretrial-hearings-defense-attorneys-protest-obstacles-effective-counsel>.

²⁰⁷ Joint Defense Couns. Letter to Charles Hagel, Sec'y of Defense, Requests to Improve the Conditions of Confinement in Guantánamo (May 20, 2013), <https://ia600404.us.archive.org/15/items/703318-2013-05-20-joint-letter-to-sec-hagel-pii-redacted/703318-2013-05-20-joint-letter-to-sec-hagel-pii-redacted.pdf> (hereinafter "Joint Defense Couns. Letter to Sec'y Hagel (May 20, 2013)"). See also ORG. FOR SEC. AND CO-OPERATION IN EUROPE, HUM. RTS. SITUATION OF DETAINEES AT GUANTÁNAMO (OSCE, 2015), <http://www.osce.org/odihhr/198721>, (hereinafter "OSCE Hum. Rts. Situation GTMO (Nov. 2015)," at 178 (citing interviews with defense counsel).

²⁰⁸ Joint Defense Couns. Letter to Sec'y Hagel (May 20, 2013).

²⁰⁹ Letter from Couns. for High-Value Detainees to Deputy Sec'y of Defense for Detainee Aff's, Request to Cease and Desist On-Going Att'y-Client Privilege Violations and For Compliance with Domestic and Int'l L. Standards Regarding Detention Conditions (Nov. 1, 2011), <http://media.miamiherald.com/smedia/2011/11/01/17/45/10ijo.S0.56.pdf>.

all legal correspondence between defense counsel and their clients and for defense counsel to permit JTF-GTMO personnel to read privileged attorney notes brought into attorney-client meetings.²¹⁰ The commander of JTF-GTMO established a “privilege team” comprising “one or more DOD attorneys, and one or more intelligence or law enforcement personnel,” whose role is to review materials going to detainees.²¹¹ Counsel were placed in “the untenable position of either choosing to comply with the ethical rules applicable to them in military commissions, or violating those rules in order to communicate with their clients.”²¹²

In January 2012, the chief defense counsel determined that defense counsel in *United States v. Mohammed, et al.*, could not adequately safeguard attorney-client privileged communications and issued an ethics instruction prohibiting defense counsel from using the Guantánamo legal mail system for privileged communications. Defense counsel were unable to exchange confidential written communications with their clients, and face-to-face client meetings became substantially less effective.²¹³ A military commissions order in *United States v. Mohammed, et al.*, regarding privileged written communications management was not adopted until November 2013.²¹⁴

JTF-GTMO’s chief staff attorney reportedly discovered that the rooms the defense counsel had used to meet with clients for years were wired with microphones that looked like smoke detectors. The chief of the guard force reportedly assured him nobody at Guantánamo was turning on the microphones to listen to privileged attorney-client meetings. The detention camp commander was reportedly left unaware of this discovery, as were defense counsel.²¹⁵ In March 2012, the detention camp commander wrote U.S. Southern Command that “no microphones are installed” in attorney/client meeting rooms “to ensure privacy between the attorney and client is maintained.”²¹⁶

At the May 2012 arraignment, defense attorneys in *United States v. Mohammed, et al.*, described how they were unable to confidentially communicate with their clients during the period in which the convening authority decided whether to move forward with capital charges, thereby rendering his decision defective.²¹⁷ In January 2013, an unknown government entity spontaneously suspended the broadcast of a military commission hearing, thus effectively closing the courtroom, an action that should be reserved solely for the judge.²¹⁸ After a three-hour closed session, the judge

²¹⁰ JTF-GTMO Written Commc’n’s Ord. (Dec. 27, 2011) and JTF-GTMO Couns. Access Ord. (Dec. 27, 2011), Attachments B and C to *United States v. Mohammed*, AE032 (May 11, 2012), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE032\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE032).pdf).

²¹¹ *Id.*

²¹² Defense Motion to Dismiss for Defective Referral at 2, *United States v. Mohammed*, AE008 (filed Apr. 9, 2012), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE008\(MAH\)\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE008(MAH)).pdf).

²¹³ *Id.* at 9; Wells Bennett, *Another Order in the 911 Case, This One on Legal Mail*, LAWFARE (Nov. 6, 2013), <https://www.lawfareblog.com/another-order-911-case-one-legal-mail#>.

²¹⁴ Ord. Privileged Written Commc’n’s, *United States v. Mohammed*, AE018U (Nov. 6, 2013), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE018U\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE018U(KSM%20et%20al)).pdf); Amended Ord. Privileged Written Commc’n’s, *United States v. Mohammed*, AE018U (June 14, 2017), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE018U\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE018U).pdf).

²¹⁵ Carol Rosenberg, *Attorney-Client Meeting Room Was Bugged, Navy Lawyer Testifies at Guantánamo*, MIA. HERALD (Feb. 12, 2013), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article1947210.html>.

²¹⁶ *Id.*

²¹⁶ Bennet, *supra* note 213.

²¹⁸ Transcript of Rec., *United States v. Mohammed* (Jan. 28, 2013), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS28January2013-PM1\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS28January2013-PM1).pdf); Amy Davidson Sorkin, *A Red Light at Guantánamo*, New Yorker (Jan. 29, 2013), <https://www.newyorker.com/news/daily-comment/a-red-light-at-guantnamo>.

determined an original classification authority had unilaterally suspended the broadcast of the proceedings.²¹⁹

Defense counsel raised questions about whether other courtroom communications were monitored, such as between counsel and their clients at their attorney-client tables.²²⁰ Defense counsel consequently discovered that intelligence agencies had free access to audio feeds from the courtroom, including all communications picked up by microphones at the tables where attorneys sat with their clients, even when attorneys thought the courtroom microphones were muted. Defense counsel also discovered that courtroom cameras could enable a viewer “to see clearly small objects on counsel table, to include printed copy and handwritten notes.”²²¹

In February of that year, defense counsel discovered listening devices disguised as smoke detectors hidden in Echo II, the location where high-value detainees meet with their defense counsel.²²² The staff attorney for the detention camp commander acknowledged that he had been aware of audio-monitoring capabilities since January 2012, and that the detention group commander had known for more than a year that several attorney-client meeting rooms contained cameras and listening devices.²²³ The government had previously denied that any such devices were installed.

The judge ordered JTF-GTMO to dismantle the listening devices. As of September 23, 2021, another military judge has begun hearing testimony on how the listening devices ended up in the rooms and whether prosecutors deliberately misled the military commission and appellate courts about them.²²⁴

Defense counsel described numerous events to the judge that “constitute credible circumstantial evidence that their privileged conversations are being monitored and recorded by the Government.”²²⁵ The judge accepted, over defense objections, government assertions that attorney-client meetings were not listened to, monitored, or recorded.²²⁶ Defense

²¹⁹ Transcript of Rec. at 1720, *United States v. Mohammed* (Jan. 31, 2013), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS31January2013-AM1\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS31January2013-AM1).pdf).

²²⁰ Transcript of Rec. at 1447, *United States v. Mohammed* (Jan. 28, 2013), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS28January2013-PM1\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS28January2013-PM1).pdf).

²²¹ Placeholder Notice of Filing of Classified Motion: Emergency Def. Motion to Remove Sustained Barrier to Att’y-Client Commc’n and Prohibit Any Elec. Monitoring and Recording of Att’y-Client Commc’n in any Location, Including Comm’n Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings at 3-4, *United States v. Mohammed*, AE133 (filed Jan. 31, 2013), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE133\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE133(KSM%20et%20al)).pdf); Placeholder Notice of Filing of Classified Motion: Def. Reply to AE133A Gov’t’s Response to Emergency Def. Motion to Remove Sustained Barrier to Att’y-Client Commc’n and Prohibit Any Elec. Monitoring and Recording of Att’y-Client Commc’n in any Location, Including Comm’n Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, *United States v. Mohammed*, AE133Q (filed Feb. 12, 2013), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE133Q\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE133Q(KSM%20et%20al)).pdf).

²²² *Id.*

²²³ Transcript of Record, *United States v. Mohammed* (Feb. 12, 2013), [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS12February2013-PM1\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS12February2013-PM1).pdf).

²²⁴ Carol Rosenberg, *Secret Hearing Focuses on Hidden Microphones at Guantánamo Prison*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/09/23/us/politics/uss-cole-bombing-guantanamo.html>.

²²⁵ *Supra* note 209.

²²⁶ Ruling: Emergency Def. Mot. to Remove Sustained Barrier to Att’y-Client Commc’n and Prohibit Any Elec. Monitoring and Recording of Att’y-Client Commc’n in any Location, including Comm’n Proc.’s, Holding Cells, and Meeting Facilities and to Abate Proc., *United States v. Mohammed*, AE133QQ (Nov. 30, 2016), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE133QQ\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE133QQ).pdf).

counsel also described the “crippling” impact of the spying revelation on the effective assistance of counsel and the right to a fair trial, “grounds alone which would justify appellate reversal of any military commissions conviction.”²²⁷ To date, the reports concerning the investigation of the “alleged” listening devices have not been declassified.

5. *Guantánamo’s Procedural and Legal Setbacks*

Allegations of government misconduct and bad faith have plagued the Guantánamo military commissions since their inception. Early in the process, ethical issues were raised by military lawyers, some of whom paid a price for voicing their concerns.²²⁸ In 2005, “two Air Force prosecutors . . . requested that they be reassigned rather than participate in the proceedings, claiming that fellow prosecutors were ignoring torture allegations, failing to protect exculpatory evidence, and withheld information from superiors.”²²⁹ An Army lieutenant colonel resigned as a prosecutor in 2008, citing ethical concerns over failures to turn over exculpatory material to defense attorneys.²³⁰ Guantánamo’s chief prosecutor, an Air Force colonel, resigned his office in 2007 and testified against the government in the *Hamdan II* case, charging that “Pentagon officials interfered with prosecutors, exerted political pressure and approved the use of evidence obtained by torture.”²³¹ Later, the judge in the *Hamdan* case, a Navy judge advocate captain, disqualified the military commission’s legal advisor to the convening authority from acting in the case, ruling that the legal advisor, an Air Force brigadier general, had exerted improper influence over military prosecutors.²³²

In 2009, Susan Crawford, Guantánamo’s convening authority and a retired civilian judge on the U.S. Court of Appeals for the Armed Forces, refused to refer the case of Mohammed al-Qahtani for trial. “We tortured Qahtani,” said Crawford. . . . [D]etainee interrogation practices are a blot on the reputation of the United States and its military judicial system.”²³³ In 2012, another Guantánamo prosecutor, a major, resigned from the Army, charging on National Public Radio that, at Guantánamo, the U.S. government was crafting a “show trial.”²³⁴

In 2008, Abd al-Rahim al-Nashiri was charged with planning the 2000 suicide bombing of the *U.S.S. Cole* that

²²⁷ Joint Defense Couns. Letter to Sec’y Hagel (May 20, 2013).

²²⁸ Marine Major Michael Mori, who vigorously defended Australian detainee David Hicks, was given the Australian Lawyers Alliance’s National Civil Justice Award. Mori was then twice passed over for promotion to lieutenant colonel. Mori reportedly sued the Marine Corps and, while suit was pending, was selected for promotion. Several years later, he was passed over for promotion to colonel. Mori retired from active service. Navy Lieutenant Commander Charles Swift, a Naval Academy graduate, later selected one of America’s top 100 lawyers, took *Hamdan I* to the Supreme Court and won, after which he was passed over for promotion to commander. Swift also retired.

²²⁹ Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104-1 AM. J. INT’L L. 1, 27 (Jan. 2010). https://www.researchgate.net/publication/228148748_Military_Lawyers_on_the_Battlefield_An_Empirical_Account_of_International_Law_Compliance.

²³⁰ Peter Finn, *Guantánamo Prosecutor Quits, Says Evidence Was Withheld*, WASH. POST, Sept. 25, 2008, at A6.

²³¹ William Glaberson, *Ex-Guantánamo Prosecutor to Testify for Detainee*, N.Y. TIMES, Feb. 28, 2008, at A14.

²³² John R. Crook, ed., *Contemporary Practice of the United States Relating to International Law*, 103-1 AM. J. INT’L L. 132, 159 (Jan. 2009), <https://doi.org/10.2307/2555235>.

²³³ Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1.

²³⁴ *Guantánamo Defense Lawyer Resigns, Says U.S. Case Is “Stacked,”* National Public Radio (Aug. 31, 2014), <https://www.npr.org/2014/08/31/344576895/guantanamo-defense-lawyer-resigns-says-u-s-case-is-stacked>.

killed seventeen American service members.²³⁵ Al-Nashiri was captured in 2002 and, after interrogations at several CIA black sites, was charged with multiple capital offenses in 2011. In June 2017, al-Nashiri’s civilian lawyers discovered a microphone concealed in the room in which they interviewed al-Nashiri. The military judge, an Air Force colonel who had been presiding over the case for three years, denied the defense motion for an explanation from the government. After consulting a law school ethics professor, defense counsel, along with the team’s civilian learned counsel (a death penalty expert, required in military cases involving the death penalty) sought permission from the military judge to resign from the case, citing an ethical conflict raised by the hidden microphone that may have revealed privileged information. The judge denied permission to withdraw and ordered them to resume their representation of al-Nashiri. They refused, pointing out that they had received permission to withdraw from Guantánamo’s chief defense counsel, a Marine Corps brigadier general. The military judge then found the Marine brigadier general in contempt, fined him a thousand dollars, and ordered him confined to his trailer (the “quarters” in which trial-related lawyers reside while at Guantánamo) for thirty days.²³⁶ After several days, the Washington, D.C.-based civilian convening authority for the military commissions ordered the Marine Corps brigadier general freed and set aside his fine, but left the contempt finding in place. The convening authority opinion was later reversed by a federal district court judge.

At about the same time, the lone Navy judge advocate lieutenant now representing al-Nashiri declined to participate further in the trial without the presence of the required learned counsel. Days later, the military judge announced in open court without warning, “I am abating these procedures—these proceedings indefinitely until a superior court orders me to resume.”²³⁷ The surviving Navy JAG defense counsel said, “Things happen here that don’t go on in normal courts, and this is one. A judge just called ‘time out’ for no clear legal reason. I don’t know how it will play out, but it will probably be worse.”²³⁸ Later, it was revealed that for the preceding two years and three months the military judge had been negotiating post-retirement employment with the Department of Justice (DOJ) as an immigration judge, even touting his al-Nashiri appointment as a qualification for the job and submitting one of his orders in the case as a writing sample.²³⁹ The military judge was hired by the DOJ for the immigration judge position. Soon thereafter, the judge received a letter from the Executive Office for Immigration Review informing him of the fast-approaching start date of his new job. The following day, the military judge abated “indefinitely” the proceedings against al-Nashiri.

Rumors surfaced that the judge had a questionable post-retirement job lined up with the DOJ—a questionable job because the judge was seeking employment with the DOJ while presiding over a trial his perspective employer was prosecuting. This revelation raised concerns about potential judicial bias against the accused. Al-Nashiri’s lawyers filed a

²³⁵ Al-Nashiri Charge Sheet, June 30, 2008, [https://www.mc.mil/Portals/0/pdfs/alNashiri/Al%20Nashiri%20\(AE001\)%20Sworn%20Charge%20Sheet.pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri/Al%20Nashiri%20(AE001)%20Sworn%20Charge%20Sheet.pdf). See also Press Release, ACLU, U.S. Government Refers Charges Against U.S.S. Cole Suspect Al-Nashiri at Guantánamo (Dec. 19, 2008), <https://www.aclu.org/press-releases/us-government-refers-charges-against-uss-cole-suspect-al-nashiri-guantanamo>.

²³⁶ The U.S. District Court for the D.C. Circuit later found that the judge’s actions in the marine general’s case were unlawful. *Baker v. Spath*, No. 17-CV-02311-RC (June 18, 2018).

²³⁷ Charlie Savage, *Military Tribunal Judge Indefinitely Halts Cole Bombing Case*, N.Y. TIMES, Feb. 17, 2018, at A10.

²³⁸ *Id.*

²³⁹ Abd al-Rahim Hussein Muhammed al-Nashiri, Pet. for Writ of Mandamus to the U.S. Ct. of Military Commission Review, No. 18-1279, 5 (Apr. 16, 2019).

motion in the CMCR seeking an order compelling discovery of the judge's employment negotiations.²⁴⁰ The CMCR denied the motion for discovery and reiterated the judge's ruling that there was no basis for excusing the three-defense counsel from continuing their representation of al-Nashiri.²⁴¹ On the same day that the CMCR waved-off defense concerns about the judge's possible DOJ employment conflict, the DOJ announced the investiture of a new class of immigration judges, with the Guantánamo judge's name and a photo of him standing next to then-Attorney General Jeff Sessions figuring prominently in the announcement.²⁴²

Three months later, the U.S. Court of Appeals for the D.C. Circuit published the results of its inquiry into events surrounding the judge's actions.²⁴³ The court presented a scathing review of the military judge's dissembling and malfeasance as well as a stinging denunciation of the Court of Military Commission Review's competence: "[B]ased on the totality of the circumstances, [the Judge's] conduct falls squarely on the impermissible side of the line [requiring disqualification] . . . [I]t is beyond question that judges may not adjudicate cases involving their prospective employers."²⁴⁴ The Court's opinion closed by saying:

[C]riminal justice is a shared responsibility. Yet in this case, save for al-Nashiri's defense counsel, all elements of the military commission system—from the prosecution team to the Justice Department to the [Court of Military Commission Review] to the judge himself—failed to live up to that responsibility. And we cannot dismiss [the military judge's] lapse as a one-time aberration, as al-Nashiri's is not the first meritorious request for recusal that our court has considered with respect to military commission proceedings.²⁴⁵

The Court of Appeals for the D.C. Circuit granted the defense counsels' request to be excused from the case and vacated all of the military judge's orders entered after the date of his first application for employment with the Department of Justice and vacated any CMCR orders that reviewed the judge's orders.²⁴⁶ The next judge assigned to the case retired within months of being appointed, also to take a job with the Department of Justice as an immigration judge.²⁴⁷

Khalid Sheikh Mohammed (captured in 2003) and four co-accused, alleged to be the primary orchestrators of the 9/11 attacks, were arraigned in May 2012, but have still not been tried. Since 2002, eight military commissions have been completed, while more than 509 terror-related trials were completed in civilian courts by mid-2013 (with

²⁴⁰ Appellee's Motion for Leave to File and Motion to Vacate the Rulings of Mil. Judge and to Compel Discovery of Evidence Relating to Disqualification of Mil. Judge and His Successor, *United States v. al-Nashiri*, No. 18-002, (filed Sept. 13, 2018), [https://www.mc.mil/Portals/0/pdfs/Nashiri18-002/USCMCR%2018-002%20108-Nash%20Def%20Mot%20Judge%20Spath%20\(09132018\).pdf](https://www.mc.mil/Portals/0/pdfs/Nashiri18-002/USCMCR%2018-002%20108-Nash%20Def%20Mot%20Judge%20Spath%20(09132018).pdf).

²⁴¹ Sarah Grant, *Summary: D.C. Circuit Vacates Military Judge's Rulings in Al-Nashiri*, *LAWFARE*, Apr. 16, 2019, <https://www.lawfareblog.com/summary-dc-circuit-vacates-military-judges-rulings-al-nashiri>.

²⁴² Carol Rosenberg, *Controversial Guantánamo Judge Joins Jeff Sessions in Immigration Judge Ceremony*, *McCLATCHY*, Sept. 25, 2018, <https://mcclatchydc.com/news/nation-world/national/national-security/article218303315.html>.

²⁴³ Grant, *supra* note 241.

²⁴⁴ Petition for Writ of Mandamus to the U.S. Court of Military Commission Review, *al-Nashiri*, No. 18-1279, 19 (Apr. 16, 2019).

²⁴⁵ *Id.* at 28.

²⁴⁶ *Id.* at 31.

²⁴⁷ Lorelei Laird, *Second Judge in a Row Leaves U.S.S. Cole Case to Join Immigration Court*, *ABA J.* (Jan. 8, 2019), <https://www.abajournal.com/news/article/second-uss-cole-bombing-judge-leaves-guantanamo-to-become-immigration-judge>.

an 89 percent conviction rate).²⁴⁸ The issue of a secret cutoff switch, previously unknown to the judge and hidden in the Guantánamo courtroom, allowing CIA monitors in Virginia to observe the proceedings and unilaterally switch off in mid-court session the televised feed to reporters and family members of 9/11 victims viewing proceedings in the United States, has not yet been resolved.²⁴⁹

From 2002 to 2021, eight Guantánamo military commission trials have reached the verdict stage, all resulting in convictions. Three of those eight convictions—Hicks, Hamdan, and Mohammed—have subsequently been vacated. No case has been litigated to the verdict stage since 2014. Eight convictions, six of which were guilty pleas, in twenty years (and counting), despite having the full resources of the federal government, makes this the least successful and least efficient criminal jurisdiction in the U.S. during that period.

D. Continuing Validity of the 2009 Military Commissions Act _____

In 2006, the MCA was first enacted to “amend[] the statutory procedures governing military commissions to cure the flaws identified in *Hamdan*.”²⁵⁰ In addition, it “specifically enumerated . . . war crimes triable by military commission . . . and conferred jurisdiction on military commissions” for these enumerated war crimes and violations of the law of war, if they were “committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”²⁵¹ It was subsequently challenged because of provisions stripping statutory habeas corpus access for detainees in *Boumediene v. Bush*, which led to the passage of the 2009 MCA. But the provisions in the 2006 MCA unrelated to the right to habeas corpus remained the largely intact.²⁵²

Broadly, the purpose of the MCA is to “establish[] procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission.”²⁵³ The statute explicitly authorizes the president “to establish military commissions . . . for [such] offenses,” which are detailed within the statute’s provisions.²⁵⁴ Moreover, it explicitly states that “[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in” the statute.²⁵⁵

A privileged belligerent is defined as one who belongs “to one of the eight categories enumerated in Article 4 of the Geneva Conventions Relative to the Treatment of Prisoners of War.”²⁵⁶ By contrast, the MCA defines an unprivileged enemy belligerent as an individual (other than a privileged belligerent) who a) has engaged in hostilities against the United States or its coalition partners; b) has purposefully and materially supported hostilities against the United States or its coalition partners; or c) was a part of Al Qaeda at the time of the alleged offense under this [statute].²⁵⁷ In personam

²⁴⁸ Clyde Haberman, *Vexed by Terrorism, Trials and Guantánamo, and Bearing Witness*, N.Y. TIMES, May 20, 2013, at A1.

²⁴⁹ Matt Apuzzo, *Covert Inquiry by F.B.I. Rattles 9/11 Tribunals*, N.Y. TIMES, Apr. 18, 2014, at A1.

²⁵⁰ *Al Bahlul v. United States*, 767 F.3d 1, 6 (D.C. Cir. 2014).

²⁵¹ *Id.* at 6–7.

²⁵² See *Boumediene v. Bush*, 553 U.S. 723, 792 (2008). Compare Military Commissions Act of 2006, 120 Stat. 2600, 2600–37 (2006), with Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2009).

²⁵³ Military Commissions Act of 2009, 10 U.S.C. § 948b (2009).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at § 948c.

²⁵⁶ *Id.* at § 948a(6).

²⁵⁷ Military Commissions Act of 2009, 10 U.S.C. § 948a(7) (2009).

jurisdiction extends to all such individuals.

The military commissions are vested with subject-matter jurisdiction over (1) any offense that is criminalized by the statute,²⁵⁸ (2) cases in which a person is suspected of aiding the enemy, of misconduct while they are a prisoner, or of being a spy,²⁵⁹ and (3) any violations of the law of war.²⁶⁰ The jurisdiction of the military commissions is not limited to events that took place on or after the 9/11 terrorist attacks; it covers the offenses listed above, regardless of “whether such offense[s] w[ere] committed before, on, or after September 11, 2001.”²⁶¹ Further, military commissions are authorized to determine for themselves whether they have jurisdiction.²⁶²

The MCA also sets forth the manner in which military commissions are composed and the procedures governing pretrial litigation, trials, access to and use of classified information, sentencing, and post-trial litigation, while delegating to DOD the authority to adopt implementing regulations.²⁶³ In addition, the MCA enumerates thirty-two crimes within the jurisdiction of military commission.²⁶⁴

Because the MCA was first passed in 2006, the possibility that one may be tried based on a law that was passed after the alleged offense occurred raised statutory interpretation questions about the retroactive applicability of this law.²⁶⁵ Although these questions have not yet been addressed by the Supreme Court, the D.C. Circuit has addressed them in several cases. Initially, in *Hamdan v. United States*, the D.C. Circuit interpreted the MCA “so that it does not authorize *retroactive* prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission.”²⁶⁶ However, it overruled this holding two years later in *Al Bahlul v. United States* when it held “that the 2006 MCA is unambiguous in its intent to authorize retroactive prosecution for the crimes enumerated in the statute—regardless of their pre-existing law-of-war status.”²⁶⁷ Subsequently, this court assumed that the *ex post facto* clause of the Constitution applied at Guantánamo because the United States took the position that it did, but it did not make a decision on this matter.²⁶⁸ Under this presumption, the court struck down two of the convictions against Al Bahlul for violating the *ex post facto* clause, while upholding one.²⁶⁹ Because the Supreme Court has not yet addressed this question or, more broadly, the questions surrounding the extent to which the Constitution applies at Guantánamo, these issues have been left to the D.C. Circuit.²⁷⁰

More recently, defense counsel for those detained at GTMO have challenged the validity of the MCA on the

²⁵⁸ *Id.* at 948d.

²⁵⁹ *Id.* at §§ 904–06, § 948d; 10 U.S.C. §§ 903–903(b).

²⁶⁰ Military Commissions Act of 2009, 10 U.S.C. § 948d (2009).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *See id.* at §§ 948h–950j.

²⁶⁴ *Id.* at §950t.

²⁶⁵ *See Hamdan v. United States*, 696 F.3d 1238, 1247–48 (D.C. Cir. 2012).

²⁶⁶ *Id.* at 1248.

²⁶⁷ *Al Bahlul v. United States*, 767 F.3d 1, 11 (D.C. Cir. 2014).

²⁶⁸ *Id.* at 18.

²⁶⁹ *Id.* at 18–31.

²⁷⁰ *Al-Hela v. Trump*, 972 F.3d 120, 154–55 (D.C. Cir. 2020) (Griffith, J., concurring in part).

grounds that it violates detainees' procedural due process rights,²⁷¹ rights to a fair trial,²⁷² and rights to have a trial with a jury composed of randomly selected members.²⁷³ For example, the defense counsel for Khalid Sheikh Mohammed has argued that the MCA violates Mohammed's Fifth and Eighth Amendment rights to procedural due process and a fair trial.²⁷⁴ In particular, the defense argues that the attorney general is an adverse party that the MCA authorizes to consult with the secretary of defense to make exceptions to procedures and rules of evidence in unique circumstances, and the attorney general is acting in self-interest when consulting about these procedural and evidentiary exceptions to negatively impact Mohammed's case.²⁷⁵ Similar to the ex post facto challenges discussed above, these arguments depend on the extent to which the Constitution is applied to detainees in Guantánamo Bay.

Over the long term, the MCA does not appear to be limited to the war on terror because of the broad language used within the statute to describe the instances when a military commission may be constituted. There is no sunset provision that sets forth an expiration date for the use of military commissions. Unlike the 2001 and 2002 Authorizations for the Use of Military Force,²⁷⁶ the MCA is not limited to a specific conflict. It authorizes the use of military commissions for thirty-two crimes that are enumerated in the statute, cases in which one is suspected of aiding the enemy, misconduct while a prisoner, or espionage, and violations of the law of war.²⁷⁷ This applies to offenses committed on, before, or after September 11, 2001, and anyone who is properly categorized as an unprivileged enemy combatant.²⁷⁸ This includes anyone who "was a part of Al Qaeda at the time of the alleged offense," but one may still qualify as an unprivileged enemy combatant under this statute without any connection to Al Qaeda, as the statute uses a disjunctive set of criteria.²⁷⁹ The MCA also authorizes the use of military commissions against individuals who have "engaged in hostilities against the United States or its coalition partners" and against those who have "purposefully and materially supported hostilities against the United States or its coalition partners."²⁸⁰ Because the MCA does not limit the definition of unprivileged enemy combatant to the context of the war on terror, and the jurisdiction of the statute applies to violations of the law of war that take place after September 11, 2001, it is possible that the MCA could be applied to future conflicts for which there has not yet been an authorization for the use of military force.

²⁷¹ See Motion to Declare § 949a(b)(1) of MCA Unconstitutional Because Att'y Gen.'s Involvement in Mil. Comm'n Rulemaking Violates Procedural Due Process at 14, *United States v. Mohammed*, AE 743 (KSM) (filed Feb. 10, 2020), [www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE743\(KSM\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE743(KSM)).pdf); Motion to Reconsider Motion to Dismiss Because Mil. Comm'n's Act Unconstitutionally Requires the Convening Auth. to Act as Both Prosecutor and Judge of the Defendants, *United States v. Mohammed*, AE091E(AAA) (filed June 17, 2016), [www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE091E\(AAA\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE091E(AAA)).pdf).

²⁷² See Motion to Declare § 949a(b)(1) of MCA Unconstitutional Because Att'y Gen.'s Involvement in Mil. Comm'n Rulemaking Violates Procedural Due Process, *supra* note 271, at 14.

²⁷³ See Motion to Declare § 948i of MCA Unconstitutional Because Convening Auth. Selection of Members Violates Right to Randomly Selected Jury at 17, *United States v. Mohammed*, AE 755 (KSM) (filed Feb. 10, 2020).

²⁷⁴ Mohammed's Motion to Declare § 949a(b)(1) of MCA Unconstitutional Because Att'y Gen.'s Involvement in Mil. Comm'n Rulemaking Violates Procedural Due Process, *supra* note 271.

²⁷⁵ Mohammed's Motion to Declare § 949a(b)(1) of MCA Unconstitutional Because Att'y Gen.'s Involvement in Mil. Comm'n Rulemaking Violates Procedural Due Process, *supra* note 271.

²⁷⁶ Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq of 2002, Pub. L. 107-243, 116 Stat. 1498 (2002).

²⁷⁷ 10 U.S.C. §§ 903–903(b) (2019); 10 U.S.C. §§ 904–06 (2009); Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2009).

²⁷⁸ Military Commissions Act of 2009, 10 U.S.C. §§ 948c–48d (2009).

²⁷⁹ Military Commissions Act of 2009, 10 U.S.C. §§ 948a(7) (2009).

²⁸⁰ *Id.*

E. Will Congress Rescind the MCA?

As part of its pledge to close Guantánamo, the Obama administration also vowed to bring about a repeal the MCA.²⁸¹ Instead, only slight amendments to the that statute were enacted.²⁸² Detainee trials and transfers could be eased if Congress voted to repeal the act or if the administration altered implementation of the act. Although the MCA is a deeply problematic law, President Joseph Biden would likely face significant challenges were he to pursue such repeal.

In previous years, Congress has shut down any motion to amend the MCA, even when Secretary of Defense Robert Gates and Secretary of State Condoleezza Rice publicly supported altering the MCA and moving the commission trials to the United States.²⁸³ Despite assertions by congresspersons who ratified the MCA that its restrictions and actions are “patently unconstitutional,” Congress continues to vote in favor of its use.²⁸⁴ With the current political makeup of the U.S. Senate (50 Republicans, 48 Democrats, and 2 Independents), the ability to repeal or hold a filibuster and garner the three-fifths votes needed appears low.²⁸⁵

Recent moves by various congresspersons, however, may provide an opportunity for the Biden administration to expedite GTMO’s closure and a major shift in the use of military commission trials. On April 16, 2021, twenty-four senators wrote a letter to President Biden calling Guantánamo Bay a “symbol of lawlessness and human rights abuses” that has “damaged America’s reputation, fueled anti-Muslim bigotry, and weakened the United States’ ability to counter terrorism and fight for human rights and the rule of law around the world.”²⁸⁶ Their letter defined clear steps that the Biden administration should take to shut down GTMO, including reestablishing the State Department office to negotiate transfers of detainees to foreign governments; using the U.S. federal court system for plea agreements for detainees that can be federally charged and allow the transfer of said detainees to foreign governments; and conducting plea agreements via video conference to navigate around the MCA laws prohibiting any “unlawful enemy combatant” from entering the U.S. mainland.²⁸⁷

The letter President Biden received from the senators does not call for the repeal of the MCA, but it does signify that certain members of Congress also seek an end to Guantánamo’s detention facility. They also lay out steps that allow the MCA to remain intact, while providing certain measures that allow for continued easement of trials even with the restrictions implemented by the MCA. Beside the continued attention on Guantánamo by government officials and its threat to national security, the Biden administration’s decision to withdraw troops from Afghanistan by September 11, 2021, signifies the possibility that the MCA, while it will not be rescinded, may encounter political pressure for some modifications.

²⁸¹ Jennifer K. Elsea, Cong. Research Serv., R41163, *Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues* (2014).

²⁸² *Id.*

²⁸³ *Military Commissions Act and the Continued Use of Guantánamo Bay as a Detention Facility Before the H. Comm. on Armed Serv’s*, 110th Cong. 51 (2007).

²⁸⁴ MICHAEL C. DORF, *THE ORWELLIAN MILITARY COMMISSIONS ACT OF 2006* (Cornell L. Fac. Publ’n., 2007).

²⁸⁵ *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Dec. 21, 2021).

²⁸⁶ Sacha Pfeiffer, *Senators Urge Biden to Shut Down Guantánamo, Calling It a “Symbol of Lawlessness,”* National Public Radio (Apr. 16, 2021), <https://www.npr.org/2021/04/16/988078547/senators-urge-biden-to-shut-down-guantanamo-calling-it-a-symbol-of-lawlessness>.

²⁸⁷ *Id.*

IV.

AUTHORITY FOR CONTINUED DETENTION

A. Authority for Continuing Detention Under Congressional Authorization

1. Detention Authority under the 2001 Authorization for Use of Military Force

The 2001 Authorization for the Use of Military Force (AUMF) was enacted by the 107th U.S. Congress on September 18, 2001. This joint resolution granted the president the authority “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the 9/11 terrorist attacks, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”²⁸⁸

The executive branch has interpreted the authority under the AUMF broadly, to extend to those groups and individuals who are part of, associated with, or evolved from Al Qaeda, and to include both the conduct of hostilities and preventive detention.²⁸⁹ It was pursuant to a combination of this statutory authority and the president’s inherent Article II authority to respond to attacks against the nation that the United States began military operations in Afghanistan on October 7, 2001.²⁹⁰ Since that date, the 2001 AUMF has been consistently asserted as the principal legal basis for continued preventive detention of individuals captured within the context of the war on terror. Nonetheless, because the AUMF never expressly authorized such detention, the authority has been challenged, albeit unsuccessfully.²⁹¹

2. Hamdi v. Rumsfeld and Its Progeny

In the 2004 Supreme Court Case *Hamdi v. Rumsfeld*, a plurality of the Court concluded that the president was authorized by the AUMF to detain a U.S. national enemy combatant captured in Afghanistan for the duration of hostilities,

²⁸⁸ Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001), § 2(a); GEOFFREY S. CORN, *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 135 (Oxford Univ. Press, 2nd ed. 2015).

²⁸⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

²⁹⁰ Stephen W. Preston, *The Legal Framework for the U.S.’ Use of Mil. Force Since 9/11 at the Ann. Meeting of the Am. Soc’y of Int’l L.* (Apr. 10, 2015), in <https://www.defense.gov/Newsroom/Speeches/Speech/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911/>.

²⁹¹ It was, however, addressed in the 2012 NDAA.

with one justice concluding that the president is vested with inherent constitutional authority to order the same. By implication this decision endorsed AUMF-based detention of all other captured alien unprivileged belligerents. The *Hamdi* decision also provided a definition for the concept of “enemy combatant,” namely an “individual who ... was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”²⁹² However, the Court did not define what constitutes “supporting” or “engaging in armed conflict,” allowing for broad use of the authority to detain captives.²⁹³

The question the Court addressed was whether the military (preventive) detention of a U.S. citizen alleged to have been a belligerent member of the Taliban captured in the area of active combat operations in Afghanistan violated substantive due process. As the opinion noted, “[t]he threshold question . . . is whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’” The Court went on to note the lack of comprehensive definition of that term. However, the plurality concluded that individuals who were “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States there” unquestionably fell within the scope of belligerent detention authority.

The plurality opinion by Justice Sandra Day O’Connor concluded that the AUMF implicitly authorized the detention of any enemy belligerent captured on the field of battle carrying arms openly and engaged in hostilities against the United States and coalition partners—even a U.S. citizen—for the duration of hostilities. Specifically, the plurality concluded that “detention of individuals falling into the limited category we are considering [belligerent members of an organized armed group engaged in hostilities against U.S. and coalition forces], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the president to use.”²⁹⁴

The Justice Department had argued that the president’s determination that Hamdi was an “enemy combatant” subject to preventive detention with no further process. This assertion was rejected by a majority of justices. Justice O’Connor, writing for these justices, noted that, “It is a clearly established principle of the law of war that detention may last no longer than active hostilities,” with citation to the Third Geneva Convention. Accordingly, these five justices and Justice Scalia (who dissented) would have agreed that a U.S. citizen captured in war must be released following the cessation of hostilities, unless serving a penal sentence after conviction for a crime by a regularly constituted U.S. court of competent jurisdiction, or unless the writ of habeas corpus has been suspended.

It is important to note two aspects of the *Hamdi* decision. First, the opinion specifically addressed the authority to detain a U.S. citizen falling within the scope of the AUMF; it did not expressly consider such authority in relation to aliens. However, the conclusion that the AUMF provided such authority is logically extended to other captives who fall within the scope of the AUMF. Indeed, *Hamdi* has remained the principal authority for detention of aliens falling within that scope.

Second, while the Court relied on the AUMF to reach the conclusion that Hamdi’s detention did not violate due process or the Non-Detention Act, the Court never reached the more challenging constitutional question of whether the president is vested with inherent Article II authority to order such detention. As the plurality noted,

²⁹² *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004).

²⁹³ Michael John Garcia et al., Cong. Rsch. Serv., R40139, Closing the Guantánamo Detention Center: Legal Issues 62 (2013).

²⁹⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.²⁹⁵

Importantly, while *Hamdi* indicates that the AUMF provides military detention authority, it does not mean that this is the *exclusive* source of such authority. Were Congress to repeal the AUMF, the question the Court avoided would then potentially become ripe if detention continues.

The *Hamdi* Court also indicated the permissible duration of the detention authority pursuant to the AUMF. Rejecting the argument that the AUMF authorizes indefinite detention for the sake of interrogation, the plurality concluded, "The United States may detain, *for the duration of these hostilities [emphasis added]*, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.' If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF."²⁹⁶ In making this determination, the Court notably acknowledged that authorization under the AUMF may unravel if the practical circumstances of a conflict diverge too much from those that informed the development of the law of war.²⁹⁷

This issue of the legality of detention following the cessation of hostilities has come before federal court several times, and it is currently still pending in one habeas petition. It came before a federal court in 2016, when the lawyers of Haroon Gul, who was captured by Afghan forces while serving as a commander of the Hezb-i-Islami militia, a group that had fought with the Taliban and Al Qaeda, filed a habeas petition arguing that the peace agreement between the Afghan government and his militia group signaled an end to hostilities in his case. In October 2021, the court granted his habeas petition, ruling that Haroon's detention was no longer authorized by statute as hostilities had ceased between the United States and his militia.²⁹⁸ Abu Zubaydah, in a habeas petition he filed in November 2021, asserted that "President Biden has declared several times that the armed conflict in Afghanistan is over"²⁹⁹ and that therefore his continued detention is without legal authority.³⁰⁰ It must be noted, however, that the decision in Haroon Gul's case appears to rely only on statutory interpretation of the AUMF and other statutes authorizing detention of unprivileged belligerents and not exclusively on customary international law. Thus arguably as long as the 2001 AUMF is in place, there is a statutory argument for the continuation of U.S. detention authority at GTMO.

Detention authority was reinforced in 2005 when President George W. Bush signed the Detainee Treatment Act

²⁹⁵ *Id.* at 516–17.

²⁹⁶ *Id.* at 521.

²⁹⁷ Robert Chesney, *When Does GTMO Detention Authority Expire? A Close Look at a New Habeas Case*, LAWFARE (Jan. 17, 2018), <https://www.lawfareblog.com/when-does-GTMO-detention-authority-expire-close-look-new-habeas-case>

²⁹⁸ Detention of an Afghan at Guantánamo Bay Is Ruled Unlawful - The New York Times (nytimes.com). Court opinion available at Gul_habeas-opinion.pdf (justsecurity.org).

²⁹⁹ Sur Reply - End of War - Abu Zubaydah - DocumentCloud at 2.

³⁰⁰ How this decision relates to the D.C. Circuit's *en banc* decision in *Al-Bihani v. Obama*, which rejected the assertion that customary international law requirements of repatriation at the end of hostilities applied to this case, is unclear. *Al-Bihani v. Obama*, 590 F.3d 866 (2010) (rejecting the contention that detention authority under the AUMF should be interpreted through the light of customary international law). That decision is discussed below.

(DTA) which, along with outlining how detainees are supposed to be treated while detained, prohibited aliens detained at the facility from applying for a writ of habeas corpus.³⁰¹

In the 2008 Supreme Court case *Boumediene v. Bush*, a majority found that those detained at Guantánamo Bay can indeed apply for a writ of habeas corpus and challenge the legality of their detention. However, the court declined to “discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.”³⁰²

On March 13, 2009, the government, relying on the precedent of *Hamdi* and *Khalid*, filed a memorandum regarding the detention authority relative to detainees held at Guantánamo Bay. The memorandum asserted a broadened scope of AUMF detention authority.³⁰³ The government claimed that the authority of the AUMF is not limited to Al Qaeda or the Taliban, but rather extends to all “individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.”³⁰⁴ This interpretation was allegedly necessary “to prevent any future acts of international terrorism against the United States.”³⁰⁵

The scope of unprivileged belligerent detention authority derived from the AUMF was again considered in the 2010 D.C. Circuit Court of Appeals en banc decision in *Al-Bihani v. Obama*. The appellate court recognized that at minimum the president of the United States is authorized to detain those who were subject to jurisdiction of military commissions established by the Military Commissions Act (MCA) of 2006 and 2009. Specifically, anyone “part of forces associated with Al Qaeda or the Taliban,” along with “those who purposefully and materially support such forces in hostilities against U.S. Coalition partners,” are subject to the provisions outlined in the MCA. The Court also declined “to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard.”³⁰⁶ The Court did note, however, that a “civilian contractor” who “purposely and materially supported” a terrorist organization as designated by the AUMF “traditional food operations essential to a fighting force and the carrying of arms” would be permitted detention at Guantánamo Bay.³⁰⁷

The D.C. Circuit Court’s decision in the *Al-Bihani* case established that the U.S. government does not have to establish that an individual was a part of the “command structure” of an AUMF-targeted organization to justify detention. Specifically, the Court stated that these determinations “must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.”³⁰⁸ The D.C. Circuit Court also found that the idea that “the war powers granted by the AUMF and other statutes are limited

³⁰¹ Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

³⁰² *Boumediene v. Bush*, 553 U.S. 723 (June 12, 2008).

³⁰³ Jennifer K. Elsea & Michael John Garcia, Cong. Rsch. Serv., R42143, *Wartime Detention Provisions in Recent Defense Authorization Legislation* 8 (2016).

³⁰⁴ Respondents’ Mem. Regarding Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay at 7, *In re Guantánamo Bay Detainee Litigation*, No. 08-0442, (D.D.C., Mar. 13, 2009).

³⁰⁵ Authorization for Use of Military Force Against Iraq of 2002, Pub. L. 107-243, § 2(a), 116 Stat. 1498 (2002).

³⁰⁶ *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

³⁰⁷ *Id.*

³⁰⁸ *Id.*

by the international laws of war” is “mistaken” and “the international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.”³⁰⁹

In 2011, Congress passed the National Defense Authorization Act for fiscal year 2012 (NDAA) which further bolstered the presidential powers of detention. The NDAA states that “the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority to detain individuals who were a part of or substantially supported al Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States” and that the provision included “detention under the law of war without trial until the end of hostilities authorized by the [AUMF].”³¹⁰

The August 28, 2020, decision in *Al-Hela v. Trump* by the U.S. Court of Appeals for the D.C. Circuit had major ramifications for the interpretation of the NDAA. The Court found,

The AUMF and the 2012 NDAA authorize the detention of persons who are “part of” or “substantially supported” Al Qaeda, the Taliban, or associated forces. In recognition of the global and diffuse nature of the conflict, this definition covers not only those who are part of covered terrorist organizations or directly aid hostilities, but also those who substantially support the organizations by facilitating the logistics and planning that make their activities possible.³¹¹

In the U.S. District Court for the D.C. Circuit’s original decision on January 28, 2019, the judge also determined that the “AUMF is not geographically limited. The text of the AUMF does not impose any geographic limitation on the use of force.”³¹² The judge determined as well that “[t]he armed conflict involving the U.S. and al Qaeda, the Taliban, and associated forces is not limited to Afghanistan.”³¹³

The Court of Appeals also made a determination regarding the temporal nature of detention:

[T]he AUMF and the 2012 NDAA impose no time limit on the President’s authority to detain enemy combatants. The government maintains that the War on Terror is an ongoing conflict involving combat operations by the United States and its allies abroad. Courts lack the authority or the competence to decide when hostilities have come to an end. The ‘termination’ of hostilities is ‘a political act’. So long as the record establishes the United States military is involved in combat against Al Qaeda, the Taliban, or associated forces, we have no warrant to second guess fundamental war and peace decisions by the political branches.³¹⁴

However, this decision was vacated when on April 23, 2021, the U.S. Court of Appeals for the D.C. Circuit granted Al-Hela’s petition for a rehearing en banc “to consider his claim for habeas corpus relief under the due process

³⁰⁹ *Id.*

³¹⁰ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2012).

³¹¹ *Al-Hela v. Trump*, 972 F.3d 120, 135 (D.C. Cir. 2020).

³¹² *Al-Hela v. Trump*, No. 05-cv-01048, slip op. at 17 (D.D.C. Jan. 28, 2019).

³¹³ *Id.*

³¹⁴ *Al-Hela v. Trump*, No. 19-5079, 17 (D.C. Cir. Aug. 28, 2020).

clause of the Fifth Amendment.”³¹⁵ Arguments were heard by the en banc court on September 30, 2021.³¹⁶

The detention authority of the AUMF was also further clarified in *Khalid v. Bush* where the D.C. District Court held that there are no geographical parameters limiting the president’s detention authority under the AUMF. This holding was based on the argument that “requir[ing] the President and the military to restrict their search, capture, and detention to the battlefields of Afghanistan would contradict Congress’s clear intention, and unduly hinder both the president’s ability to protect our country from future acts of terrorism and his ability to gather vital intelligence.”³¹⁷ Functionally, this interpretation validates the detention of individuals who are members of Al Qaeda or provide substantial support to Al Qaeda forces captured in other parts of the world.³¹⁸

3. *Duration of Hostilities and the Detention Authority*

The scope of the detention authority under the AUMF has been interpreted as limited to the duration of hostilities.³¹⁹ In 2010, the Court of Appeals for the D.C. Circuit interpreted the meaning of “active hostilities” pursuant to the laws of war codified by the four Geneva Conventions of 1949. The court found that “[t]he Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops.”³²⁰ In making this determination, the Court of Appeals noted that the use of the term “active hostilities” instead of “conflict” or “state of war” found elsewhere in the document distinguishes between physical violence and the official beginning and end of a conflict. This distinction is central to enemy belligerent detention authority, but importantly the court noted that the “[t]he determination of when hostilities have ceased is a political decision, and we defer to the Executive’s opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war.”³²¹ It follows that absent a determination by the executive or legislative branches that hostilities authorized pursuant to the AUMF (or potentially pursuant to the inherent authority of the president) have ceased, continued detention is legally permissible. Subsequent cases have reaffirmed this position.³²²

In supporting the position that active hostilities remain ongoing, the government has cited various factors. Primarily, the government relies on what presidents have actually said regarding the matter. In a memorandum in opposition to a Guantánamo detainee’s motion for an order granting habeas corpus, the government cited to reports made by President Barack Obama and President Donald Trump that active hostilities against Al Qaeda, the Taliban, and

³¹⁵ Adam Chan, *Al-Hela v. Biden and Due Process at Guantánamo*, LAWFARE (May 25, 2021), <https://www.lawfareblog.com/al-hela-v-biden-and-due-process-guantanamo>.

³¹⁶ *Id.*

³¹⁷ *Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005).

³¹⁸ Jennifer K. Elsea & Michael John Garcia, Cong. Rsch. Serv., RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court* (2010).

³¹⁹ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004). See also *Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014); *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013).

³²⁰ *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010).

³²¹ *Id.*

³²² *Maqaleh v. Hagel*, 738 F.3d 312, 341 (D.C. Cir. 2013).

associated forces remained ongoing.³²³ Notably, the AUMF has yet to be repealed or amended by Congress, a factor that the government has relied on consistently to support its ongoing hostilities position.³²⁴

In 2017, the government bolstered its argument that hostilities remained ongoing in Afghanistan citing to various statistics reported by the Department of Defense. At that time, the United States maintained approximately 14,000 military personnel in Afghanistan and “continued to engage in traditional uses of military force consistent with prior armed conflicts, such as air strikes, ground operations, and combat enabler support to coalition partners in active combat zones.” Additionally, the United Nations reported in December 2017 that “the security situation in Afghanistan remained highly volatile due to violent armed clashes, increased air operations, and multiple large-scale attacks by Taliban forces.”³²⁵ These markers may prove useful in making a present-day determination regarding the cessation of hostilities. However, this binary, “on-off” view of the end of hostilities fails to account for the ambiguity of real-world conflict.³²⁶

4. End of U.S. Hostilities in Afghanistan and the Impact on Detention Authority

On April 14, 2021, President Biden announced that he intended to terminate an active U.S. military presence in Afghanistan by September 11, 2021, and indeed the Pentagon announced that the last U.S. troops had left Afghanistan by August 31, 2021. As the president has indicated, this signals an end to U.S. involvement in the Afghan Civil War and therefore an end to the conflict authorized by the AUMF. Yet when asked before Congress whether he would support repeal of the 2001 AUMF, Secretary of State Antony Blinken answered that he did not believe repeal of the AUMF was warranted or wise, and the United States may need to reenter given the resurgence of the Taliban and the ongoing threat of terrorism in the region.³²⁷ Withdrawing U.S. military personnel from Afghanistan and terminating the mission they have been engaged in does not indicate that the United States no longer considers itself involved in an ongoing armed conflict against Al Qaeda and associated forces. Indeed, a Pentagon spokesperson assured, “We are still going to maintain counterterrorism capabilities in the region ... And we will still be able to strike at terrorist threats in Afghanistan even if we don’t have boots on the ground.”³²⁸ These comments further complicated the determination of whether hostilities remain ongoing for the purposes of the AUMF. Nonetheless, the complete withdrawal from Afghanistan has undoubtedly added weight to the assertions that AUMF detention authority for Taliban captives should be considered terminated in light of remarks from executive branch officials regarding the status of *that* conflict.

The uncertainty as to the legal basis for continued detentions arising from this major change in conflict circumstances necessitates that the government review all detainee cases and provide a clear statement of the legal basis

³²³ Respondents’ Opp’n to Pet’rs’ Mot. Order Granting Writ of Habeas Corpus at 16–17, *Al-Bihani v. Trump*, 04-cv-1194 (D.D.C., Feb. 16, 2018).

³²⁴ *Id.*

³²⁵ *Id.* at 17–21.

³²⁶ Adam Klein, *Part III: Ending the AUMF War*, LAWFARE (Apr. 22, 2016), <https://www.lawfareblog.com/part-iii-ending-aumf-war>.

³²⁷ Lauren Giella, *Blinken Says Taliban Has Not Severed Its Relationship with Al Qaeda*, NEWSWEEK (Sept. 14, 2021), <https://www.newsweek.com/live-updates-antony-blinken-faces-second-showdown-congress-over-afghanistan-withdrawal-1628884>.

³²⁸ Carol Rosenberg & Charlie Savage, *Biden’s Plan to End Afghanistan War Gives Some Detainees Hope for Release*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/04/21/us/politics/afghanistan-war-guantanamo-prison.html>.

for any continued detentions. In addition, a presidential declaration or executive order on this matter would help to clarify the legal status of the thirty-six detainees who remain in GTMO. Particularly with those who have never been charged and hence are not before the commission, it is critical to clarify the status of their detentions and the government's authority to hold them. By failing to do so thus far, we have created an international precedent that places U.S. troops in danger should they be captured overseas.³²⁹

B. Possible Recission of the 2001 and 2002 AUMFs

1. *Recission of Prior AUMFs*

On June 29, 2021, the House of Representatives passed a package of seven bills that included legislation abrogating both the 1957 and the 1991 AUMFs.³³⁰ A bipartisan 366–46 majority consisting of 218 Democrat and 148 Republican representatives voted to pass the “Motion to Suspend the Rules and Pass Certain Bills and Agree to Certain Resolutions” that encompassed the two bills.³³¹

The bill rescinding the 1957 AUMF was sponsored by Representative Peter Meijer (R-MI).³³² He stated that the 1957 AUMF passed to combat Soviet Union communist influence in the Middle East “no longer serves any purpose, but instead has the potential for abuse by current and future administrations to launch an unwarranted military operation in the Middle East without approval from Congress.”³³³ He asserted the 1957 AUMF would not impact any current military operations.³³⁴

³²⁹ For example, just days after the announcement, on April 20, one petitioner, Asadullah Haroon “Al Afghani” Gul, filed a motion for an order requiring his immediate release. His counsel argued that “[t]he United States’ detention authority over prisoners of war is by law coterminous with the war itself, and based on the foregoing declaration, that authority has now, at long last, expired.” Mot. Order Requiring Immediate Release of Asadullah Haroon Gul at 1, *Gul v. Biden*, No. 16-CV-01462 (APM) (D.D.C., Apr. 20, 2021). In response to an email from petitioner’s counsel, Tara J. Plochocki, asking whether the government’s position on the detention authority had changed following the president’s announcements that both the war with Al Qaeda and the conflict with Afghanistan were complete, a representative for the DOJ, Daniel Barish, asserted that “[t]he Government’s Position is unchanged that it possesses the legal authority to detain Petitioner” without providing further elucidation as the source of that authority. *Id.* Gul has since been released. Carol Rosenberg, *U.S. Repatriates Afghan Whose Guantánamo Detention Was Unlawful*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/politics/guantanamo-afghan-prisoner-released.html>. In addition, the institutional structure in the administration has not been put in place to enable the State Department as well as the DOD and the DOJ to play their roles in effectuating transfer.

³³⁰ Nicholas Reimann, *House Votes to Revoke the President’s War Powers—to Fight the Soviet Union*, FORBES (June 29, 2021), www.forbes.com/sites/nicholasreimann/2021/06/29/house-votes-to-revoke-the-presidents-war-powers-to-fight-the-soviet-union/?sh=3a2d199e493a.

³³¹ *Roll Call 191, MOTION, 117th Congress, 1st Session*, OFFICE OF THE CLERK, U.S. HOUSE OF REP.’S (June 29, 2021), clerk.house.gov/Votes/2021191?Date=06%2F29%2F2021.

³³² Reimann, *supra* note 330.

³³³ *Id.*

³³⁴ Lindsay Wise, *House Votes to Repeal Two Older Military Force Authorizations*, WALL ST. J. (June 29, 2021), www.wsj.com/articles/house-votes-to-repeal-two-older-military-force-authorizations-11624993924.

The bill repealing the 1991 AUMF was sponsored by Representative Abigail Spanberger (D-VA).³³⁵ Referencing the 1991 AUMF enacted to authorize the first Gulf War in Iraq, she alleged that “[t]he short military conflict that took place under this authority has been over for three decades” and that “[r]epealing this AUMF would help ensure that it is not misused or stretched by any American president going forward.”³³⁶ The passage of this legislation rescinding 1991 AUMF in the House of Representatives would support the provision of S.J.RES.10 that also calls for the repeal of the 1991 AUMF.³³⁷

Compared to the 2002 AUMF, abrogating the 1957 AUMF and the 1991 AUMF is much less controversial.³³⁸ Both repeal measures were placed on the House of Representatives “suspension” calendar primarily used for legislation that likely would be affirmed by vote or a two-thirds majority roll call vote.³³⁹ Ranking Member of the House of Representatives Foreign Affairs Committee, Representative Michael McCaul (R-TX), commented that the bipartisan abrogation of the 1957 and 1991 AUMFs was “a very historic moment because it could be the first time in my memory that Congress has finally reasserted its Article I authority and cleaned up very outdated, old AUMFs” and “a very positive day, working together as Republicans and Democrats.”³⁴⁰ It seems likely that the Senate will also affirm the repeal of the 1957 and 1991 AUMFs, and the legislation repealing the 1957 and 1991 AUMFs will be signed by President Biden.

2. *Recission of the 2002 AUMF*

On June 17, 2021, the House of Representatives passed an act to repeal the 2002 AUMF.³⁴¹ The legislation, sponsored by Representative Barbara Lee (D-CA), is known as H.R. 256, an act to repeal the Authorization for Use of Military Force Against Iraq Resolution of 2002.³⁴² The act explicitly rescinding the 2002 AUMF was affirmed by a bipartisan 268–161 majority that consisted of 219 Democrat and 49 Republican representatives.³⁴³ Representative Lee commented that the recission of the 2002 AUMF has “been such a long time coming . . . It’s Congress’ responsibility to authorize the use of force, and that authorization cannot be blank checks that stay as authorizations for any administration to use the way they see fit.”³⁴⁴

In the Senate, a similar piece of legislation to H.R. 256 is being developed.³⁴⁵ Senator Tim Kaine (D-VA), with the

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ S.J. Res. 10, 117th Cong. (2021).

³³⁸ Rebecca Kheel, *House Votes to Repeal 1991, 1957 War Authorizations*, HILL (June 21, 2021), thehill.com/policy/defense/560763-house-votes-to-repeal-1991-1957-war-authorizations.

³³⁹ *Id.*

³⁴⁰ Wise, *supra* note 334.

³⁴¹ H.R. Res. 256, 117th Cong. (2021).

³⁴² *Id.*

³⁴³ *Roll Call 172, Bill Number: H.R. 256, 117th Congress, 1st Session*, OFFICE OF THE CLERK, U.S. HOUSE OF REP.’S (June 17, 2021), clerk.house.gov/Votes/2021172.

³⁴⁴ Claudia Grisales, *In Historic, Bipartisan Move, House Votes to Repeal 2002 Iraq War Powers Resolution*, NATIONAL PUBLIC RADIO (June 17, 2021), www.npr.org/2021/06/17/1007363054/congress-is-poised-to-take-back-some-of-its-war-powers-from-the-president.

³⁴⁵ *Id.*

support of four Republican senators including Senator Todd Young (R-IN), has sponsored S.J.RES.10, a joint resolution to repeal the authorizations for use of military force against Iraq and for other purposes.³⁴⁶ The joint resolution explicitly rescinds the 2002 AUMF along with the 1991 AUMF, a discrepancy between H.R. 256 that must be addressed before submitting for the president's approval if the measure is affirmed in the Senate.³⁴⁷

Currently, the efforts to pass S.J.RES.10 are being delayed. Some Republican senators oppose the measure. For example, Senate Minority Leader Mitch McConnell (R-KY) stated that “the legal and practical application of the 2002 AUMF extends far beyond the defeat of Saddam Hussein’s regime. And tossing it aside without answering real questions about our ongoing efforts in the region is reckless.”³⁴⁸

Additionally, on June 19, 2021, Senators Mitt Romney (R-UT), Mike Rounds (R-SD), Marco Rubio (R-FL), Ron Johnson (R-WI), and Bill Hagerty (R-TN) wrote a letter to the chairman of the Senate Committee on Foreign Relations, Senator Robert Menendez (D-NJ), asking for the vote on S.J.RES.10 to be delayed until public hearings and classified briefings could occur.³⁴⁹ The senators requested that the Senate Committee on Foreign Relations, which has jurisdiction over the joint resolution, “hold a public hearing with testimony from the Secretaries of State and Defense and from outside experts, and that members receive a classified briefing from the Departments of State and Defense and the Office of the Director of National Intelligence” before the vote occurs to ensure “that every member of this committee fully understand the scope and use of existing legal authorities, the current threats to the U.S. and its allies and partners, and the implications for our national security and foreign policy.”³⁵⁰ In response to the letter, Senator Menendez has postponed the vote on S.J.RES.10 in order to hold the public hearings and briefings so senators “will all have an opportunity to hear directly from the administration and to question State and Defense Department officials concerning the proposed repeal.”³⁵¹

Even as the process for affirming the legislation has been pushed back, the prospects for its ultimate approval seem likely. On June 14, 2021, the Biden administration issued an official Statement of Administration Policy that stated, “The Administration supports House passage of H.R. 256 . . . as the United States has no ongoing military activities that rely solely on the 2002 AUMF as a domestic legal basis, and repeal of the 2002 AUMF would likely have minimal impact on current military operations. . .”³⁵² As S.J.RES.10 already has bipartisan support in the Senate, and the Biden administration publicly endorsed legislation rescinding the 2002 AUMF, it is probable that S.J.RES.10 will be passed, both houses of Congress will agree on a version of the legislation, and that the combined measure abrogating the 2002 AUMF will be approved by President Biden.

³⁴⁶ S.J. Res.10, 117th Cong. (2021).

³⁴⁷ *Id.*

³⁴⁸ Grisales, *supra* note 344.

³⁴⁹ Rebecca Kheel, *Senate Panel Delays War Authorization Repeal After GOP Push*, HILL (June 21, 2021), thehill.com/policy/defense/559483-senate-panel-delays-war-authorization-repeal-after-gop-push.

³⁵⁰ Letter from Mitt Romney et al. to Robert Menendez, Chairman of Senate Comm. On Foreign Rel.'s (June 19, 2021), <https://www.justsecurity.org/wp-content/uploads/2021/06/Letter-to-Chairman-Menendez-re-SJRES103.pdf>.

³⁵¹ Rebecca Kheel, *Senate Panel Plans July Briefing on War Authorization Repeal*, HILL (June 22, 2021), thehill.com/policy/defense/559674-senate-panel-plans-july-briefing-on-war-authorization-repeal.

³⁵² H.R. Res. 256, 117th Cong. (2021).

3. *Rescission of the 2001 AUMF*

The likelihood of Congress rescinding the 2001 AUMF is drastically lower than that of the 1957, 1991, and 2002 AUMFs because the 2001 AUMF is the United States' primary legal basis for the war on terror.³⁵³ In a 2020 speech, Representative Barbara Lee (D-CA) presented data from the Congressional Research Service, stating, "According to the Congressional Research Service, the AUMF has been used as a blank check by three administrations to justify military force more than 40 times in 18 countries."³⁵⁴ In comparison, the 1957 AUMF has never been used as the basis for military action.³⁵⁵ The Biden administration publicly supported the repeal of the 2002 AUMF partly due to the fact it did not believe the action would affect any current military actions, a reality that starkly contrasts with that of the 2001 AUMF.³⁵⁶

Also, as a result of the consistent use of the 2001 AUMF to justify American military operations against Al Qaeda and affiliates in various geographic locations, many believe repealing the 2001 AUMF without a suitable replacement measure would be imprudent.³⁵⁷ In 2017 testimony to the Senate Committee on Foreign Relations, former Secretary of State Rex Tillerson stated that the "potential repeal of the 2001 AUMF without an immediate and appropriate replacement could raise questions about the domestic legal basis for the United States' full range of military activities against the Taliban, al-Qaeda, and associated forces, including against ISIS, as well as our detention operations at Guantánamo Bay."³⁵⁸ Even Representative Lee herself, who has opposed the 2001 AUMF from its inception, believes that the 2001 AUMF must be replaced before it can be rescinded and has expressed it will be a very difficult undertaking.³⁵⁹

The creation of subsequent legislation replacing the 2001 AUMF, which would essentially provide the new statutory basis for U.S. efforts to engage in hostilities against enemy armed groups identified in such new authorization, would likely be a prolonged and extremely partisan endeavor. Thus, at this time, the prospects for congressional revocation of the 2001 AUMF are low.

C. Barriers to Charging Detainees Who Are Currently Uncharged ———

One major issue preventing detainees from being charged is that the legislation justifying their detention does not necessitate it. Furthermore, the language in the two pieces of governing legislation, the AUMF and the National Defense Authorization Act (NDAA), as well as subsequent U.S. court decisions, limit the avenues for recourse for detainees. Specifically, the AUMF and the NDAA authorize detention of individuals "supporting" Al Qaeda and associated forces as long as "hostilities" are ongoing. Since what constitutes "supporting" is not defined by either the AUMF or the NDAA, individuals can be detained for even tangential affiliation. Furthermore, the NDAA prohibits alien detainees from being transferred to the mainland of the United States. The combination of the powers afforded by the NDAA and AUMF allows for the United States to detain individuals indefinitely and for a variety of reasons.

³⁵³ Kheel, *supra* note 351.

³⁵⁴ Congressional Progressive Caucus, 166 Cong. Rec. 9 (2020), www.govinfo.gov/content/pkg/CREC-2020-01-15/html/CREC-2020-01-15-pt1-PgH276-4.htm.

³⁵⁵ Wise, *supra* note 334.

³⁵⁶ Kheel, *supra* note 351.

³⁵⁷ *Id.*

³⁵⁸ Rex Tillerson, Sec'y of State to Senate Foreign Rel's Comm. on AUMF (Oct. 30, 2017).

³⁵⁹ *Id.*

When the Supreme Court held that detainees have the right to file for petitions for habeas corpus in *Boumediene v. Bush*, several issues arose from the decision that hobbled the decision's effect. Issues that are still not clearly defined are the "scope of habeas review available to Guantánamo detainees, the remedy available for those persons found to be unlawfully held by the United States, and the extent to which other constitutional provisions extend to noncitizens held at Guantánamo."³⁶⁰

Most recently, in May 2021, the Supreme Court declined to review *Ali v. Trump*, a habeas case concerning eleven Guantánamo detainees claiming that the detainees' detention violated the Fifth Amendment's due process clause. This petition for habeas corpus was denied by the District Court, then reviewed by the D.C. Court of Appeals who affirmed the habeas corpus denial.³⁶¹ While the Court of Appeals stated that the due process clause needed to be accessible for detainees, it clarified that due process requirements do not apply wholesale to detainees' cases. Detainees must be granted the due process rights "necessary to ensure 'meaningful review' of the lawfulness of their detention," but there is no formal enumeration of which due process rights have been deemed constitutionally necessary for the detainees.³⁶²

Importantly, the recent case *Al-Hela v. Biden* addresses the issues of due process and habeas corpus for Guantánamo detainees. *Al-Hela* concerns the continued detention of Abdulsalam Ali Abdulrahman Al-Hela, a Yemeni businessman and government official who was apprehended by American forces in 2002 and transferred to Guantánamo Bay in 2004.³⁶³ Al-Hela filed a petition for habeas corpus in 2005 challenging the legality of his detention under the 2001 AUMF. Al-Hela has also claimed due process rights violations relating to his continued detention and his counsel's lack of access to the government's ex parte filings. Judge Royce Lamberth of the D.C. District Court rejected these claims,³⁶⁴ a ruling that was later affirmed by a three-judge D.C. Circuit panel.³⁶⁵ On April 23, 2021, the Court of Appeals for the D.C. Circuit granted Al-Hela a rehearing en banc to consider the application of the due process clause to his detention, thus vacating the 2020 panel opinion.³⁶⁶ On June 8, 2021, the Periodic Review Board (PRB) "determined that continued law of war detention of the detainee is no longer necessary to protect against a continuing significant threat to the security of United States."³⁶⁷ Importantly, the PRB noted that imposing "appropriate security assurances" upon resettlement can effectively mitigate the risks associated with Al-Hela's past activities.³⁶⁸ Despite this determination, the U.S. government asserted that it can continue to detain Al-Hela under the AUMF until the cessation of hostilities. Oral arguments before the en banc court occurred on September 30, 2021.³⁶⁹ This case is discussed in further detail in Part V.C.2 of this Report.

³⁶⁰ Grisales, *supra* note 344.

³⁶¹ *Ali v. Trump*, CTR. FOR CONST. RTS., <https://ccrjustice.org/node/8316> (last visited Dec. 21, 2021).

³⁶² *Ali v. Trump*, 317 F. Supp. 3d 480, 487 (D.D.C. 2018).

³⁶³ *Guantánamo Docket*, *supra* note 3.

³⁶⁴ *Ali v. Trump*, 317 F. Supp. 3d 480, 487 (D.D.C. 2018).

³⁶⁵ Adam Chan, *Al-Hela v. Biden and Due Process at Guantánamo*, LAWFARE (May 25, 2021), <https://www.lawfareblog.com/al-hela-v-biden-and-due-process-guantanamo>.

³⁶⁶ *Al-Hela v. Biden*, No. 1:05-cv-01048-UNA (D.C.C. Apr. 23, 2021).

³⁶⁷ *Unclassified Summary of Final Determination – Al-Hilah*, Periodic Review Board (June 8, 2021), <https://int.nyt.com/data/documenttools/210608-upr-isn1463-sh2-final-determination-alhela/5778f30779d0f1d3/full.pdf>.

³⁶⁸ *Id.*

³⁶⁹ Audio tape: *Abdulsalam Ali Al-Hela v. Joseph Biden Court of Appeals for the D.C. Circuit*, COURT LISTENER (Sept. 30, 2021), <https://www.courtlistener.com/audio/77858/abdulsalam-ali-al-hela-v-joseph-biden/>.

Closing Guantánamo Bay is as much a political issue as it is a security issue. In his first term, President Obama vowed to close the detention facility in his first year. However, an action such as this requires intentionality and political will, which has been hard to garner. Even as support for the facility wanes, “[m]ost politicians are still reluctant to spend political capital on bringing perceived terrorists to the United States, no matter how securely imprisoned.”³⁷⁰ Even in 2016, a poll found that 56 percent of Americans opposed the closing of Guantánamo Bay.³⁷¹ Without congressional action regarding the powers afforded by the AUMF and NDAA, there is little reason to think detainees who are not eligible for transfer will be charged at this point if they have not already been.

There is no political consensus regarding what actions should be taken to reform military commissions and move toward closure. For example, ahead of the rehearing of Al-Hela’s case en banc regarding due process for Guantánamo detainees, Senator Richard Durbin (D-IL), chairman of the Judiciary Committee, sent a letter to Attorney General Merrick Garland requesting he use his influence to steer the Department of Justice into advocating for Guantánamo detainees to have due process rights.³⁷² Durbin wrote, “It is well past time for the department to reconsider its approach to the applicability of the basic safeguards of due process to the men who remain imprisoned without charge or trial at Guantánamo, as well as other positions that help perpetuate this moral stain on our nation.”³⁷³ Note, however, that Attorney General Garland ultimately decided to recuse himself from any role in this litigation.³⁷⁴

There are few avenues of recourse for those detained at Guantánamo Bay. The legal ambiguity regarding key concepts, such as that connected with the end of hostilities discussed above, makes challenging one’s detention status difficult at best, including in the context of habeas litigation. As it stands, the combination of domestic policy, legal ambiguity, and political and jurisdictional disagreement are major barriers to challenging the status of the uncharged detainees.

³⁷⁰ John Keating, *Will Biden Finally Close Guantánamo?*, SLATE (Dec. 15, 2020), <https://slate.com/news-and-politics/2020/12/will-biden-close-guantanamo-bay.html>.

³⁷¹ Tom LoBianco, *CNN/ORC Poll: Americans Oppose Plan to Close Guantánamo Bay Prison*, CNN (Mar. 4, 2016), <https://www.cnn.com/2016/03/04/politics/guantanamo-bay-poll-north-korea/index.html>.

³⁷² Chairman Durbin did not send the letter to anyone on the Senate Armed Services Committee.

³⁷³ Letter from Richard Durbin, Chair of Senate Judiciary Comm., to Att’y Gen. Merrick Garland on the Justice Dep’t’s Approach to Ongoing Detention at Guantánamo Bay (July 7, 2021), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-calls-on-justice-department-to-reconsider-its-approach-to-ongoing-detention-at-guantanamo-bay>.

³⁷⁴ Charlie Savage, *Biden Administration Punts on Due Process Rights for Guantánamo Detainees*, N.Y. TIMES, July 9, 2021, <https://www.nytimes.com/2021/07/09/us/politics/guantanamo-detainees-due-process.html>.

V.

CRITICAL QUESTIONS OF LAW THAT ARISE IN THE COMMISSIONS

A. Does the Fruit of the Poisonous Tree Doctrine Apply to Military Commissions?

Whether the fruit of the poisonous tree doctrine applies in military commission proceedings, as it does in civilian criminal proceedings, is not clear. While the U.S. government concedes that evidence directly obtained from torture or other coercive interrogation tactics is not admissible in trial proceedings, it also asserts that evidence derived from such statements may be used to validate derivative forms of evidence.³⁷⁵

Further complicating this question is the lack of any decisive court rulings on whether Guantánamo detainees are considered protected by substantive due process rights or whether the exclusion of detainee statements obtained by coercive tactics is a purely statutory remedy pursuant to the Military Commissions Act (MCA). These broader substantive due process questions continue to be disputed and provide the backdrop to the unresolved questions challenging the rules of evidence governing military commissions, the availability of the exclusionary remedy for foreign nationals captured abroad but tried under U.S. law in U.S. courts, and, to what extent, the fruit of the poisonous tree doctrine applies to military commissions.³⁷⁶

The fruit of the poisonous tree doctrine is an outgrowth of the exclusionary rule first created by the Supreme Court in *Weeks v. United States*³⁷⁷ in order to give meaning to the protections of the Fourth Amendment and to prevent the government from profiting from constitutional violations that lead to evidence. The rule, incorporated to apply to the states in *Mapp v. Ohio*,³⁷⁸ presumptively prohibits the use by the prosecution of evidence derived from an initial constitutional violation. While originally adopted in relation to protections of the Fourth Amendment, the rule has been

³⁷⁵ Ruling on Def. Motion to Strike AE 353V for Inclusion of Statements and Derivative Evidence Obtained by Torture or Cruel, Inhuman, or Degrading Treatment, *United States v. al-Nashiri*, AE 353AA 2 (Mil. Comm. May 18, 2021), available at <https://www.justsecurity.org/wp-content/uploads/2021/05/AE-353AA-RULING-dtd-18-May-21-003.pdf>.

³⁷⁶ DAVID J. LUBAN ET AL., *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 315 (3d ed. 2018).

³⁷⁷ *Weeks v. United States*, 232 U.S. 383 (1914).

³⁷⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961).

applied to other constitutional violations, including the use of confessions derived from constitutional violations.³⁷⁹ In civilian legal proceedings, the fruit of the poisonous tree doctrine *extends* the scope of the exclusionary rule to bar not only evidence *directly seized*, but also derivative evidence *indirectly obtained* as a result of information learned or obtained from the constitutional violation.³⁸⁰ The *Wong Sun*³⁸¹ decision extended the scope of the exclusionary rule as applied through the fruit of the poisonous tree doctrine to evidence derived from violations of the Constitution. Once a defendant establishes the predicate constitutional violation, derivative evidence is presumptively inadmissible. At that point the burden shifts to the prosecution to prove applicability of an established exception to the rule.

The central thrust behind the fruit of the poisonous tree doctrine is the idea that the government should not profit in any manner from its own illegality.³⁸² However, in *United States v. Leon*,³⁸³ the Supreme Court held that the exclusive rationale for the rule is deterrence of *police* misconduct, *not* the integrity of the judicial system. This means that where government agents act in good faith reliance on a source of authority (for example a warrant, a statute, or a judicial precedent) later determined to be invalid, there is no justification for applying the exclusionary rule to the fruits of their efforts. In that vein, the policy rationale supporting the exclusionary rule, and, by extension, the fruit of the poisonous tree doctrine, is to remove any incentive for unlawful police conduct in pursuit of evidence.³⁸⁴

It is clear from a review of constitutional jurisprudence that application of the fruit of the poisonous tree doctrine is predicated on a finding that the government engaged in a *constitutional* violation that led to derivative evidence. This requirement is the rationale relied on by the Supreme Court in *Oregon v. Elstad*³⁸⁵ to hold that a violation of the *Miranda* warning and waiver requirement does not trigger the fruit of the poisonous tree doctrine. This is because the Court characterized a *Miranda* violation as violation of a rule that *protects* the underlying privilege against compelled self-incrimination, and not the constitutional protection itself. According to the Court, triggering the fruit of the poisonous tree doctrine requires a finding of more than a *Miranda* violation; it requires a finding of *actual coercion*.³⁸⁶

This creates an initial degree of uncertainty as to the doctrine's applicability to military commission trials: as explained below, while the MCA prohibits the use of statements obtained by coercion or torture, it is not clear whether the use of such tactics triggers a purely statutory exclusion or whether it amounts to a due process violation. This is a critical predicate determination for assessing applicability of the fruit of the poisonous tree doctrine because a purely statutory basis for exclusion arguably fails to satisfy the predicate requirement.

The 2009 reforms to the MCA of 2006 limit the admission of coerced and otherwise improper evidence in proceedings. However, the evidentiary standards outlined in the MCA create exceptions to the rules of evidence, which may ultimately

³⁷⁹ See *Brown v. Illinois*, 422 U.S. 590 (1975); Gary D. Spivey, Annotation, *Fruit of the Poisonous Tree Doctrine Excluding Evidence Derived from Information Gained in Illegal Search*, 43 A.L.R.3d 385 (originally published in 1972).

³⁸⁰ 43 A.L.R.3d 385.

³⁸¹ *Wong Sun v. United States*, 371 U.S. 471 (1963).

³⁸² Mark S. Bransdorfer, *Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, 62 IND. L.J. 1061, 1069 (1987).

³⁸³ *United States v. Leon*, 468 U.S. 897, 926 (1984).

³⁸⁴ Robert Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized*, 56 CAL. L. REV. 579 (1968).

³⁸⁵ *Oregon v. Elstad*, 470 U.S. 298 (1985).

³⁸⁶ *Id.* at 309.

permit the admission of information in military commissions proceedings that was obtained through coercive interrogation tactics (i.e., evidence obtained through torture or other coercive interrogation tactics).³⁸⁷

Pursuant to the MCA of 2009, no statement “obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act (DTA) of 2005 (42 U.S.C. 2000dd), whether or not under color of law, shall be admissible in a military commission.”³⁸⁸

While the MCA precludes the admission of statements obtained by the use of torture or inhuman or other degrading forms of treatment, the legislation creates exceptions to the rules of evidence, which may permit statements obtained by the U.S. government at CIA black sites to be admitted into evidence in trial proceedings. The procedural and evidentiary exceptions outlined at § 949b permit the secretary of defense, in consultation with the attorney general, to grant exceptions in the applicability of procedures and rules of evidence in military commissions, otherwise controlling in general courts-martial, when the unique circumstances surrounding the conduct of military and intelligence operations during hostilities require such exceptions.³⁸⁹

B. Must All Statements Derived from Torture Be Excluded? _____

Pursuant to the Military Commission Rule of Evidence 304(a)(1) of the *Manual for Military Commissions*, no statement “obtained by the use of torture or by cruel, inhuman, or degrading treatment, as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd), whether or not under color of law, shall be admissible in a military commission.”³⁹⁰

Additionally, the manual outlines standards for the admissibility of derivative evidence obtained by cruel, inhuman, or degrading treatment.³⁹¹ Specifically, Mil. Comm. R. Evid. 304(a)(5)(A) states that evidence derived from a statement that would be excluded under the general provision prohibiting the admission of torture-tainted evidence Mil. Comm. R. Evid. 304(a)(1) cannot be received in evidence against the accused who made the statement, if the accused makes a timely motion to suppress or an objection.³⁹²

However, Mil. Comm. R. Evid. 304(a)(5)(A) includes exceptions to the general provision excluding derivative evidence obtained by torture or other coercive tactics, which may ultimately permit the admission of torture-tainted evidence otherwise inadmissible in federal court. Mil. Comm. R. Evid. 304(a)(5)(A) states that the military judge may admit such evidence if the military judge determines, by a preponderance of the evidence, that (i) the evidence would have been obtained even if the statement had not been made; or (ii) use of such evidence would otherwise be consistent with the interests of justice.³⁹³

³⁸⁷ 10 U.S.C. § 948r.

³⁸⁸ *Id.*

³⁸⁹ *Id.* § 949b.

³⁹⁰ Mil. Comm. R. Evid. 304.

³⁹¹ Mil. Comm. R. Evid. 304(b)(5)(A).

³⁹² *Id.*

³⁹³ Mil. Comm. R. Evid. 304(a)(5)(A).

This first exception integrated into the manual's derivative evidence rule tracks closely with the inevitable discovery exception controlling the exclusionary rule in civilian criminal proceedings.³⁹⁴ The second exception incorporated into Mil. Comm. R. Evid. 304(a)(5)(A) appears to create significant discretionary authority for a military judge in deciding whether to allow an exception to the presumptive inadmissibility of evidence derived from statements obtained by torture or other forms of coercive treatment.³⁹⁵ As the provision's Discussion Comments indicate, the intention behind Mil. Comm. R. Evid. 304(a)(5) is that the "interests of justice" standard generally will restrict the admission of evidence derived from statements obtained by torture or cruel, inhuman, or degrading treatment.³⁹⁶ However, it is noteworthy that no analogous exception has ever been endorsed for application in federal or state courts. In any event, the "interests of justice" term seems highly subjective, creating a situation in which the "interests of justice" standard changes depending on the facts and the detainee involved in each case.

Mil. Comm. R. Evid. 304(a)(5)(B) elaborates on this exception for evidence derived from a statement that would be excluded under Mil. Comm. R. Evid. 304(a)(2) if the accused makes a timely motion to suppress or an objection. Specifically, the rule indicates that a military judge may waive restrictions on admissibility for evidence derived from other statements excluded under Mil. Comm. R. Evid. 304(a)(2) if the military judge determines, by a preponderance of the evidence, that (i) the totality of the circumstances renders the evidence reliable and possessing sufficient probative value; and (ii) use of such evidence would be consistent with the interests of justice.

In addition to the military regulations prescribing rules of evidence governing military commissions proceedings, relevant case law exists concerning the constitutional admissibility of statements made by the detainees through coercive tactics, and, to what extent, subsequent statements are properly admissible or are considered the poisonous fruit of the initial constitutional violation. This case law is relevant to the federal agent clean team re-interrogation program, as well as the extent to which the statements made by detainees during these re-interrogation sessions were voluntary and sufficiently attenuated the taint of the initial detainee statements obtained by torture.

The re-interrogations by federal agent clean teams were stood up precisely because the government recognized that the original torture-tainted interrogations of detainees at CIA black sites were almost certainly inadmissible in military commission proceedings.³⁹⁷ The government has previously argued that these detainee re-interrogations are not the fruit of the poisonous tree because these interrogations were conducted without resort to waterboarding, sleep deprivation, or other so-called enhanced interrogation techniques, and are sufficiently separated from any interrogation involving the enhanced interrogation technique program so as to attenuate the taint of the initial torture-produced statements.³⁹⁸ Similarly, the government claims that the passage of a few months insulates clean team statements from suppression as being derived from torture. However, relevant case law suggests that the statements made by the detainees in the federal agent re-interrogations may be considered the poisonous fruits of the original constitutional violation.

³⁹⁴ See *Nix v. Williams*, 467 U.S. 431, 443 (1984).

³⁹⁵ Mil. Comm. R. Evid. 304(a)(5) (discussion).

³⁹⁶ Mil. Comm. R. Evid. 304(a)(5) (discussion).

³⁹⁷ Josh White et al., *FBI "Clean Team" Re-Interrogated 9/11 Suspects*, NBC News (Feb. 11, 2008), <https://www.nbcnews.com/id/wbna23120362>.

³⁹⁸ Sarah Grant, *Military Commission Judge Bars Government from Using Defendants' Statements to FBI "Clean Teams" in 9/11 Case*, LAWFARE (Aug. 19, 2018), <https://www.lawfareblog.com/military-commission-judge-bars-government-using-defendants-statements-fbi-clean-teams-911-case>.

In *Wong Sun*,³⁹⁹ the Supreme Court established the attenuation exception for confessions derived from a prior unlawful arrest. The Court held that statements must not only meet the Fifth Amendment’s voluntariness standard, but must also be “sufficiently an act of free will to purge the primary taint” in light of the prevailing policies and interests of the Fourth Amendment.⁴⁰⁰ In *Wong Sun*, the Court held that petitioner Toy’s declarations and contraband were the poisonous fruits of the law enforcement officers’ initial illegal actions and were inadmissible as evidence because the statements were not obtained from “an intervening independent act of a free will,” and that it was not “sufficiently an act of free will to purge the primary taint of the unlawful invasion.”⁴⁰¹

Unlike petitioner Toy, the Court held that petitioner Wong Sun’s confession was properly admissible, despite the previous unlawful behavior of the law enforcement agents, because Wong Sun had been released on his own recognizance and voluntarily returned to the police station several days later to make his statement. The Court reasoned that the connection between Wong Sun’s initial unlawful arrest and the statements made after his release was sufficiently an act of free will and had “become so attenuated as to dissipate the taint.”⁴⁰²

There is, however, a substantial difference between *Wong Sun* and the Guantánamo detainee cases. Unlike *Wong Sun*, it is not clear that the taint of prior unlawful conduct qualifies as a constitutional violation. This likely explains, in part, the clean team approach: if the prior violation triggers a purely *statutory* exclusion of the statements, then the only relevant inquiry is whether the clean team confession does the same. In other words, absent proof the violation amounts to a constitutional violation, there is no applicability of a constitutional exclusionary rule.

However, if the defense is able to establish applicability of the fruit of the poisonous tree doctrine, it is equally significant that the gravity of the predicate violation (torture) is far more significant than the illegal arrest in *Wong Sun*, indicating that the burden to prove attenuation is equally heightened. This means it is less than clear that subsequent statements made to federal agent clean teams were sufficiently attenuated from the initial illegality; it is certainly difficult to understand how someone in the conditions at Guantánamo made statements as the result of any intervening independent act of free will to purge the primary taint of the original constitutional violation.

In fact, the defense counsel for some of the detainees have already argued that the environment in which these re-interrogations took place was inherently coercive because they were conducted by the same government that tortured the detainees.⁴⁰³ Defense counsel for Khalid Sheikh Mohammed, for example, has argued that anything Mohammed and the other suspects said to federal agent clean teams at Guantánamo was effectively a “Pavlovian response,” drilled into them after years of torture at CIA black sites. Defense counsel has contended that the government’s calculated abuse regimen coached the detainees to tell the federal agents what the CIA had forced them to say.⁴⁰⁴ The defense counsel thus contended that this reality makes the re-interrogations too poisonous to admit into evidence in future trial proceedings.⁴⁰⁵

³⁹⁹ *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

⁴⁰⁰ *Id.* at 486.

⁴⁰¹ *Id.* at 484–85.

⁴⁰² *Id.*

⁴⁰³ Carol Rosenberg, *Lawyers Press Case That 9/11 Confessions Given to F.B.I. Are Tainted*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/us/politics/september-11-confessions-guantanamo.html>.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

Additionally, *Brown v. Illinois*⁴⁰⁶ offers key analysis as to whether statements are properly admissible because the giving of the *Miranda* warnings sufficiently attenuated the taint of the original illegal arrest. In *Brown*, for Fourth Amendment purposes, the Court held that the giving of *Miranda* warnings does not always render the act of confessing sufficiently a product of free will to sever the causal connection between the initial illegality and the confession.⁴⁰⁷ The Court reasoned that the *Miranda* warnings, by themselves, do not attenuate the taint of an unconstitutional arrest. The extent to which the initial constitutional violation is wanton and purposeful is relevant in assessing what is needed to attenuate. As the Court noted, a finding that the giving of the *Miranda* warnings functioned as a cure-all would substantially weaken the deterrent effect of the exclusionary rule because of the understanding that evidence derived from constitutional violations could be properly admissible by the cleansing effect of subsequent *Miranda* warnings.⁴⁰⁸ Any incentive to avoid constitutional violations would be eviscerated.

Guantánamo detainees subject to federal agent re-interrogations were also read rights similar to a standard U.S. *Miranda* warning.⁴⁰⁹ However, a military commissions judge may find that the giving of *Miranda*-like warnings fails to create any meaningful distinction between the original torture-tainted interrogations and the subsequent federal agent “clean team” re-interrogations and the statements produced therefrom. The continued detention of the detainees by the same government that tortured them and the absence of intervening circumstances that could attenuate the taint of the torture-induced statements create a coercive environment likely rendering the detainee statements constitutionally inadmissible as evidence. However, the broader constitutional question then shifts into focus, which is whether substantive due process rights even apply to Guantánamo detainees.

There are limited military commissions rulings on the admissibility of the clean team statements in commissions proceedings. In August 2018, in the trial of Khalid Sheikh Mohammed and four other co-defendants, the military commissions ruled that the introduction of federal agent clean team statements at trial were prohibited.⁴¹⁰ However, the extent to which this evidentiary ruling was motivated by a desire to protect the constitutional rights of the detainees, or to restore some evidentiary parity between the prosecution and defense, is uncertain.⁴¹¹ This ruling may affect the introduction of evidence obtained in the federal agent re-interrogations in the trials of other detainees and possibly influence future rulings on motions to suppress.⁴¹²

Any information obtained after a sustained regiment intentionally inflicted to produce debility, dread, and dependency on a prisoner must be excluded. Detainees such as Majid Khan who described dungeon-like conditions, humiliating nudity, and near drownings produced whatever information the abuse inflictors wanted to hear. Khan manufactured tales and testified: “I lied to just make the abuse stop.”⁴¹³

⁴⁰⁶ *Brown v. Illinois*, 422 U.S. 590, 591–92 (1975).

⁴⁰⁷ *Id.* at 603.

⁴⁰⁸ *Id.* (quoting and affirming *Davis v. Mississippi*, 394 U.S. 721, 726–27 (1969)).

⁴⁰⁹ White et al., *supra* note 397.

⁴¹⁰ Charlie Savage, *Judge Bars Statements Made by Guantánamo Detainees During F.B.I. Interrogations*, N.Y. TIMES (Aug. 17, 2018), <https://www.nytimes.com/2018/08/17/us/politics/guantanamo-detainees-fbi-interrogations.html>.

⁴¹¹ Grant, *supra* note 398.

⁴¹² *Id.*

⁴¹³ Carol Rosenberg, *For First Time in Public, a Detainee Describes Torture at C.I.A. Black Sites*, N.Y. TIMES (Oct. 30, 2021), <https://www.nytimes.com/2021/10/28/us/politics/guantanamo-detainee-torture.html>

For these reasons, among others, the Working Group concludes that evidence from unlawful interrogation techniques should be barred and that any evidence derived from such inadmissible statements should be subject to an exclusionary rule identical to that applicable in federal courts. Indeed, in 2022, the government itself reached such conclusion in the *al-Nashiri* case, reversing its previous view and stating:

The government recognizes that torture is abhorrent and unlawful, and unequivocally adheres to humane treatment standards for all detainees. See Executive Order 13491. In the absence of direct authority interpreting Section 948r(a), the government took the position below that Section 948r(a)'s prohibition on admission of statements obtained through torture or cruel, inhuman, or degrading treatment applies only to the trial and sentencing phases of a military commission and not to pretrial proceedings. Since that filing, the government has reconsidered its interpretation of Section 948r(a) and, as a result of that review, has concluded that Section 948r(a) applies to all stages of a military commission case, including pretrial proceedings. In accordance with that conclusion, the government will not seek admission, at any stage of the proceedings, of any of petitioner's statements while he was in CIA custody.⁴¹⁴

This development demonstrates the new approach the new prosecutorial team is taking and echoes many of the concerns noted by the Working Group.

C. Does Due Process Apply in the Military Commissions? _____

The right to liberty and bodily freedom is perhaps the closest held value upon which the United States was founded. The Constitution prevents the government from depriving individuals of their right to liberty without due process and adequate justification. Although the law has recognized differences between the rights afforded to citizens and those afforded to foreign nationals imprisoned outside the United States, the individuals imprisoned at Guantánamo—who have been detained for decades and continue to be detained indefinitely—are entitled to an opportunity to know and respond to the basis for their detention. These detainees have suffered a complete deprivation of personal freedom at the hands of the U.S. military in what is, for all functional purposes, a U.S. territory. In order to uphold the values of the American legal system, principles of due process must guide both the continued operation of GTMO and its closure.

There is good reason to think the due process clause applies in some form to detainees at Guantánamo. Though courts have not yet delineated the precise due process rights that these individuals can invoke, two rights under the due process clause stand out as particularly necessary: first, the right (through security-cleared counsel) to view the evidence that forms the basis of an individual's detention so that a detainee may have a meaningful opportunity to respond to the allegations used to justify detention; and second, the right to exclude from consideration unreliable hearsay evidence so as to ensure that the evidence used to detain an individual is traceable to a trustworthy source. While detainees may well be entitled to greater due process rights than these, at least these two basic protections, each of which is supported by decades of Supreme Court and lower court precedent, rightly applies to individuals being detained at Guantánamo.

1. Supreme Court Precedent and the Application of Due Process

Before determining which due process rights apply to detainees at Guantánamo, we must examine whether the due process clause applies at all. The Court most recently took up the question of which rights apply to Guantánamo

⁴¹³ Tess Bridgeman, *Biden Team Gets It Right on Inadmissibility of Torture Evidence in Al-Nashiri Case*, JUST SEC. (Feb. 1, 2022), <https://www.justsecurity.org/80047/biden-team-gets-it-right-on-inadmissibility-of-torture-evidence-in-al-nashiri-case/>.

detainees in *Boumediene v. Bush*.⁴¹⁵ There, the Court held that the suspension clause applied to those imprisoned at Guantánamo, meaning that individuals had the right to bring petitions for habeas corpus challenging the legality of their detentions in federal courts.⁴¹⁶ In so holding, the Court also considered more generally “the issue of the Constitution’s extraterritorial application” and concluded that its precedents did not support the idea that “the Constitution necessarily stops where *de jure* sovereignty ends.”⁴¹⁷ The Court rejected such a hard and fast rule.⁴¹⁸

The Court in *Boumediene* identified “at least three factors [as] relevant” in applying its functional approach to determine whether constitutional provisions apply abroad: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving” the individual’s constitutional claim.⁴¹⁹ Several other courts have since used *Boumediene*’s approach to determine the extent of various other constitutional provisions outside of the United States.⁴²⁰ Applying those factors to the question whether Guantánamo detainees are entitled to rights under the due process clause compels the same conclusion as for the suspension clause: the right must apply to those being held at Guantánamo.

Turning first to their citizenship and status, the Court determined that “the status of these detainees is a matter of dispute” because, unlike other foreign prisoners, many if not all of the detainees at Guantánamo “deny they are enemy combatants.”⁴²¹ Some may have been afforded minimal process to determine their status, but as a general matter, they have had “no trial by military commission for violations of the laws of war.”⁴²²

Second, the territorial status of the Guantánamo military base weighs in favor of extending the due process clause’s protections to Guantánamo just as it did for the suspension clause in *Boumediene*. Then-judge Kavanaugh described the Court’s holdings on this issue as “determin[ing] that Guantánamo was *de facto* U.S. territory—akin to Puerto Rico, for example—and not foreign territory.”⁴²³ Guantánamo is therefore unlike other military prisons abroad.⁴²⁴ The due

⁴¹⁵ 553 U.S. 723 (2008).

⁴¹⁶ *Id.* at 771.

⁴¹⁷ *Id.* at 755.

⁴¹⁸ *Id.* at 759–64. The Insular Cases are a century-old set of cases that recognized that various constitutional rights could apply outside the territorial United States, depending on the particular right and the “[p]ractical considerations” at issue; the Court “use[d] its power sparingly” to extend the various provisions of the Constitution when and where they are “most needed.”⁴¹⁸ Such considerations also guided the Court’s later decisions in *Reid v. Covert* and *Johnson v. Eisentrager*,⁴¹⁸ where factors such as the place of confinement and trial and the difficulties of producing the necessary parties for a hearing were key to determining whether a particular right applied. These practicalities have led to a “functional approach to questions of extraterritoriality” that precludes any sort of bright line rule turning on “*de jure* sovereignty.”⁴¹⁸ As a result, the fact that Guantánamo detainees are foreign nationals imprisoned outside of the United States does not, by itself, determine whether they may invoke due process rights.

⁴¹⁹ *Id.* at 766.

⁴²⁰ See, e.g., *Fitisemanu v. United States*, 1 F.4th 862, 870, 878 (10th Cir. 2021) (citing *Boumediene*’s discussion of “objective factors and practical concerns, not formalism” as the standard for determining whether a particular constitutional guarantee is applicable abroad); *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015) (similar).

⁴²¹ *Boumediene*, 553 U.S. at 766.

⁴²² *Id.* at 766–67.

⁴²³ *Al Bahlul v. United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part).

⁴²⁴ *Boumediene*, 553 U.S. at 768.

process clause should therefore apply to those at the facility as it does to people in other U.S. territories.⁴²⁵

Finally, the analysis in *Boumediene* also controls as to the third consideration. Given that the detention facility is not “located in an active theater of war,” there is “no credible argument [] that the military mission at Guantánamo would be compromised” if courts hear detainees’ due process claims.⁴²⁶ Nor would adjudicating such claims “cause friction with the host government” because, “[w]hile obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.”⁴²⁷ As such, the Court held in *Boumediene* that there were “few practical barriers” to extending the suspension clause to detainees.⁴²⁸ This analysis applies equally to the question of applying the due process clause at Guantánamo. Especially given the limited number of prisoners remaining at Guantánamo Bay and the many years since their capture, there is no colorable argument that affording due process rights to this limited group would negatively affect foreign relations or military strategy.

Opponents of extending the rights conferred by the due process clause to detainees at Guantánamo frequently cite *Eisentrager*, which held that the due process clause does not apply to “an alien enemy engaged in the hostile service of a government at war with the United States.”⁴²⁹ But later Supreme Court cases such as *Rasul* and *Boumediene* have made clear that *Eisentrager* should not be interpreted to require a “formalistic, sovereignty-based test” for purposes of deciding which constitutional rights apply to those outside the territorial United States.⁴³⁰ As already explained, whether a particular right applies instead depends on “objective factors and practical concerns,”⁴³¹ such as “whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”⁴³² Reading *Eisentrager* as setting out a bright-line prohibition on applying the Constitution to foreign nationals abroad would “mark[] not only a change in, but a complete repudiation of, the Insular Cases’ (and later *Reid*’s) functional approach to questions of extraterritoriality.”⁴³³ Moreover, the Court in *Boumediene* pointed out several differences between Guantánamo and the prison at Landsberg, Germany, which was at issue in *Eisentrager*. *Eisentrager* took place in the aftermath of World War II, and the Court found that ordering the government to produce the prisoners at issue “would damage the prestige of military commanders at a sensitive time.”⁴³⁴ The Court also noted that the petitioners in *Eisentrager* “did not contest, it seems, the Court’s assertion that they were enemy aliens.”⁴³⁵ These differences and others dissuaded the Court from applying the holding of that case to the context of Guantánamo. And what was true in *Boumediene* regarding *Eisentrager*’s applicability to Guantánamo for purposes of the suspension clause remains true when considering the due process clause. Thus, *Eisentrager* does not control the question of due process at Guantánamo.

⁴²⁵ *Downes v. Bidwell*, 182 U.S. 244, 277, 282-83 (1901) (holding that “the right to personal liberty” applied even in unincorporated territories); *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (holding that the right to due process applied in Puerto Rico).

⁴²⁶ *Boumediene*, 553 U.S. at 769–70.

⁴²⁷ *Id.* at 770.

⁴²⁸ *Id.*

⁴²⁹ 339 U.S. at 785.

⁴³⁰ *Boumediene*, 553 U.S. at 762; *see also Rasul*, 542 U.S. at 479.

⁴³¹ *Boumediene*, 553 U.S. at 764.

⁴³² *Id.* at 759–60 (quoting *Reid*, 354 U.S. at 74 (Frankfurter, J., concurring in the result)).

⁴³³ *Id.* at 762–64.

⁴³⁴ *Id.* at 762.

⁴³⁵ *Id.* at 766 (quotation marks and alteration omitted).

The recent case of *DHS v. Thuraissigiam*⁴³⁶ also cannot be read as compelling the denial of due process rights to detainees. That case discussed the rights of a foreign national not permitted to enter the United States, whom the law treats as being in a completely foreign country.⁴³⁷ The many authorities already discussed that have treated Guantánamo as a “de facto U.S. territory—akin to Puerto Rico”⁴³⁸ do not allow for similar treatment in this situation.

The Supreme Court has not yet directly addressed the question of the applicability of due process in the military commissions. But the opportunity may soon arise for the high court to address it. Recently, a panel of the D.C. Circuit rejected the claim in *Al-Hela v. Biden*,⁴³⁹ on the grounds that “the due process clause may not be invoked by aliens without property or presence in the sovereign territory of the United States.”⁴⁴⁰ That decision, however, was later vacated and the case was heard again by the full D.C. Circuit in September 2021.⁴⁴¹ We turn to a discussion of the *Al-Hela* case next.

2. *Al-Hela v. Biden*

The *Al-Hela* case contemplates whether the due process clause requires any greater protection than those already afforded by the suspension clause. It also questions the reliability and credibility of the ex parte filings, hearsay, and other exculpatory evidence used to justify Al-Hela’s detention. Furthermore, the case directly concerns Executive Order 13567, titled “Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force.”⁴⁴² In particular, section four outlines the process of transferring a detainee following the Periodic Review Board (PRB) determination:

If a final determination is made that a detainee does not meet the standard in section 2 of this order, the Secretaries of State and Defense shall be responsible for ensuring that *vigorous efforts* are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States and the commitment set forth in section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105-277).⁴⁴³

Based on the oral arguments, the en banc court appeared reluctant to extend due process rights to detainees held at Guantánamo Bay.⁴⁴⁴ David Zionts, Al-Hela’s lawyer, argued that, given the 2021 PRB determination, the court should issue an order to ensure the executive branch takes “vigorous efforts” to secure Al-Hela’s conditional release.⁴⁴⁵ Since the PRB makes only factual determinations, executive action to effectuate his release is based solely on internal obligations

⁴³⁶ 140 S. Ct. 1959 (2020).

⁴³⁷ *Id.* at 1982.

⁴³⁸ *Al Bahlul v. United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part).

⁴³⁹ *Al-Hela v. Trump*, 972 F.3d 120, 127 (D.C. Cir. 2020).

⁴⁴⁰ *Id.*

⁴⁴¹ *Al-Hela v. Biden*, No. 19-5079, Doc. No. 1895855 (D.C. Cir. Apr. 23, 2021).

⁴⁴² 76 Fed. Reg. 13277 (Mar. 10, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba>.

⁴⁴³ *Id.* § 4 (emphasis added).

⁴⁴⁴ Tierney Sneed, *DC Appeals Court Grapples with the Question of Due Process Rights for Guantánamo Detainees*, CNN (Sept. 30, 2021), <https://www.cnn.com/2021/09/30/politics/guantanamo-due-process-dc-circuit-court-en-banc/index.html>.

⁴⁴⁵ Exec. Order No. 13567, 76 Fed. Reg. 13275 (Mar. 7, 2011).

related to Executive Order 13567. According to Zions, a court order would impose another layer of accountability, transparency, and obligation on the executive and, therefore, safeguard against Al-Hela following in Ghaleb Nassar Al Bihani's footsteps—another detainee who was recommended for released by the PRB in 2014 but not transferred to Oman until 2017.⁴⁴⁶

By contrast, the DOJ argued that the en banc court should apply the principle of constitutional avoidance and thus issue a narrow ruling and leave due process questions unanswered. DOJ lawyer Sarah Harrington claimed that the due process clause does not afford any greater protections than the suspension clause; therefore, the court should decline to apply it in this case. In other words, Al-Hela “has had a ‘meaningful opportunity’ to challenge the basis for his detention and that the process already includes ‘robust’ protections for detainees.”⁴⁴⁷ The government assured the court that Al-Hela will be released as soon as possible given the complexities of relocation, the ongoing hostilities in the Middle East, and the current congressional ban on transferring detainees to Yemen. Several judges were concerned about the treatment and accessibility of classified evidence; however, it is unclear whether the court will rule on such detainees’ rights claims without addressing the broader constitutional issue at hand.

Thus, the *Al-Hela* ruling has important implications for the general application of due process rights at GTMO. It may also open different avenues for detainees to challenge the basis of their detention and necessitate a revision of current government procedures regarding evidence and transfers.

3. *The Right to Review the Government’s Evidence*

The due process clause requires that detainees at Guantánamo have—at a minimum—the right to view the government’s evidence against them. This aspect of due process goes to the premise upon which our judicial system rests: that meaningful adversarial testing is the best way to ensure an accurate result. And meaningful adversarial testing is only possible when each side has access to the evidence and arguments employed by the other. As Justice Felix Frankfurter explained: “No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”⁴⁴⁸ Notice of the government’s case and the opportunity to meet it includes the right to view the government’s evidence. Thus, the Supreme Court has recognized that “where governmental action seriously injures an individual, . . . the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”⁴⁴⁹

Conversely, the Supreme Court has expressed skepticism of “closed and accusatorial” proceedings—even for Guantánamo detainees—because of the “risk of error” that is “inherent in” such a process.⁴⁵⁰ Such closed proceedings

⁴⁴⁶ *Center for Constitutional Rights Client Ghaleb Al-Bihani Released From Guantánamo to Oman*, CTR. FOR CONST. RTS. (Jan. 17, 2017), <https://ccrjustice.org/home/press-center/press-releases/center-constitutional-rights-client-ghaleb-al-bihani-released-guant>.

⁴⁴⁷ Ann E. Marimow & Missy Ryan, *Appeals Court Appears Reluctant to Say Guantánamo Detainees Have Due Process Rights*, WASH. POST (Sept. 30, 2021), https://www.washingtonpost.com/politics/courts_law/guantanamo-due-process-case/2021/09/29/09ad4982-206a-11ec-8200-5e3fd4c49f5e_story.html.

⁴⁴⁸ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring).

⁴⁴⁹ *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

⁴⁵⁰ *Boumediene v. Bush*, 553 U.S. 723, 725 (June 12, 2008); *see also* *Fuentes v. Shevin*, 407 U.S. 67, 81 (1982) (holding that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 183 (1968) (stating that without a meaningful hearing that includes adversarial testing, “there is insufficient assurance of the balanced analysis and careful conclusions” that are necessary under the Constitution.).

are therefore presumptively unconstitutional because of the concern that “use of undisclosed information will violate due process because of the risk of error.”⁴⁵¹ It has instead been the “firmly held main rule,” including for cases involving classified or otherwise privileged information, “that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions.”⁴⁵²

To be sure, even a due process right that is of great importance to a private individual must be balanced against the government’s countervailing interest in national security. Some courts have applied the framework laid out in *Mathews v. Eldridge*⁴⁵³ to this situation.⁴⁵⁴ But the government’s concern with protecting classified information is lessened when classified information is released only to counsel with the appropriate level of security clearance. An attorney can obtain a security clearance only when there has been an individualized determination that it is “clearly consistent with the national security interests of the United States” and where the attorney has shown a “willingness and ability to abide by regulations governing the use, handling, and protection of classified information.”⁴⁵⁵ “[A]ny doubt” about the individual’s trustworthiness must be “resolved in favor of the national security” before such clearance is issued.⁴⁵⁶ Further, courts have historically treated all attorneys—regardless of security clearance—as officers of the court because they are sworn to uphold the law and “bound to work for the advancement of justice.”⁴⁵⁷

For these reasons, many courts have agreed to release classified documents to attorneys even when they have not released them to the client directly.⁴⁵⁸ Indeed, some have even considered “a lawyer . . . who has the appropriate security clearance” to “not implicate national security when viewing the classified material because, by definition, he or she has the appropriate security clearance.”⁴⁵⁹ Finally, any national security concerns are further lessened given that, in cases involving detainees at Guantánamo, the events in question often took place over a decade before the hearing. The balancing of the importance of the right to view the government’s evidence against the lessened risk of compromising national security when the information is given only to security-cleared counsel therefore favors giving detainees at Guantánamo this due process right.

A comparison to the federal Classified Information Procedure Act (CIPA), 18 U.S.C. App. III, §§ 1-16, confirms that Congress balanced these rights similarly when considering the use of classified information in criminal cases. CIPA provides a mechanism by which courts can balance a defendant’s right to see the evidence against him with considerations of national security. Indeed, courts have already used CIPA to guide decisions regarding access to information in Guantánamo cases.⁴⁶⁰ The statute’s “animating purpose is to harmonize a criminal defendant’s right to obtain and present exculpatory material with the government’s need to withhold information from discovery when disclosure would be inimical to national security.”⁴⁶¹ As such, it requires courts to disclose the underlying facts of the government’s evidence—

⁴⁵¹ *Al Haramain Islamic Found., Inc. v. United States Dep’t of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012).

⁴⁵² *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986).

⁴⁵³ 424 U.S. 319 (1976).

⁴⁵⁴ *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality).

⁴⁵⁵ *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 117 n.21 (2d Cir. 2008) (quoting 28 C.F.R. § 17.41(b)).

⁴⁵⁶ *Id.*

⁴⁵⁷ *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

⁴⁵⁸ *In re Terrorist Bombings*, 552 F.3d at 120, 127-128; *United States v. Abu Ali*, 528 F.3d 210, 254 (4th Cir. 2008); cf. *United States v. Camacho*, 2002 WL 31770810, at *3 (S.D.N.Y. Dec. 11, 2002).

⁴⁵⁹ *Al Haramain Islamic Found., Inc. v. United States Dep’t of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012).

⁴⁶⁰ *See, e.g.*, *Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009); *Parhat v. Gates*, 532 F.3d 834, 849–50 (D.C. Cir. 2008).

⁴⁶¹ *In re Terrorist Bombings*, 552 F.3d at 115–16 (alterations, quotations, and citations omitted).

even if the information is classified—to a defendant when it is “helpful to the defense of an accused, or is essential to a fair determination of a cause.”⁴⁶² Notably, CIPA does not permit the government to submit *ex parte* information to the court to resolve the merits of the case.⁴⁶³ Allowing the government to “use *ex parte* information in court as evidence to obtain a conviction” is “not . . . authorize[d]” by CIPA and “plainly violate[s]” a defendant’s rights.⁴⁶⁴

The government may provide a substitution for the original source material such as a summary, but it must “provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”⁴⁶⁵ If the government cannot provide such a substitution, and it refuses to disclose the information to the defendant, “the district court must impose a sanction, which is presumptively dismissal of the indictment.”⁴⁶⁶ To do otherwise would allow the government to “hide the evidence from the defendant” while allowing the factfinder to rely on it.⁴⁶⁷ Another court has described a conviction based on such secret evidence as “patently absurd.”⁴⁶⁸ These rulings confirm that withholding facts relevant to the government’s basis for detaining a prisoner at Guantánamo is unacceptable. Releasing sensitive information to security-cleared counsel represents a middle ground that preserves the essential due process rights of detainees while also ensuring the protection of state secrets.

It is a critical aspect of justice that all Guantánamo detainees have the right for an individual’s security-cleared counsel to view the government’s evidence to allow for a meaningful defense and response to the basis for detention.

D. Death Sentences Delivered by Military Commissions

In 2015, a review of all death sentences from 1973 to 2013 found that the most likely outcome for a capital case once a death sentence was imposed was that the defendant’s conviction would be reversed on appeal.⁴⁶⁹ The case study, which examined the cases of both state and federal death row inmates, found that only one in six defendants were ultimately executed.⁴⁷⁰ For the 3,194 cases that were overturned on appeal, 523 were overturned on the basis that the underlying statute was unconstitutional, 890 convictions were overturned, and 1,781 had the death penalty overturned although guilt was sustained.⁴⁷¹

Currently, the five co-defendants in the 9/11 trial and *al-Nashiri* (*U.S.S. Cole* case) are charged with multiple capital

⁴⁶² *United States v. Abu Ali*, 528 F.3d 210, 247–48 (4th Cir. 2008) (quotation omitted); *see also* *United States v. Aref*, 533 F.3d 72, 79–80 (2d Cir. 2008) (collecting cases for the proposition that “the [g]overnment’s privilege must give way in a CIPA case” when the information is “helpful or material to the defense”).

⁴⁶³ *Abu Ali*, 528 F.3d at 255.

⁴⁶⁴ *Id.*

⁴⁶⁵ 18 U.S.C. App. III, § 6I.

⁴⁶⁶ *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004).

⁴⁶⁷ *Abu Ali*, 528 F.3d at 255.

⁴⁶⁸ *United States v. Claudio*, 44 F.3d 10, 14 (1st Cir. 1995) (rejecting as “patently absurd” the argument that “safeguards against wide-ranging discovery . . . would be sufficient to justify a conviction on secret evidence”).

⁴⁶⁹ Frank R. Baumgartner & Anna W. Dietrich, *Most Death Penalty Sentences Are Overturned. Here’s Why That Matters.*, WASH. POST (Mar. 17, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/>.

⁴⁷⁰ *Id.*

⁴⁷¹ Tracy L. Snell, *Capital Punishment, 2013—Statistical Tables*, BUREAU OF JUSTICE STATISTICS, 19 (Dec. 19, 2014), <https://bjs.ojp.gov/content/pub/pdf/cp13st.pdf>.

offenses under 10 U.S.C. §950(t) including murder in violation of the law of war, terrorism, and conspiracy.⁴⁷² Under federal law, capital punishment has long been considered an acceptable punishment for aggravated murder and terrorism resulting in death, so the decision to seek the death penalty in the 9/11 and *U.S.S. Cole* cases cannot be considered particularly unusual. However, attorneys may bring several constitutional challenges to death sentences imposed for either crime. Additionally, the ever-present issue of torture of the detainee-defendants may undermine any death sentence if a federal court decides to punish government misconduct by barring the death penalty.⁴⁷³ First, this Report will examine what rules or case law may be binding on the sentencing process and appeals of sentences in military commissions. Next, this Report will examine the constitutional requirements for federal death sentences and potential challenges under the Eighth Amendment.

1. Rules and Binding Precedent for Potential Death Sentences

Although the Guantánamo military commissions have been operating for nearly two decades and early assumptions were that the commissions would quickly impose the death penalty on detainees, no commission has ever imposed the death sentence on any detainee.⁴⁷⁴ This means that there is no precedent within these courts regarding death sentences, although Chapter X of the Rules for Military Commissions covers sentencing and what factors may be considered by the panel. R.M.C. §1001(b)(2) provides that “evidence in aggravation” may be presented by trial counsel, and R.M.C. §1001(c) allows the defense to present “matters in extenuation” and “matters in mitigation” to either lessen the punishment or provide grounds for a clemency recommendation.⁴⁷⁵ However, it may be appropriate to consider the precedent established by courts-martial decisions, since the rules surrounding sentencing in courts-martial similarly allow trial counsel to present evidence of aggravating factors and allow the accused to present evidence in extenuation and mitigation.⁴⁷⁶

Generally, legal interpretations by most Article III courts are not necessarily binding precedent for Article I courts and vice versa.⁴⁷⁷ However, courts-martial precedent shows that in cases involving death penalty sentencing, the courts turn to federal and Supreme Court interpretations and precedent. For instance, in its review of the capital case of Major Nidal Hasan, who killed thirteen and wounded thirty in a mass shooting at Fort Hood, the United States Army Court of Criminal Appeals relied heavily on Supreme Court determinations and reasoning in *Furman v. Georgia*, *Gregg v. Georgia*, and *Coker v. Georgia* to determine that Hasan was allowed to forgo presenting mitigation evidence as his own counsel.⁴⁷⁸

⁴⁷² 10 U.S.C. § 950(t) (2018).

⁴⁷³ Jess Bravin & Andrew Restuccia, *Alleged 9/11 Mastermind Open to Helping Victims’ Lawsuit if U.S. Spares Him Death Penalty*, WALL ST. J. (July 29, 2019), <https://www.wsj.com/articles/alleged-9-11-mastermind-open-to-helping-victims-lawsuit-if-he-isnt-executed-11564426390>.

⁴⁷⁴ *Military*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/military> (last visited Dec. 21, 2021).

⁴⁷⁵ R.M.C. § 1001(b)(2); R.M.C. § 1001(c).

⁴⁷⁶ R.C.M. § 1004(b)(–) - (3).

⁴⁷⁷ Anna C. Henning, Cong. Rsch. Serv., RL34697, *Supreme Court Appellate Jurisdiction Over Military Court Cases 5* (2009), <https://sgp.fas.org/crs/misc/RL34697.pdf>.

⁴⁷⁸ See Kyle Rempfer, *What Death Row Executions May Mean for These Four Soldiers at Leavenworth*, ARMY TIMES (July 30, 2019), <https://www.armytimes.com/news/your-army/2019/07/30/what-death-row-executions-may-mean-for-these-four-soldiers-at-leavenworth/>; *United States v. Hasan*, 80 M.J. 682, 701 (A. Ct. Crim. App. 2020).

Accordingly, since the military commission rules regarding sentencing are similar to the courts-martial rules regarding sentence, it is appropriate to consider Supreme Court precedent in determining whether death sentences imposed by a military commission may withstand constitutional challenges.

2. Eighth Amendment Requirements and Challenges

Any processes by which an individual is sentenced to death must be conducted with fundamental fairness to not violate the Fifth Amendment's due process clause.⁴⁷⁹ Certain aspects of military commission sentencing processes, such as the composition of the sentencing panel, nominally raise due process concerns. However, in 2020, the D.C. Circuit Court determined that the due process clause does not apply to Guantánamo detainees in *Al-Hela v. Trump*.⁴⁸⁰ While the D.C. Circuit has granted a rehearing en banc to *Al-Hela* and vacated this decision, courts have repeatedly refused to make a concrete determination on this matter.⁴⁸¹ It remains to be seen whether future decisions on due process rights for detainees will apply it broadly or to narrower understandings of it like in *Qassim v. Trump*, where the D.C. Circuit found that the District Court erred in applying a decision in *Kiyemba v. Obama* as a categorical bar on constitutional procedural protections on Guantánamo detainees.⁴⁸²

That said, the constitutionality of the sentencing decision itself may be challenged through the Eighth Amendment, as it has been in previous courts-martial cases.⁴⁸³ Capital punishment is not per se cruel and unusual in violation of the Eighth Amendment, so long as the individualized factors of the offense and the offender are taken into consideration.⁴⁸⁴ However, a penalty must be proportional to the crime.⁴⁸⁵ Death sentences handed down by the military commission would likely not satisfy both the individualized sentencing principal and the proportionality requirement.

Juries must consider the individual circumstance of the defendant in imposing a death sentence,⁴⁸⁶ taking into account mitigating factors and aggravating circumstances.⁴⁸⁷ While federal law specifies mitigating and aggravating factors to be considered in determining whether a sentence of death is justified,⁴⁸⁸ the statute regarding military commissions does not name these factors.⁴⁸⁹ It simply indicates which crimes may be punishable by death.⁴⁹⁰ Anticipating that these death penalties will be appealed to the D.C. Circuit, we must consider which federal mitigating and aggravating factors may be

⁴⁷⁹ U.S. CONST. amend. V.

⁴⁸⁰ *Al-Hela v. Trump*, 972 F.3d 120 (D.C. Cir. 2020).

⁴⁸¹ Chan, *supra* note 365.

⁴⁸² *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019); *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

⁴⁸³ See *United States v. Hasan*, 80 M.J. 682 (A. Ct. Crim. App. 2020), *review dismissed*, 81 M.J. 48 (C.A.A.F. 2021).

⁴⁸⁴ U.S. CONST. amend. VIII; *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁴⁸⁵ See *Coker v. Georgia*, 433 U.S. 584, 584 (1977).

⁴⁸⁶ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁴⁸⁷ *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁴⁸⁸ 18 U.S.C. § 3592 (2006).

⁴⁸⁹ 10 U.S.C. § 950t (2018).

⁴⁹⁰ 10 U.S.C. § 950t (the crimes of attacking civilians, terrorism, murder, intentionally causing serious bodily injury, and conspiracy are punishable by death if they result in death of one or more victims).

applicable. While the Supreme Court has held that state mandates requiring the death penalty when the jury found that aggravating and mitigating circumstances weighed equally was constitutional, no such mandate exists for federal death sentence proceedings.⁴⁹¹

Impaired capacity is a listed mitigating factor, and it is defined, in part, as when the defendant's capacity to appreciate the wrongfulness of the defendant's conduct is significantly impaired.⁴⁹² In June 2020, Colonel Douglas K. Watkins ruled that war court judges may reduce prison sentences of individuals as a remedy for torture by the Central Intelligence Agency (CIA) and ordered a fact-finding hearing for the use of torture in the case of Majid Khan, who pleaded guilty in 2012 to charges related to the 2003 bombing of a Marriott hotel in Jakarta.⁴⁹³ However, in May 2021, Khan agreed to not call CIA officers to testify in his case in exchange for reducing his sentence to eleven to fourteen years with time served.⁴⁹⁴ This agreement requires that the defense request vacatur of the previous decision, which could have been used by other detainees in their own trials.⁴⁹⁵

However, in the 2020 ruling, Colonel Watkins noted that the D.C. Circuit had "left an opening for remedies in egregious cases of torture."⁴⁹⁶ In *United States v. Rezaq*, the court suggested that there be a "very limited" exception for outrageous government conduct claims in the cases of torture, brutality, and similar conduct.⁴⁹⁷ In *Rochin*, conviction of a defendant was overturned because the method by which admitted evidence was obtained "shocked the conscience."⁴⁹⁸ The traditional remedy for these pretrial misconducts is the exclusionary rule, and courts have oversight authority when government activity violates protected rights such as the right to be free from cruel and unusual punishment.⁴⁹⁹

In the 9/11 and *U.S.S. Cole* cases, although the right to seek relief through the military commission's ruling in the *Khan* case will soon be vacated, they may seek relief on appeal to the D.C. Circuit. Many of them were tortured while in pretrial custody at CIA black sites—Khalid Sheikh Mohammed, the lead defendant in the 9/11 case, was waterboarded 183 times and sleep deprived.⁵⁰⁰ Ammar al-Baluchi was "walled," sleep-deprived, and hung by his wrists.⁵⁰¹ Mustafa al Hawsawi's lawyers contend he suffers rectal damage as a result of being raped while in CIA custody.⁵⁰² Al-Nashiri, the

⁴⁹¹ *Kansas v. Marsh*, 548 U.S. 163 (2006).

⁴⁹² 18 U.S.C. § 3592(a)(1).

⁴⁹³ See Ruling: Def. Motion for Pretrial Punishment Credit and Other Related Relief at 29–42, *United States v. Khan*, AE 033k, (Mil. Comm. Jun. 4, 2020).

⁴⁹⁴ Carol Rosenberg & Julian E. Barnes, *Guantánamo Detainee Agrees to Drop Call for C.I.A. Testimony*, N.Y. TIMES (May 14, 2021), <https://www.nytimes.com/2021/05/14/us/politics/guantanamo-detainee-cia-testimony.html>.

⁴⁹⁵ Luban, *supra* note 197.

⁴⁹⁶ See Ruling: Def. Motion for Pretrial Punishment Credit and Other Related Relief, *supra* note 494, at 19-20.

⁴⁹⁷ *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998).

⁴⁹⁸ *Rochin v. California*, 342 U.S. 165, 169 (1952).

⁴⁹⁹ See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *Hampton v. United States*, 425 U.S. 484, 489 (1976).

⁵⁰⁰ Carol Rosenberg, *Trial Guide: The Sept. 11 Case at Guantánamo Bay*, N.Y. TIMES (July 8, 2021), <https://www.nytimes.com/article/september-11-trial-guantanamo-bay.html>.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

defendant in the *U.S.S. Cole* case, has been described as “one of the most damaged victims of torture,” by Sondra Crosby, an American psychiatric expert on the after-effects of torture who was called to examine him by al-Nashiri’s defense team.⁵⁰³ This is comparable to the torture described in *Rochin*, in which an emetic solution was forced into the defendant’s stomach to obtain two pills, which was later admitted as evidence.⁵⁰⁴

It is likely that the D.C. Circuit will apply the exclusionary rule and find any evidence obtained by torture inadmissible. In 2019, Colonel Gary Brown stated that prosecutors are unlikely to win death penalty convictions because much of the evidence is tainted by torture.⁵⁰⁵ If that is indeed the case, and all evidence obtained via torture is deemed inadmissible, the case against many of the defendants would likely fall apart. It would take an enormous amount of litigation and declassification of information, but, weighing this alone, the death penalty would likely not stand federal court scrutiny.

In *Sochor v. Florida*, the Supreme Court held that heinousness was properly found to be an aggravating factor when the defendant strangled a conscious victim.⁵⁰⁶ Furthermore, in *Gregg*, the court ruled that a petitioner’s vagueness challenge to aggravating circumstances could be rejected if the murder was “outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.”⁵⁰⁷ The Court also ruled that juries could consider the defendant’s previous criminal convictions and whether the defendant caused a “great risk of death to more than one person” when considering whether there was an aggravating factor allowing the death penalty or not.⁵⁰⁸ 18 U.S.C. § 3592(c)(16) also lists “multiple killings or attempted killings” as an aggravating factor.⁵⁰⁹ The defendant must have intentionally killed or attempted to kill more than one person in a single criminal episode.⁵¹⁰

There is little doubt that the aggravating factors requirement would be met for the 9/11 defendants. The 9/11 attacks resulted in the deaths of 2,977 individuals, and roughly 25,000 people were injured in a series of four coordinated attacks.⁵¹¹ In 2009, the Military Commission received a document written by Khalid Sheikh Mohammed and signed by all defendants in the 9/11 case declaring “Killing you and fighting you, destroying you and terrorizing you, responding back to your attacks, are all considered to be great legitimate duty in our religion.”⁵¹²

A further issue in the 9/11 case is the joint nature of the proceedings. In *Kansas v. Carr*, the Supreme Court held

⁵⁰³ *In Guantánamo, An Alleged Al-Qaeda Killer Awaits Trial*, *ECONOMIST* (Jan. 14, 2017), <https://www.economist.com/international/2017/01/14/in-guantanamo-an-alleged-al-qaeda-killer-awaits-trial>.

⁵⁰⁴ *Rochin v. California*, 342 U.S. 165, 169 (1952).

⁵⁰⁵ Pfeiffer, *supra* note 92.

⁵⁰⁶ *Sochor v. Florida*, 504 U.S. 527, 530 (1992).

⁵⁰⁷ *Gregg v. Georgia*, 428 U.S. 153, 201 (1976).

⁵⁰⁸ *Id.*

⁵⁰⁹ 18 U.S.C. § 3592(c)(16).

⁵¹⁰ *Id.*

⁵¹¹ Jonathan Stempel, *Accused 9/11 Mastermind Open to Role in Victims’ Lawsuit if Not Executed*, *REUTERS* (July 30, 2019), <https://www.reuters.com/article/us-usa-sept-11-saudi-ksmohammed/accused-9-11-mastermind-open-to-role-in-victims-lawsuit-if-not-executed-idUSKCN1UO27M>.

⁵¹² Commission Order Regarding Pro Se Filing: “The Islamic Response to the Government’s Nine Accusations,” *United States v. Mohammed*, D-101 (Mil. Comm. Mar. 9, 2009).

that joint proceedings and sentencing of capital trials are not only permissible, but “preferable when the joined defendants’ criminal conduct arises out of a single chain of events.”⁵¹³ The two defendants alleged that evidence associating him with the other would not have been admitted had he been tried alone and that this prejudiced the jury against him by either associating him with his brother’s confession to their sister or to the portrayal of the other brother as an “incurable sociopath.”⁵¹⁴ The court ruled that it was improper to vacate a death sentence based on “speculation” of fundamental unfairness, determining that the judge’s instructions to the jury that evidence was “limited to only one defendant should not be considered by you as to the other defendant.”⁵¹⁵ The court also reasoned that the joint-sentencing may allow juries to arrive more reliably to conclusions, determine the respective role of each defendant, and reconcile conflicting theories of mitigation.⁵¹⁶

Currently, there are five co-defendants in the 9/11 trial. While their crimes arise from their contributions to the plan the 9/11 terror attack, the way in which they committed the crimes is different from defendant to defendant. Each is speculated to have had different roles and contributed in different ways, and joint proceedings and sentencings may help the jury assign responsibility to each defendant. There are a number of additional personal and individual details that set them apart from one another which are crucial to the sentencing phase—they were not picked up together, nor detained together while held at CIA black sites. They were not subject to the same pretrial punishments or treatments. As a result, joint proceedings could actually slow down the trials. Additionally, as stated above, these individual considerations could have a drastic impact on the constitutionality of death sentences imposed on the defendants.

The military commissions could very well instruct the twelve-person panel to consider and limit the evidence to each individual defendant, which could satisfy the court’s requirements as laid out in *Carr*. However, with the 9/11 attacks being so horrific and widely publicized, the five defendants in the 9/11 case already face an uphill battle in being considered as individuals with their own personalized circumstances and factors. Under *Carr*, a joint trial may fail to meet individualized sentencing standards. Federal statutes did not allow the death penalty for terrorism until the Federal Death Penalty Act of 1994, and consequently there are only fifteen prior cases in which prosecutors sought the death penalty for an accused terrorist.⁵¹⁷ Only one defendant, Timothy McVeigh, was actually executed.⁵¹⁸ Most recently, in 2015, Dzhokhar Tsarnaev was sentenced to death by a jury for participating in the terror attack on the 2013 Boston Marathon that killed three people and injured 264, although it was later overturned on grounds that the judge failed to mitigate the risk of juror bias.⁵¹⁹

Many of the rest, including Ted Kaczynski (the Unabomber) and Zacarias Moussaoui (who was convicted of

⁵¹³ *Kansas v. Carr*, 577 U.S. 108, 125 (2016).

⁵¹⁴ *Id.* at 123.

⁵¹⁵ *Id.* at 124.

⁵¹⁶ *Id.*

⁵¹⁷ Eli Hager, *America Hates Terrorists*, MARSHALL PROJECT (Jan. 27, 2015), <https://www.themarshallproject.org/2015/01/27/america-hates-terrorists>.

⁵¹⁸ *Id.*

⁵¹⁹ *United States v. Tsarnaev*, 968 F.3d 24 (1st Cir. 2020), *cert. granted*, 209 L.Ed.2d 463 (2021).

helping to plot the 9/11 attacks), were sentenced to life in federal prison.⁵²⁰ Moussaoui only narrowly avoided the death penalty, with one juror refusing to make the verdict unanimous.⁵²¹ Although the pool of sample cases is small, it is clear that jurors and judges are reluctant to impose the death penalty on convicted terrorists. It is also difficult to characterize potential death sentences for the 9/11 defendants when Moussaoui, who was similarly accused and convicted of plotting the 9/11 attacks, avoided the death penalty himself.

In the 9/11 case, several family members of victims have spoken of their relief that the case is finally starting, although little has been said on their preference for a capital or non-capital trial.⁵²² However, it is important to note that any constitutional challenges will likely delay the conclusion of these proceedings for a number of years, further delaying justice for both the victims of the 9/11 and *U.S.S. Cole* attacks and the detainee-defendants themselves. At the same time, the Constitution, the rule of law, and the federal appeals process require that the detainee-defendants be given the opportunity for a thorough review of their sentence.

Additionally, at least one of the co-defendants in the 9/11 case, Khalid Sheikh Mohammed, has previously expressed that he wished to be a martyr.⁵²³ Another, Walid bin Attash, also told the court, “You killed my brother who was younger than me during the war, and this is my wish to be in your hands.”⁵²⁴ Although, as of 2019, the defendants are allegedly no longer as interested in martyring themselves as they once were, executing politically motivated terrorists may still elevate them to “true martyr” status in the eyes of other Islamic extremists.⁵²⁵ If so, this may add further barriers to reaching the strategic counterterrorism objective of eliminating support for acts of terrorism, which remains a U.S. goal despite the recent withdrawal of troops from Afghanistan.⁵²⁶

It is true that death sentences handed down by the military commissions may very well withstand scrutiny in the federal courts. However, given the high threshold of review, public opinion on the death penalty and torture of the detainee-defendants, and the already prolonged proceedings, it is questionable whether pursuing the death penalty is the best course of action.

⁵²⁰ Hager, *supra* note 517.

⁵²¹ *Id.*

⁵²² Carol Rosenberg, *Trial for Men Accused of Plotting 9/11 Attacks Is Set for 2021*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/us/politics/sept-11-trial-guantanamo-bay.html>; Bill Tammeus, *End America’s Guantánamo Bay Chapter for Detainees and for 9/11 Families Like Mine*, USA TODAY (Jan. 27, 2021), <https://www.usatoday.com/story/opinion/voices/2021/01/27/biden-end-guantanamo-saga-for-prisoners-9-11-families-column/6671262002/>.

⁵²³ Elana Schor, “*I Want to Be a Martyr*”—*Alleged Planner of 9/11 Attacks Defiant in Face of Death Penalty*, GUARDIAN (June 5, 2008), <https://www.theguardian.com/world/2008/jun/06/alqaida.terrorism>.

⁵²⁴ *Id.*

⁵²⁵ Jess Bravin & Andrew Restuccia, *Alleged 9/11 Mastermind Open to Helping Victims’ Lawsuit if U.S. Spares Him Death Penalty*, WALL ST. J. (July 29, 2019), <https://www.wsj.com/articles/alleged-9-11-mastermind-open-to-helping-victims-lawsuit-if-he-isnt-executed-11564426390>; Thomas M. McDonnell, *The Death Penalty—An Obstacle to the “War on Terrorism?”*, 37 VAND. J. TRANS’AT’L L. 353, 403 (2004), <http://digitalcommons.pace.edu/lawfaculty/279/>.

⁵²⁶ Robert Burns & Lolita C. Baldour, *Explainer: When Is the US War in Afghanistan Really Over?*, AP NEWS (July 3, 2021), <https://apnews.com/article/joe-biden-europe-middle-east-afghanistan-government-and-politics-8ad5ac2d3fad1943daec1bce8f5442c6>.

VI.

THE ROLE OF FEDERAL COURTS

A. Possibility of Transfer to Federal Courts to Enter Guilty Pleas _____

The National Defense Authorization Act (NDAA), passed by Congress for the fiscal year 2011, included statutory restriction on the ability to transfer detainees from Guantánamo Bay.⁵²⁷ Congress passes a new NDAA each fiscal year, and recently passed NDAA for fiscal year 2022 once again contains this restriction. The NDAA presents a major obstacle to moving commission cases to an alternate venue, the most obvious of which would be federal courts. The same can be said for removing detainees.⁵²⁸

The legal restrictions impeding detainees' transfer are of two sorts. The first is the NDAA prohibition on the expenditure of Department of Defense (DOD) funds to transfer detainees from the detention facility to the United States for any reason, including for medical reasons.⁵²⁹ The second is a continuing appropriations bill prohibiting the use of other agencies' funds from being used to transfer detainees to the United States.⁵³⁰

In 2016, the Senate Armed Services Committee reported favorably on a version of the 2017 NDAA that would have allowed detainees in Guantánamo Bay “to plead guilty to federal court charges via video teleconference and to serve their sentences in foreign countries.”⁵³¹ In this proposed version, judges at the federal district court level would have jurisdiction to arraign, accept guilty pleas from, and enter judgments of conviction and sentence for individuals who are detained in Guantánamo Bay by video teleconference.⁵³² This use of video teleconferencing was permitted only “with the

⁵²⁷ National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2010).

⁵²⁸ Ashley Fuchs et al., *Congress Must Exclude the Provision Banning Transfers from GTMO to the U.S. from the 2022 NDAA*, Center for Ethics and Rule of Law (Dec. 10, 2021), <https://archive.law.upenn.edu/live/news/11413-congress-must-exclude-the-provision-banning/news/cecl-news>.

⁵²⁹ *Id.* § 1032.

⁵³⁰ Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. Law No. 112-10, § 1112, 125 Stat. 38, 104 (2011).

⁵³¹ BACKGROUND PAPER, GUANTÁNAMO PROVISIONS IN THE HOUSE AND SASC NDAA'S FOR FISCAL YEAR 2017 1 (HUM. RTS. FIRST, 2016), <https://www.humanrightsfirst.org/sites/default/files/Background-GTMO-Provisions-FY17-NDAA-House-SASC.pdf>.

⁵³² National Defense Authorization Act for Fiscal Year 2017, S. 2943, 114th Cong. § 1025(a) (2016).

consent of the individual.”⁵³³ It is worth considering such provisions in the 2023 NDAA.

Even without associated legislation, this option could become more available as the use of video conferencing is becoming more common within the military commission system. On November 18, 2020, a court proceeding for a detainee in Guantánamo Bay was held exclusively through video conferencing for the first time.⁵³⁴ This use of video conferencing to conduct a hearing is separate from the use of this technology during in-person hearings to permit witnesses to testify without traveling to Guantánamo Bay.⁵³⁵ Because of concerns about the spread of the coronavirus, a pretrial hearing that was initially planned to be held in Reston, Virginia, was cancelled.⁵³⁶ This hearing in the case of Majid Khan was also possible since one of his attorneys had been quarantined for two weeks, which meant that he was able to sit with Khan during the hearing.⁵³⁷ Khan had already plead guilty in 2012, so the virtual hearing was “to discuss witnesses for his sentencing.”⁵³⁸ In addition, the Pentagon set up a remote viewing site at Fort Meade, Maryland, for journalists to watch the proceedings in feeds that would have toggled between Guantánamo and Virginia; ordinarily reporters could travel to Guantánamo to observe the hearings.⁵³⁹

Nonetheless, the use of video conferencing for such purposes has been opposed by some defense attorneys in the 9/11 case, who assert that “they have a duty to consult regularly, and in court, with their clients and other defense team members.”⁵⁴⁰ Similar to the approach taken in the proposed exception in the 2017 NDAA, this concern about the wider use of video conferencing highlights the importance of ensuring that this technology is used only with detainee consent. Otherwise, there may be additional litigation concerning the use of video technology that could further delay resolution of cases.

As a part of “[t]he Coronavirus Aid, Relief, and Economic Security Act (CARES Act),” a 2020 bill that was passed in response to the COVID-19 pandemic, federal courts are authorized to conduct certain criminal pretrial hearings virtually.⁵⁴¹ Specifically, the use of video conferencing is permitted if:

the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President . . . with respect to the Coronavirus Disease 2019 (COVID-19) will materially affect the functioning of either the Federal courts generally or a particular district court of the United States.⁵⁴²

Ultimately, exploring the use of virtual hearings to mitigate the impact of NDAA transfer restrictions might

⁵³³ *Id.*

⁵³⁴ Carol Rosenberg, *Military Judge in U.S. Held Court by Video Link to Guantánamo Bay*, N.Y. TIMES (Nov. 18, 2020), www.nytimes.com/2020/11/18/us/politics/zoom-court-guantanamo-bay.html.

⁵³⁵ See R.M.C. 703(c)(3); R.M.C. 1001(e).

⁵³⁶ Rosenberg, *supra* note 534.

⁵³⁷ *Id.*

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ Pub. L. No. 116-136, § 15002, 134 Stat. 527 (2020).

⁵⁴² *Id.* at div. B.

lead to viable prosecutorial alternatives to the military commission. However, any effort to utilize video teleconferencing in a way that would permit detainees at Guantánamo Bay to be prosecuted and sentenced in a federal district court would almost certainly require defendant consent and create its own complex issues. Use of such technology for pretrial hearings, client consultation, and witness testimony would be less controversial.

B. Prosecution in Article III Courts

Under the 2009 Military Commissions Act (MCA), charges against unprivileged enemy belligerents must be filed by way of a military charge sheet, similar to how members of the U.S. military are charged at courts martial.⁵⁴³ The charges and specifications, in addition to listing the offense or offenses, must also clearly state the facts constituting any offense charged. The charges must be signed, under oath, by a person subject to chapter 47 of the title, stating that “the signer has personal knowledge of, or reason to believe, the matters set forth therein; and (2) that such matters are true in fact to the best of the signer’s knowledge and belief.”⁵⁴⁴ Under the 2009 MCA, these charges are to be served upon the accused and the military defense counsel “sufficiently in advance of trial to prepare a defense.”⁵⁴⁵ The thirty-two crimes triable by military commissions are enumerated in section 950t of the 2009 MCA.⁵⁴⁶ In contrast, federal prosecutors before a civilian court may choose from any of more than four thousand federal crimes.⁵⁴⁷

Where federal court is concerned, the Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .”⁵⁴⁸ An “infamous crime” is a crime punishable by death or by imprisonment for a term of over one year. On the other hand, petty offenses and misdemeanors for which no infamous punishment is prescribed may be prosecuted by information, meaning a charge sworn by a prosecutor.⁵⁴⁹

This right has been codified by the Federal Rules of Criminal Procedure. Rule 6 provides that “the court must order that one or more grand juries be summoned” when the public interest so requires.⁵⁵⁰ This grand jury may only indict if at least twelve jurors concur. The rule further stipulates that the court must order that enough legally qualified persons be summoned to form a grand jury of sixteen to twenty-three members.⁵⁵¹ Either party may challenge the grand jury “on the ground that it was not lawfully drawn, summoned, or selected.”⁵⁵² Parties may also move to dismiss an indictment handed down by the grand jury based on an objection to the grand jury or on an individual juror’s lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). However, the court

⁵⁴³ 10 U.S.C.A. § 948q.

⁵⁴⁴ *Id.*

⁵⁴⁵ 10 U.S.C.A. § 948s.

⁵⁴⁶ 10 U.S.C.A. § 950t (1)-(32).

⁵⁴⁷ Paul H. Hennessy, *Prosecution by Military Commission Versus Federal Criminal Court: A Comparative Analysis*, 75 *FED. PROBATION* 27 (2011), https://www.uscourts.gov/sites/default/files/75_1_5_0.pdf.

⁵⁴⁸ U.S. CONST. amend. V.

⁵⁴⁹ *Duke v. United States*, 301 U.S. 492 (1937).

⁵⁵⁰ Fed. R. Crim. P. 6.

⁵⁵¹ *Id.*

⁵⁵² *Id.*

must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least twelve qualified jurors concurred in the indictment.⁵⁵³ Rule 6 also outlines grand jury procedures regarding who may be present, disclosure of proceedings, discharging the grand jury, and excusing jurors.

Rule 7 provides that defendants in federal criminal court are charged by way of indictment or information.⁵⁵⁴ Misdemeanors, offenses punishable by imprisonment of one year or less, may be prosecuted in accordance with Rule 58(b)(1), while felonies, offenses (other than criminal contempt) punishable by death or by imprisonment of more than one year, must be prosecuted by an indictment.⁵⁵⁵ However, offenses punishable by imprisonment of more than one year may be prosecuted by information if the defendant, “in open court and after being advised of the nature of the charge and of the defendant’s rights,” chooses to waive prosecution by indictment.⁵⁵⁶ Rule 7 further stipulates that “[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government.”⁵⁵⁷

This section addresses the challenges imposed by the statute of limitations in Article III. courts. While an unprivileged enemy belligerent may be charged with any of the enumerated charges “at any time without limitation,”⁵⁵⁸ many civil and criminal causes of action are subject to statutes of limitations. Thus, if transferred to federal court for trial, it is likely that the prosecution would confront dismissal motions based on these limitations.

1. Right to Assistance of Counsel

Guantánamo detainees subject to the military commissions have the right to be represented by counsel. Under the 2009 MCA, the procedures and rules of evidence applicable in trials by general courts-martial of the United States are applicable in trials by military commission, unless otherwise provided by the statute.⁵⁵⁹ At a minimum, the rights of the accused under military commissions include:

(a)(1)(C)(i) When none of the charges sworn against the accused are capital, to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by either the defense counsel detailed or the military counsel of the accused’s own selection, if reasonably available.

(ii) When any of the charges sworn against the accused are capital, to be represented before a military commission in accordance with clause (i) and, to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense.

(D) To self-representation, if the accused knowingly and competently waives the assistance of counsel, subject to the provisions of paragraph (4).⁵⁶⁰

⁵⁵³ *Id.*

⁵⁵⁴ Fed. R. Crim. P. 7.

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ 10 U.S.C.A. § 950t.

⁵⁵⁹ 10 U.S.C.A. § 949a.

⁵⁶⁰ *Id.*

If transferred to Article III courts for criminal prosecution, detainees will be afforded the Sixth Amendment right “to have the Assistance of Counsel for his defense.”⁵⁶¹ This right attaches “at or after the time that judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arraignment.”⁵⁶² In *Moran v. Burbine*, the Court clarified that the Sixth Amendment right to the assistance of counsel “becomes applicable only when the government’s role shifts from investigation to accusation. For it is only then that the assistance of one versed in the ‘intricacies . . . of law,’ is needed to assure that the prosecution’s case encounters ‘the crucible of meaningful adversarial testing.’”⁵⁶³ But this line will automatically be crossed if such a shift in prosecution is implemented as it will necessitate an indictment to bring the defendants into Article III criminal jurisdiction. Furthermore, as these defendants are undoubtedly indigent, and because there is no plausible scenario where conviction could result in a non-confinement sentence, they would also be entitled to appointment of counsel at government expense.

2. Prohibition Against Use of Coerced Confessions in Evidence

Regardless of the forum, Guantánamo detainee litigation will have to confront the use of coerced confessions. Sections a, b, and d, of Article 31, Uniform Code of Military Justice (UCMJ) and the Military Rules of Evidence define the scope of the prohibition against the use of coerced confessions in courts martial.⁵⁶⁴ Those sections provide that no person subject to this chapter may “compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him”, “interrogate. . . a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense. . . and that any statement made by him may be used as evidence against him.” These provisions of the article are generally analogous to the *Miranda* rule in civilian court prohibiting the use of *presumptively* coerced statements absent proof of a *Miranda* warning and waiver. However, the article also addresses *actual* coerced statements, indicating that “[n]o statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.”⁵⁶⁵ The Military Rules of Evidence provide enhancement to this prohibition.

The 2009 MCA also addresses coerced statements in military commissions.⁵⁶⁶ Under that act, however, sections a, b, and d, of Article 31, UCMJ, are made explicitly inapplicable, a deliberate decision by Congress to exempt detainee statements from any *Miranda*-type warning and waiver requirement.⁵⁶⁷ However, *actual* coercion is addressed. The MCA provides that “[c]onfessions allegedly elicited through coercion or compulsory self-incrimination that are otherwise admissible are not to be excluded at trial unless their admission violates § 948r.”⁵⁶⁸ Statements obtained by the use of torture or by cruel, inhuman, or degrading treatment fall under this exclusion, “except against a person accused of

⁵⁶¹ U.S. CONST. amend. VI.

⁵⁶² *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

⁵⁶³ *Moran v. Burbine*, 475 U.S. 412, 430 (1986).

⁵⁶⁴ 10 U.S.C. § 831.

⁵⁶⁵ *Id.*

⁵⁶⁶ See Jennifer K. Elsea, Cong. Rsch. Serv., R40932, Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court, (2014), <https://fas.org/sgp/crs/natsec/R40932.pdf>.

⁵⁶⁷ 10 U.S.C. § 948b(d).

⁵⁶⁸ 10 U.S.C.A. § 949a(b)(3)(B).

torture or such treatment as evidence that the statement was made.”⁵⁶⁹ The act further provides that statements of the accused may be used as evidence in a military commission if the judge finds that the statement is reliable and sufficiently probative and either made voluntarily or “incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence.”⁵⁷⁰ This distinction highlights that the MCA does not afford detainees full constitutional protection against the admission of coerced confessions.

3. *Right to Confront Classified Evidence*

Whether Guantánamo detainee cases are held via military commission or Article III court, the protection of classified information will undoubtedly be a central issue. Classified information, as defined by Executive Order 13526, refers to information whose unauthorized disclosure “reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism.”⁵⁷¹ Both forums have established rules and procedures intended to balance the fundamental rights of defendants and the government’s national security interests.⁵⁷² In a federal criminal trial, the handling of classified information is codified in the Classified Information Procedures Act (CIPA),⁵⁷³ which has been modified and adapted to the military commissions by the 2009 MCA. While the two statutes share many provisions, there are a few key differences that must be considered in any proposal to transfer Guantánamo cases to Article III courts for trial.

The protection of classified information in military commissions is governed by the 2009 MCA. 10 U.S.C.A. § 949p-1 provides that “[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.”⁵⁷⁴ The act further provides that “[t]he judicial construction of the Classified Information Procedures Act (18 U.S.C. App.) shall be authoritative in the interpretation of this subchapter, except to the extent that such construction is inconsistent with the specific requirements of this chapter.”⁵⁷⁵ Subchapter V of the MCA provides that a military judge cannot, under any circumstances, order the release of classified information to anyone not authorized to receive it. If the government seeks to “delete, withhold or . . . obtain other relief with respect to . . . classified information,” the trial counsel must “submit a declaration invoking the United States’ classified information privilege and setting forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause.”⁵⁷⁶ Once such a declaration has been made, the military judge may only authorize the discovery of or access to the pertinent information if they determine that the evidence is “noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution’s case, or to sentencing.”⁵⁷⁷ If disclosure or access is deemed necessary, the military judge must grant the trial counsel’s request to delete or withhold specified items of classified

⁵⁶⁹ 10 U.S.C.A. § 948r.

⁵⁷⁰ *Id.*

⁵⁷¹ Exec. Order No. 13526, 75 C.F.R. 707 (2009).

⁵⁷² Harry Graver, *The Classified Information Procedures Act: What It Means and How It’s Applied*, LAWFARE (Nov. 20, 2017), <https://www.lawfareblog.com/classified-information-procedures-act-what-it-means-and-how-its-applied>.

⁵⁷³ 18 U.S.C. App. III.

⁵⁷⁴ 10 U.S.C.A. § 949p-1.

⁵⁷⁵ *Id.*

⁵⁷⁶ 10 U.S.C.A. § 949p-4.

⁵⁷⁷ *Id.*

information; to substitute a summary for classified information; or to substitute a statement admitting relevant facts that the classified information or material would tend to prove, so long as the alternative procedure would provide the accused with substantially the same ability to make a defense as would access to the classified information.⁵⁷⁸ Upon declaration of risk of disclosure of classified information to the military commission by an appropriate official, any hearing regarding the handling of such material may be held in camera.⁵⁷⁹ The detainee may be excluded from these in camera hearings in order to protect the classified nature of the material; while the detainee is not permitted to access information regarding the source of the evidence, the detainee's defense counsel is allowed to be present to advocate for disclosure of the information on behalf of the detainee.⁵⁸⁰

If a detainee is transferred to federal court, disclosure procedures would be fully enforced under CIPA. Section 3 requires the court to issue a protective order "against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case."⁵⁸¹ This restriction applies to defense attorneys, who must obtain a security clearance to access classified information, as well as some defendants.⁵⁸² Under Section 4, the government, upon a sufficient showing, may "delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove."⁵⁸³ The court may reject the government's substituted or redacted version as an insufficient proxy for the original evidence, the decision is made *ex parte* without the defense counsel's knowledge.⁵⁸⁴ Under Section 5, defendants must, within the specified time, provide a written notice to the attorney for the United States and the court if he "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant."⁵⁸⁵ Section 6 provides that, upon request by the government, the court is required to hold a pretrial evidentiary hearing "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding."⁵⁸⁶ This hearing can be held in camera, although both parties may attend. Upon the court's authorization of disclosure of specific classified information, the government may move to substitute or summarize the evidence, similar to Section 4, provided that the defense has substantially the same ability to make its case.⁵⁸⁷

While these outlined procedures are intended to strike a fair balance between the rights of defendants and the national security interests of the United States, the act has still been the subject of significant controversy. Some constitutional challenges to the act have been repeatedly litigated in court, including the defendant's access to information and the pretrial notice of intended use.

⁵⁷⁸ *Id.*

⁵⁷⁹ 10 U.S.C.A. § 949p-6.

⁵⁸⁰ Garcia et al., *supra* note 293.

⁵⁸¹ 18 U.S.C. app. III § 3.

⁵⁸² Graver, *supra* note 572.

⁵⁸³ 18 U.S.C. app. § 4.

⁵⁸⁴ Garcia et al., *supra* note 293.

⁵⁸⁵ 18 U.S.C. app. III § 5.

⁵⁸⁶ 18 U.S.C. app. III § 6.

⁵⁸⁷ *Id.*

A number of defendants have challenged Section 3 of CIPA, which requires the court to issue protective orders and limits access to disclosed classified information. First, defendants argue that the procedures are a violation of the Sixth Amendment. For example, in *United States v. Bin Laden*, defendant Odeh, who was later joined by defendants Mohammed and El-Hage at oral argument, filed a motion objecting to the proposed protective order.⁵⁸⁸ They argued that the court lacked the authority to require counsel to obtain security clearance and that, even if the court did have that authority, exercising it would violate their Sixth Amendment right to counsel.⁵⁸⁹ In denying the defendant's motions, the Court held that imposition of a mandatory security clearance procedure would not violate defendants' rights under the Sixth Amendment.⁵⁹⁰ Although the court recognized the defendant's concern regarding the government's power to disqualify the chosen counsel, it ultimately determined that "the procedures governing the clearance process, when combined with the Court's vigilance in responding to questions of potential abuse in the application process, will be sufficient to protect the Moving Defendants' rights."⁵⁹¹ It follows that the procedures under Section 3 of CIPA do not violate a defendant's Sixth Amendment right, as they sufficiently balance a defendant's ability to put forth a defense and the government's interest in the protection of classified information.⁵⁹²

The Second Circuit took up the issue on appeal in *In re Terrorist Bombings of U.S. Embassies in E. Afr.* El-Hage argued that the protective order entered by the District Court pursuant to CIPA violated his Fifth and Sixth Amendment rights on various grounds—"(1) Sixth Amendment right to counsel, (2) Sixth Amendment right to confront the witnesses and evidence against him, (3) Fifth Amendment right to testify at trial, and (4) Fifth Amendment and Sixth Amendment rights to present a defense. El-Hage also contended that his exclusion from hearings at which classified material would be discussed violated his (5) Fifth Amendment and Sixth Amendment rights to be present at a crucial stage in his trial."⁵⁹³ The court found that the unauthorized disclosure of the classified evidence posed the risk of a "particularly disastrous security breach" and that the restrictions were appropriate for the "evil they intended to prevent."⁵⁹⁴ They further concluded that "the exclusion of El-Hage from hearings at which classified information was discussed—a consequence of the clearance requirement permitted by CIPA and applicable regulations, and imposed by the District Court—did not violate El-Hage's due process right to be present at a crucial stage in his trial," as a fair and just CIPA hearing would not be impeded by his absence.⁵⁹⁵ The finding that Section 3 does not violate the defendant's Fifth and Sixth Amendment rights has subsequently been confirmed.⁵⁹⁶

⁵⁸⁸ *United States v. Bin Laden*, 58 F. Supp. 2d 113, 116 (S.D.N.Y. 1999), 'ff'd sub nom.'

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.* at 119–21.

⁵⁹¹ *Id.* at 121.

⁵⁹² Graver, *supra* note 572.

⁵⁹³ *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 115 (2d Cir. 2008).

⁵⁹⁴ *Id.* at 128.

⁵⁹⁵ *Id.* at 130. In *United States v. Bell*, the Second Circuit determined four factors in evaluating defendant's right to be present: (1) justification for barring the defendant, the need to avoid jeopardizing lives, was compelling, (2) defendant's exclusion was necessary, (3) defendant's defense counsel was permitted to participate on defendant's behalf, and (4) the substance of the matters discussed at the hearing bore no relationship to the question of the defendant's guilt or innocence. See *United States v. Bell*, 464 F.2d 667, 672 (2d Cir.1972) (finding that a district court had properly excluded a criminal defendant from an in camera hearing at which a witness discussed information that was sensitive for public safety reasons and fell outside the personal knowledge of the defendant).

⁵⁹⁶ Graver, *supra* note 572.

Defendants have also argued that Section 5, requiring a defendant to provide notice of any “classified information that he reasonably expects to disclose . . . in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant,” violates their rights under the Fifth Amendment (self-incrimination), Sixth Amendment (ability to confront accusers), and the due process clause.⁵⁹⁷ However, the federal district court rejected each of these arguments in *United States v. Lee*. Lee first argued that the notice and hearing requirements of § 5 and § 6 violate his Fifth Amendment privilege against self-incrimination because they force him to reveal classified aspects of his own trial testimony.⁵⁹⁸ The court found that this argument was misplaced, as CIPA merely requires a general disclosure as to what classified information the defense expects to use at trial, not a disclosure of whether or not he will testify or what he will testify about. The court further noted that the concept of pretrial disclosure is not a novel one, citing various provisions of the Federal Rules of Criminal Procedure.⁵⁹⁹

Lee next contended that § 5 and § 6 violate his Sixth Amendment right to confront and cross-examine government witnesses because the “prosecution can shape its case-in-chief to blunt the force of the defense cross examination” and the advance notice would “impede effective defense cross-examination.”⁶⁰⁰ However, the court found that Lee failed to demonstrate that CIPA renders opportunity to cross-examine witnesses ineffective because CIPA does not require the defense to reveal who will be cross-examined or what questions they will be asked.⁶⁰¹ Finally, the Court rejected Lee’s argument that CIPA’s disclosure requirements violate the due process clause by imposing a burden on the defense without imposing a reciprocal burden on the prosecution.⁶⁰² The court rejected the notion that the burden is one-sided, as the prosecution has reciprocal duties in a Section 6 hearing. Finding that “the burdens of discovery under CIPA and the Federal Rules of Criminal Procedure are carefully balanced,” the court rejected the defendant’s due process claim.⁶⁰³ In summary, *United States v. Lee* demonstrates that the framework for determining the use of classified information under CIPA is properly balanced to protect the Fifth and Sixth Amendment rights of defendants.

Thus, while a transfer to federal court for trial would impose slightly different procedures under CIPA, it is likely that any constitutional challenges to the procedures would likely fail. The litigation in *United States v. Bin Laden* and *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, while establishing important case law on the constitutionality of CIPA, more importantly demonstrates the ability of the federal courts to effectively litigate terrorism cases. However, it must be noted that the over-classification of Guantánamo will likely complicate these issues.

4. Right to Confront Witnesses, Compulsory Process, and Evidentiary Questions

Were Guantánamo detainee litigation to take place in Article III courts, detainees would enjoy the right to compulsory process for obtaining the appearance of witnesses who reside in the United States or are U.S. citizens located abroad. This right to compulsory process would even enable federal courts to compel the testimony of other enemy combatants held at Guantánamo. This would provide an important tool for detainees seeking to prove that they were

⁵⁹⁷ *Id.*

⁵⁹⁸ *United States v. Lee*, 90 F. Supp. 2d 1324, 1326 (D.N.M. 2000).

⁵⁹⁹ *Id.* at 1327.

⁶⁰⁰ *Id.* at 1328.

⁶⁰¹ *Id.* at 1328–29.

⁶⁰² *Id.* at 1329.

⁶⁰³ *Id.*

tortured while in U.S. custody, thus enabling them to invalidate confessions gained under coercion or to exclude evidence that was illegally obtained.

The Sixth Amendment states that “in all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him.”⁶⁰⁴ In *Washington v. Texas*, the Supreme Court held that “[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”⁶⁰⁵

The compulsory process right in federal court is defined “by the ability of the district court to obtain the presence of a witness through service of process.”⁶⁰⁶ In *United States v. Moussaoui*, the government appealed the district court’s order to produce enemy combatant witnesses for the purpose of deposing them, arguing that “because the witnesses are noncitizens outside the territorial boundaries of the United States, there is no means by which the district court can compel their appearance on Moussaoui’s behalf” and that, even if the district court had the power to reach the witnesses, “its exercise of that power is curtailed by the reality that the witnesses are in military custody in time of war, and thus requiring them to be produced would violate constitutional principles of separation of powers.”⁶⁰⁷ The U.S. Court of Appeals for the Fourth Circuit rejected the argument, affirming the district court’s order but noting that it is a “well established and undisputed principle that the process power of the district court does not extend to foreign nationals abroad.”⁶⁰⁸ The Fifth Circuit reaffirmed this notion in *United States v. Zabaneh* when it held that “[i]t is well established, however, that convictions are not unconstitutional under the Sixth Amendment even though the United States courts lack power to subpoena witnesses, (other than American citizens) from foreign countries.”⁶⁰⁹

Hearsay evidence is normally inadmissible at trial, pursuant to the Federal Rules of Evidence, subject to a long list of exceptions. However, when hearsay is offered as a substitute for the testimony of an unavailable witness it may implicate the Sixth Amendment right to confrontation. Even where such hearsay is admissible pursuant to the Federal Rules of Evidence, it will be excluded if it qualifies as “testimonial” in nature unless the defendant had a prior opportunity to subject the declarant to adversarial testing.

In *Crawford v. Washington*, the Supreme Court addressed the intersection of hearsay exceptions and the defendant’s Sixth Amendment right to confront witnesses against him.⁶¹⁰ The Court held that “testimonial” hearsay statements made to the police may be used at trial only if the declarant has become unavailable, and the defendant has had a meaningful prior opportunity to cross-examine the accuser.⁶¹¹ The meaning of “testimonial” statements has not been fully defined, although both *Crawford* and subsequent Supreme Court decisions indicate the proper inquiry to be “whether a reasonable person

⁶⁰⁴ U.S. CONST. amend. VI.

⁶⁰⁵ *Washington v. Texas*, 388 U.S. 14, 19 (1967).

⁶⁰⁶ *United States v. Moussaoui*, 382 F.3d 453, 464 (4th Cir. 2004).

⁶⁰⁷ *Id.* at 463.

⁶⁰⁸ *Id.* at 463–64.

⁶⁰⁹ *United States v. Zabaneh*, 837 F.2d 1249, 1259–60 (5th Cir. 1988).

⁶¹⁰ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁶¹¹ *Id.* at 55.

in the declarant's position would have expected his statements to be used at trial."⁶¹² For example, police investigative records, such as lab reports of drug tests,⁶¹³ statements by victims and witnesses made to police after the investigation has begun describing the defendant's conduct, and depositions, affidavits, transcripts of prior testimony, and other formalized statements are testimonial.⁶¹⁴ However, emergency 911 calls that are made to seek help,⁶¹⁵ statements to police about a suspect's identity, type of vehicle, and state of mind that will assist them in resolving an "ongoing emergency" where the suspect is still at large,⁶¹⁶ and documents and hearsay statements admitted to lay an evidentiary foundation are not testimonial.⁶¹⁷

5. *Hearsay Evidence in the Commissions*

The protections afforded under the confrontation clause apply to both civilian and military proceedings.⁶¹⁸ While the operation of these protections in federal court is relatively clear, the more disputed issues arise in the application of the confrontation clause to hearsay testimony in military commissions.⁶¹⁹ Some scholars have argued that military commissions are outside the scope of the confrontation clause, proposing that "a testimonial statement is a uniquely civilian concept."⁶²⁰ This argument stems from the fact that, even if the Sixth Amendment applies at Guantánamo, the confrontation clause "does not bar out-of-court statements in a wartime prosecution because those statements are not the kind of hearsay evidence that implicates the confrontation clause."⁶²¹ On the other hand, some have proposed that the Obama administration's acceptance of Article 75 of Additional Protocol I to the Geneva Conventions as customary international law for international armed conflicts may have extended the application of the confrontation clause to defendants in military commissions.⁶²² Article 75 relevantly provides that "anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."⁶²³ Arguably the same rule should be extended to

⁶¹² Garcia et al., *supra* note 293 (citing United States v. Udeozor, 515 F.3d 260 (4th Cir. 2008) (citing decisions by the First, Second, Third, Fourth, Seventh, and Tenth Circuits).

⁶¹³ Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

⁶¹⁴ Crawford v. Washington, 541 U.S. 36 (2004).

⁶¹⁵ Davis v. Washington, 547 U.S. 813 (2006).

⁶¹⁶ Michigan v. Bryant, 562 U.S. 344, 364 (2011).

⁶¹⁷ See Speers v. State, 999 N.E.2d 850, 855 (Ind. 2013) (evidence establishing chain of custody).

⁶¹⁸ See Garcia et al., *supra* note 293.

⁶¹⁹ Mohamed Al-Hendy, Article III Courts v. Military Commissions: A Comparison of Protection of Classified Information and Admissibility of Evidence in Terrorism Prosecutions, 50 ST. MARY'S L.J. 787 (2019), <https://commons.stmarytx.edu/thestmaryslawjournal/vol50/iss3/2>.

⁶²⁰ Christina M. Frohock, *Military Justice as Justice: Fitting Confrontation Clause Jurisprudence into Military Commissions*, 48 NEW ENG. L. REV. 255, 257 (2014).

⁶²¹ *Id.* at 287.

⁶²² Al-Hendy, *supra* note 619, at 801.

⁶²³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

GTMO detainees captured in a non-international armed conflict.⁶²⁴

The procedural application of hearsay rules varies between federal civilian courts, courts-martial, and military commissions. The procedural rules regarding limitations on the usage of hearsay evidence are similar under the Federal Rules of Evidence and Military Rules of Evidence.⁶²⁵ Under both frameworks, hearsay is generally inadmissible unless an exception to the hearsay rule applies.⁶²⁶ Both sets of rules also provide a “residual exception” for statements deemed to be of sufficient trustworthiness.⁶²⁷ For example, Rule 807 of the Federal Rules of Evidence provides that a hearsay statement is not excluded if the statement “is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement,” provided that the statement “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.”⁶²⁸ Rule 807 of the Military Rules of Evidence has a similar provision.⁶²⁹

By contrast, the procedural rules governing the restriction of the use of hearsay evidence in military commissions are more lenient. The 2009 MCA specifically provides for the expansion of the rules under courts-martial in cases in which the party seeking to introduce the evidence notifies the adverse party sufficiently in advance to provide “a fair opportunity to meet the evidence” and certain other fairly minimal conditions are met, such as that the statement is offered as evidence of a material fact and “direct testimony from the witness is not available as a practical matter.”⁶³⁰

Under this provision, hearsay evidence that is admissible in a military commission could be inadmissible in trial before an Article III court or courts-martial. Thus, if Guantánamo detainees were transferred to Article III courts or general courts-martial tribunals for trial, it is likely that both parties would come up against evidentiary challenges. For example, while the scope of inculpatory evidence available to prosecutors would be limited in a federal civilian court, so too would the scope of exculpatory evidence available to defendants.⁶³¹ Regardless of the venue, hearsay will undoubtedly be an issue of contention in the prosecution of any individual captured in the war on terror, as judges must consider “not only a witness’s location, but also ‘the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witnesses.’”⁶³² Legal considerations aside, finding witnesses and bringing them to court poses a significant practical problem that must be overcome in the trial of any Guantánamo detainee.

⁶²⁴ See <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>

⁶²⁵ See Garcia et al., *supra* note 293.

⁶²⁶ FED. R. EVID. 802; MIL. R. EVID. 802.

⁶²⁷ FED. R. EVID. 807; MIL. R. EVID. 807.

⁶²⁸ FED. R. EVID. 807.

⁶²⁹ *Id.*

⁶³⁰ 10 U.S.C.A. § 949a.

⁶³¹ Garcia et al., *supra* note 293.

⁶³² Frohock, *supra* note 620 (citing MCA of 2009, 10 U.S.C. § 949a(b)(3); see MIL. COMM. R. EVID. 803; *cf.* MCA of 2009 § 949a(b)(1) (allowing Secretary of Defense to create exceptions to court-martial rules for use in military commissions “as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities”).

C. Confronting the Challenges to Detainee Transfer to the United States _____

The current statutory scheme substantially limits the scope of options available to the government in transferring detainees held at GTMO. Specifically, under current U.S. law, congressionally appropriated funds are also prohibited for use to transfer detainees into the United States.⁶³³ As a result, the limited options available to reduce the total detainee population at GTMO include transferring detainees to their home country, if possible, or transferring to a third country for possible detention or monitoring.

Available data also indicates that the American public remains largely opposed to closing the detention facility and the transferring of detainees to the continental United States. For example, a 2016 CNN/ORC poll found that 56 percent of respondents opposed closing the facility, while only 40 percent supported the idea.⁶³⁴ Thus, prevailing public sentiment surrounding the detention center's closure provides the backdrop to the bleak political prospects for closure and transferring the remaining detainees to the United States for trial or sentencing.

Given the current statutory and political restraints virtually excluding the possibility of detainee transfers to the United States for trial proceedings, any comprehensive analysis of the options for transfer must acknowledge its theoretical nature. In that vein, this section explores the legal options for transferring detainees to federal district court beyond the current statutory limitations, discusses prior case precedent for transferring detainees from a military commission to federal district court, and analyzes the procedural similarities and differences between the military commissions and federal court relative to pleading guilty and pretrial agreements.

Despite the statutory prohibitions on expenditures for detainee transfers to federal court, a defendant can be transferred for sentencing purposes pursuant to President George W. Bush's original military order establishing the military commissions, provided that 2022 NDAA Sections 1032-35 are not renewed and no further restrictions are enacted.⁶³⁵ Section 7(e) of the November 2001 Military Order provided that the president reserved the authority to direct the secretary of defense to transfer to a governmental authority control of any individual subject to the order.⁶³⁶ Accordingly, the language of the military order creates the possibility that a person subject to the order might be transferred to some other governmental authority for trial, or transferred to the federal system for post-trial procedures, including sentencing and carrying out sentences.⁶³⁷

There is precedent for transferring GTMO detainees from a military commission system to the federal district court system for trial, sentencing, and the execution of sentences. Ahmed Khalfan Ghailani, a Tanzanian national held at the Guantánamo Bay detention facility for almost three years, was the first and only GTMO detainee to be tried and subsequently convicted in a federal district court.⁶³⁸ Ghailani was transferred from GTMO to the United States to stand

⁶³³ National Defense Authorization Act for Fiscal Year 2022, PL 117-81 section 1033, 135 STAT. 1901 (2021)

⁶³⁴ LoBianco, *supra* note 371.

⁶³⁵ Military Order §7(e), Nov. 13, 2001, <https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html>

⁶³⁶ *Id.*

⁶³⁷ *Id.*

⁶³⁸ Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES (Jan. 25, 2011), <https://www.nytimes.com/2011/01/26/nyregion/26ghailani.html>; Press Release, Dep't of Just., Ahmed Ghailani Transferred from Guantánamo Bay to New York for Prosecution on Terror Charges (June 9, 2009), <https://www.justice.gov/opa/pr/ahmed-ghailani-transferred-guantanamo-bay-new-york-prosecution-terror-charges>

trial in the Southern District of New York for his role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania.⁶³⁹ In November 2010, Ghailani was convicted of one charge of conspiracy to destroy government property.⁶⁴⁰ Ghailani is serving a life sentence without parole at the high-security federal penitentiary in McCreary, Kentucky.⁶⁴¹ The Ghailani case provides a functioning framework for the transfer of GTMO detainees to federal district court in the United States for prosecution, sentencing, and carrying out of sentences.

1. Pretrial Agreements: A Comparison of Options

There are a number of procedural similarities between the military commission system and federal district court system relative to pretrial agreements. Article 705 of the Rules for Military Commissions (R.M.C.) contains provisions for the accused in a military commission proceeding to enter into a pretrial agreement with the military commission prosecutors, subject to the approval of the convening authority.⁶⁴² R.M.C. 705 is substantially similar to Rule 11(c) of the Federal Rules of Criminal Procedure, which governs pretrial agreements in federal district court.⁶⁴³

Pretrial plea agreements in a military commission proceeding may include a promise by the convening authority to “refer a capital offense as non-capital”;⁶⁴⁴ a promise to “withdraw one or more charges or specifications”;⁶⁴⁵ an agreement to “[t]ake specified action on a sentence adjudged by the commission”;⁶⁴⁶ and/or a commitment “to approve no sentence in excess of a specified maximum or outside a specified and agreed-upon range.”⁶⁴⁷ The convening authority may also promise “to suspend all or part of a sentence”⁶⁴⁸ under the pretrial agreement in exchange for a guilty plea.⁶⁴⁹ Additionally, the manual requires that pretrial plea agreements be voluntary, specifying that “[a] term or condition in a pretrial agreements shall not be enforced if the accused did not freely and voluntarily agree to it.”⁶⁵⁰

A pretrial plea agreement entered into by a Guantánamo detainee Omar Khadr illustrates the procedural

⁶³⁹ Press Release, Dep’t of Just., Ahmed Ghailani Transferred from Guantánamo Bay to New York for Prosecution on Terror Charges (June 9, 2009), <https://www.justice.gov/opa/pr/ahmed-ghailani-transferred-guantanamo-bay-new-york-prosecution-terror-charges>

⁶⁴⁰ Press Release, FBI, Ahmed Khalfan Ghailani Found Guilty in Manhattan Federal Court of Conspiring in the 1998 Destruction of United States Embassies in East Africa Resulting in Death (Nov. 17, 2010), <https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo111710a.htm>.

⁶⁴¹ Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES (Jan. 25, 2011), <https://www.nytimes.com/2011/01/26/nyregion/26ghailani.html>; <https://www.bop.gov/inmateloc/#>; <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>; see also Zack Budryk, *Federal Inmate Dies in Altercation with Another Prisoner*, HILL (Mar. 7, 2021), <https://thehill.com/blogs/blog-briefing-room/news/542023-federal-inmate-dies-in-altercation-with-another-prisoner/>.

⁶⁴² Man. Mil. Comm. R. 705 <https://www.mc.mil/Portals/0/pdfs/Manual%20for%20Military%20Commissions%202019%20Edition.pdf>

⁶⁴³ FED. R. CRIM. P. 11(c).

⁶⁴⁴ Man. Mil. Comm. R. 705(b)(2)(B).

⁶⁴⁵ Man. Mil. Comm. R. 705(b)(2)(C)

⁶⁴⁶ Man. Mil. Comm. R. 705(b)(2)(E)

⁶⁴⁷ Man. Mil. Comm. R. 705(b)(2)(F). Discussion Comments.

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.*

⁶⁵⁰ Man. Mil. Comm. R. 705(c)(1)(A)

similarities between the military commission system and federal criminal court relative to pretrial agreements. Khadr entered into a pretrial plea deal with military prosecutors for a terrorism-related offense he committed in Afghanistan while he was a teenager,⁶⁵¹ which was subsequently approved by the convening authority.⁶⁵² Under the terms of the plea agreement, Khadr pled guilty to the murder of a U.S. Army sergeant and waived his right “to appeal his conviction, sentence, and/or detention.”⁶⁵³ Additionally, Khadr agreed “not to engage in or support hostilities against the U.S. or its coalition partners”⁶⁵⁴ and agreed “to submit to interviews by U.S. law enforcement officials, intelligence authorities, and prosecutors while in U.S. custody.”⁶⁵⁵ In exchange, Khadr was sentenced to no more than eight years in prison, which represented a significantly reduced sentence, compared to the military panel determination of forty years in prison.⁶⁵⁶ Lastly, the plea deal included an agreement that the United States would support his transfer to Canadian custody after serving one year in U.S. custody.⁶⁵⁷

The terms of Khadr’s pretrial agreement under the military commission system contained the essential components of a pretrial plea agreement in a federal court context.⁶⁵⁸ First, pretrial agreements under both systems typically require waiving future rights to appeal the conviction, sentence, and detention, and require cooperation with law enforcement authorities.⁶⁵⁹ However, pretrial plea agreements in the federal criminal court context usually do not include “negotiated caps on the sentence”⁶⁶⁰ or agreements to transfer prisoners to the custody of another country for carrying out sentences.⁶⁶¹ Aside from these additional aspects of the pretrial plea agreements under the military commission system, both systems are similar from a procedural standpoint.

2. Sentencing Hearings and Penal Incarceration

Key aspects of sentencing hearings in the military commissions and the federal court system are also similar.⁶⁶² For instance, in a military commission “the prosecution is permitted to call witnesses in aggravation, and the defense is allowed to present evidence in mitigation.”⁶⁶³ However, a significant distinction between sentencing hearings in federal

⁶⁵¹ Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. TIMES (Nov. 1, 2010), <https://www.nytimes.com/2010/11/02/us/02detain.html>.

⁶⁵² Paul H. Hennessy, *Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis*, *Federal Probation*, vol. 75, https://www.uscourts.gov/sites/default/files/75_1_5_0.pdf.

⁶⁵³ *Id.*

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.*

⁶⁵⁶ Charlie Savage, *Child Soldier for Al Qaeda Is Sentenced for War Crimes*, N.Y. TIMES (Nov. 1, 2010), <https://www.nytimes.com/2010/11/02/us/02detain.html>.

⁶⁵⁷ Paul H. Hennessy, *Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis*, *Federal Probation*, vol. 75, https://www.uscourts.gov/sites/default/files/75_1_5_0.pdf.

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.*

⁶⁶⁰ *Id.*

⁶⁶¹ *Id.*

⁶⁶² *Id.*

⁶⁶³ *Id.*; Man. Mil. Comm. R. 1001(a)(2). Compare, Fed. R. Crim. P. 32(i)(4)

district court proceedings and those in a military commission proceeding is that while in the former sentencing is the sole responsibility of the judicial officer, in the latter it is performed by the panel members.⁶⁶⁴

Despite repeated prohibitions on the transfer of GTMO detainees to federal court, there is other statutory guidance supporting the position that GTMO detainees could serve their sentence at any U.S. military or federal prison. In fact, the 2009 reforms to the MCA theoretically permit a prisoner to serve his sentence at any U.S. military or federal prison. 10 U.S. Code § 949u(a) states,

(a) In General.—Under such regulations as the Secretary of Defense may prescribe, a sentence of confinement adjudged by a military commission under this chapter may be carried into execution by confinement—

(1) in any place of confinement under the control of any of the armed forces; or

(2) in any penal or correctional institution under the control of the United States or its allies, or which the United States may be allowed to use.⁶⁶⁵

This language appears to leave open the possibility that GTMO detainees could be transferred to the continental United States pursuant to § 949u(a) and subject to the discontinuance of existing statutory restrictions on the use of congressionally appropriated funds for transporting detainees to the United States.

Additionally, as a practical security matter, the U.S. Penitentiary at Florence, Colorado, which is classified as a supermax control-unit prison facility and operated by the Federal Bureau of Prisons, is certainly capable of housing the detainees for the purpose of carrying out sentences.⁶⁶⁶ This facility has housed domestic terrorists, international narco-terrorists, and some of the most violent federal offenders in the country.⁶⁶⁷

3. Practical Impediments for Transfer to the Continental United States

Current political realities make the transfer of detainees difficult at best. First, despite Democrats controlling both chambers of Congress,⁶⁶⁸ it remains unclear whether all Democrats would support eliminating statutory prohibitions on expenditures to transfer detainees into the United States. Given the slim Democratic majorities in both chambers, any Democratic opposition with respect to relaxing current funding prohibitions would put detainee transfers out of the realm of possibility.

However, this is not the only challenge providing the backdrop to the enormous political difficulties of detainee transfers. Staunch Republican opposition in Congress with respect to the transfer of detainees must also be considered. In

⁶⁶⁴ Paul H. Hennessy, *Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis*, *Federal Probation*, vol. 75. https://www.uscourts.gov/sites/default/files/75_1_5_0.pdf.

⁶⁶⁵ 10 U.S. Code § 949u(a)

⁶⁶⁶ Federal Bureau of Prisons. USP Florence AdMax, <https://www.bop.gov/locations/institutions/flm/>

⁶⁶⁷ Stephanie Hogan, *This Is Where the U.S. Could Try to Keep 2-Time Jailbreaker El Chapo Locked Up for Life*, CBC News (Feb. 14, 2019) <https://www.cbc.ca/news/world/el-chapo-guzman-prison-adx-florence-1.5017828>; Alex Dobuzinskis, *Mexican Drug Lord “El Chapo” Begins Life Term in Colorado “Supermax” Prison*, REUTERS (July 19, 2019) <https://www.reuters.com/article/us-usa-mexico-el-chapo/mexican-drug-lord-el-chapo-begins-life-term-in-colorado-supermax-prison-idUSKCN1UE2GA>.

⁶⁶⁸ Jennifer E. Manning, Cong. Rsch. Serv., R46705, *Membership of the 117th Congress: A Profile* (2022) <https://crsreports.congress.gov/product/pdf/R/R46705>.

the past, House and Senate Republicans have argued that closing GTMO would endanger the United States.⁶⁶⁹ Certainly, one could envision the current Republican conference framing the issue of transfers in the exact same light.

Additionally, the transfer of detainees from GTMO to continental United States presents a series of substantive due process questions, particularly the scope of habeas rights once a detainee is serving a sentence in the United States. Does a detainee's general classification change once serving a sentence in the United States such that his substantive due process rights are expanded beyond what *Boumediene* and other cases provide for? Not wishing to face such questions, federal courts as well as members of Congress and members of the Executive Branch may be loath to transfer GTMO detainees to federal court.

Another issue to be considered is what happens after the sentence is served. The American public and national political leaders may resist allowing GTMO detainees to remain in the United States after they serve their sentence. In that vein, in order to create a system where GTMO detainees could be tried, sentenced, and imprisoned in the United States, provisions guaranteeing detainees' removal from the United States to another country after they serve their sentence are paramount. Identifying countries willing to accept the detainees after they serve their sentences is critical. Taken together, these lingering political, legal, and policy questions will likely frustrate any attempt to lay the statutory groundwork authorizing transfers of detainees into the United States for trials, sentencing, and carrying out sentences.

4. Transfer to Federal Military Courts for Trial by General Courts-Martial

Article 18 of the Uniform Code of Military Justice vests general courts-martial with jurisdiction over two classes of defendants. First, any person who, pursuant to Article 2 of the UCMJ is "subject to the Code" may be tried for a violation of the UCMJ. These individuals may be tried for alleged violation of the punitive articles enumerated in the UCMJ. This does not include enemy personnel prior to capture as they are not "subject to the Code" at that time. However, in the second prong of Article 18, general courts-martial are vested with jurisdiction to try, "any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." This second category includes enemy personnel whose acts or omissions violate the laws and customs of war *prior to capture* and who, as a result, are charged with such violations.

Since the inception of the military commission trials at Guantánamo, trial by general courts-martial has therefore been a viable alternate jurisdictional option. Indeed, the jurisdictional predicate for the military commission—that the captive committed a precapture violation of the laws and customs of war—is the identical jurisdictional predicate for trial by general courts-martial. This is still the case. Any allegation of a law of war violation may be brought before *either* a military commission as recognized in Article 21 of the UCMJ, or a general court-martial.

Although this grant of jurisdiction predates the UCMJ it has never been invoked, even during and after World War II. The U.S. custom has been to use courts-martial only for offenders subject to the UCMJ pursuant to Article 2, which primarily includes members of the U.S. armed forces and several other narrow categories, such as prisoners of war—enemy captives who become subject to the UCMJ once they are captured. Precapture law of war violations by enemy personnel have historically been tried by military commission. Nonetheless, Article 18 remains a valid source of general courts-martial jurisdiction for these offenses.

There is, however, one recent amendment to the UCMJ that may call this jurisdiction into question. That

⁶⁶⁹ Sacha Pfeiffer, *What Might Happen to Guantánamo Now That U.S. Troops Are Leaving Afghanistan*, National Public Radio (July 10, 2021), <https://www.npr.org/2021/07/10/1014772283/what-happens-to-guantanamo-now-that-u-s-troops-are-leaving-afghanistan>

amendment included within the scope of Article 2, “Individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war.” This is an oxymoronic provision at best. As noted, these individuals are already subject to general courts-martial jurisdiction for violations of the law of war pursuant to Article 18, which is a grant of jurisdiction independent of Article 2. Furthermore, it is perplexing what law this amendment is subjecting these captives to. Article 2 indicates they are “subject to the Code,” which includes the enumerated punitive articles of the UCMJ. But this would mean Congress has applied domestic military crimes to enemy personnel *prior to* capture. This certainly is illogical. The text of the amendment indicates the jurisdiction extends to law of war violations. But this is equally perplexing as law of war violations are not enumerated in the UCMJ the amendment purports to subject these individuals to. And, as noted, this is superfluous with the existing jurisdiction provided by Article 18.

The most likely explanation for this incongruous amendment is that Congress sought to foreclose the use of courts-martial to try *unprivileged* enemy belligerents: captured enemy personnel who do not qualify for prisoner of war status pursuant to the Third Geneva Convention. This obviously would include all Guantánamo detainees pending prosecution by military commission. However, if this was the intent, Congress amended the wrong provision, because an individual need not be “subject to the Code” pursuant to Article 2 to fall within the jurisdiction established by Article 18. Nonetheless, this amendment may be invoked as a basis for denying general courts-martial jurisdiction for unprivileged belligerents.

In any event, whether tried by military commission or courts-martial, a punitive sentence of confinement or death could in theory be executed at a military correctional facility. Both the U.S. Army and U.S. Navy operate such facilities, although the maximum-security facility and likely focal point for punitive detention would be the U.S. Army Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas. The USDB currently holds at least four former soldiers on death row: Ronald Gray, Hasan Akbar, Timothy Hennis, and Nidal Hasan, and has the facilities to implement the death penalty by lethal injection (though the military’s last execution took place in 1961, capital punishment is still an admissible legal penalty under the UMCJ).⁶⁷⁰

A report issued by the Government Accountability Office in 2012 noted:

DOD operates a system of corrections facilities in the continental United States that it uses to confine members of the uniformed services charged with or convicted of violations of the UCMJ. Six of these facilities, operated by the Army and the Navy, are equipped to confine individuals for more than 1 year. Five of the six are joint regional correctional facilities—two Army-operated regional correctional facilities and three Naval consolidated brig— that are used for pre- and post-trial confinement for inmates with sentences of 5 years or fewer. The sixth is the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, a facility operated by the Army, which holds inmates with sentences exceeding 5 years as well as inmates sentenced to death. Five of these six DOD corrections facilities are accredited by the American Correctional Association, which reaccredits facilities every 3 years to ensure they meet specific national standards related to facility administration and management, physical plant and institutional operations, institutional services, and inmate programs.⁶⁷¹

⁶⁷⁰ *Id.*

⁶⁷¹ U.S. Gov’t Accountability Off., GAO-13-31, *Guantánamo Bay Detainees: Facilities and Factors for Consideration If Detainees Were Brought to the United States* (2012), <https://www.gao.gov/assets/gao-13-31.pdf>.

The facilities encompass housing available for the general population as well as independent units. When detainees are being considered for a certain area, their security custody is examined, allowing proper placement of low-risk individuals who require minimal supervision to high-risk individuals who must be constantly monitored.⁶⁷²

D. Immigration Aspects of Transfer to U.S. Jurisdictions

This section concerns how immigration jurisprudence, policies, and practices might affect the status, admissibility, detention, removal, and avenues for legal recourse of GTMO detainees if transferred to the United States.

World War II provides a historical precedent for the differential application of immigration laws to prisoners of war (POWs) and enemy aliens.⁶⁷³ As explained in *In Re Territo*,⁶⁷⁴ POWs brought to the United States under a military war measure were kept within U.S. borders for safe keeping. Such arrangements did not constitute residence and were held beyond the purview of immigration laws. By contrast, enemy aliens were detained by the Immigration and Naturalization Service and repatriated at the cessation of hostilities. Although some challenged the legality of their repatriation, the Second Circuit consistently ruled that, as summarized in *United States. ex rel. Ling Yee Suey v. Spar*, “The cases hold that a person brought into the United States by the authorities, and then released on bond, never entered the United States. His case is like that of one who had been *stopped at the border and kept there all the time*.”⁶⁷⁵ In *United States. ex rel. Schirrmeister v. Watkins*, the Court elaborated that being forcibly brought into the country did not constitute entry, adding that such individuals would be subject to government-ordered deportation only after their refusal or neglect to leave.⁶⁷⁶

Although these cases provide a useful backdrop to issues of GTMO transfers, it is critical to recognize that unlawful enemy combatants do not fit squarely within either the POW or enemy alien framework. Specific national security considerations and statutory restrictions would certainly complicate the admissibility and removal of GTMO detainees.

1. Immigration Complexities at the Border

As the World War II case study makes clear, an individual’s physical presence and legal status in the United States are not one and the same. While transferred GTMO detainees might geographically be in the mainland United States, their legal status would likely be considered “at the border.”⁶⁷⁷ It is well established in case law that physical entry does not necessarily amount to a legal admission into the country under immigration law. In *Kaplan v. Tod*,⁶⁷⁸ the Supreme Court noted of the Russian immigrant appellant, “[W]hile she was at Ellis Island, she was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared. . . . She *was still in theory of law at the*

⁶⁷² *Id.* at 26.

⁶⁷³ Sarah Weiner, *The Immigration Consequences of Relocating Guantánamo Detainees*, 35 YALE L. & POL’Y REV. 539 (2017).

⁶⁷⁴ 156 F.2d 142 (9th Cir. 1946).

⁶⁷⁵ U.S. *ex rel. Ling Yee Suey v. Spar*, 149 F.2d 881, 883 (2d Cir. 1945) (emphasis added); *see also United States v. Watkins*, 163 F.2d 328, 330-31 (2d Cir. 1947).

⁶⁷⁶ *United States ex rel. Schirrmeister v. Watkins*, 171 F.2d 858, 859 (2d Cir. 1949).

⁶⁷⁷ Weiner, *supra* note 673.

⁶⁷⁸ 267 U.S. 228 (1925).

boundary line, and had gained no foothold in the United States.”⁶⁷⁹ Separations between legal status and geographic location were reiterated in *Shaughnessy v. Mezei*⁶⁸⁰: “And this Court has long considered such temporary arrangements as not affecting an alien’s status; he is treated as if stopped at the border.”⁶⁸¹ As expressed in *Zadvydas v. Davis*,⁶⁸² this distinction between “an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law”⁶⁸³ is highly relevant for transferred GTMO detainees.

2. Paroled into the United States

Another avenue the government has used to admit individuals into the United States is § 212 of the Immigration and Nationality Act (INA), which provides that:

The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this [title 8], in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.⁶⁸⁴

An alien can be temporarily paroled into the U.S., thus allowing the government to charge and detain the individual without extending certain legal rights that come with a fully admitted status.⁶⁸⁵ Some have suggested this authority could be used to relocate GTMO detainees.⁶⁸⁶

3. Transferred GTMO Detainees’ Eligibility for Relief

Despite their “at the border” status, transferred GTMO detainees could theoretically be eligible for three different forms of relief under U.S. immigration law: asylum, withholding of removal, and deferring of removal.⁶⁸⁷ GTMO

⁶⁷⁹ *Id.* at 230 (emphasis added).

⁶⁸⁰ 345 U.S. 206 (1953).

⁶⁸¹ *Id.* at 215 (emphasis added).

⁶⁸² 533 U.S. 678 (2001).

⁶⁸³ *Id.* at 693.

⁶⁸⁴ 8 U.S.C. § 1182(d)(5)(A).

⁶⁸⁵ As explained in *Leng May Ma v. Barber*, 357 U. S. 185, 188–190 (1958), an “alien ‘paroled’ into the United States pending admissibility had not effected an ‘entry.’” Parole authority has also been delegated to U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). *The Use of Parole Under Immigration Law*, AM. IMMIGRATION COUNCIL (Jan. 24, 2018), <https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law>; Sarah Murphy, *Parole into the United States*, AM. IMMIGRATION COUNCIL, <http://www.borderimmigrationlawyer.com/parole-into-the-us/> (last visited Dec. 21, 2021).

⁶⁸⁶ Weiner, *supra* note 673; Garcia et al., *supra* note 293.

⁶⁸⁷ *Id.*

detainees' prior involvement in terrorist activities, their enemy combatant designation, and several statutory prohibitions limit or may even foreclose such options for relief and protected status.⁶⁸⁸ For example, under 8 U.S.C. § 1182(a)(3)(B), an alien who has engaged in terrorist activity is ineligible for asylum. According to the *Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014*, the Obama administration contended that no GTMO detainee relocated to the U.S. would have a right to seek asylum.⁶⁸⁹ The report explained,

An alien is also barred from obtaining asylum where he has ordered, incited, assisted, or otherwise participated in persecution on account of a protected ground or where there are reasonable grounds for regarding the alien as a danger to the security of the United States. Additionally, where an alien, having been convicted of a particularly serious crime, poses a danger to the community or where there are 'serious reasons for believing that the alien has committed a serious nonpolitical crime' outside the United States, the alien is also barred from receiving asylum.⁶⁹⁰

Asylum and withholding of removal claims are provided for in the 1980 Refugee Act, which implemented Refugee Convention obligations, and are thus available to individuals who meet the criteria of refugee. Individuals who have engaged in terrorism or may reasonably be regarded as a danger to the U.S. would likely be excluded under section 208(b)(2)(A) of the INA.⁶⁹¹

These same exemptions do not exist for deferral or removal under the Convention Against Torture (CAT), a relief which is available to all individuals who can establish that they will "more likely than not" be tortured if transferred to another country. If applicable, relief under CAT may be a viable relief option for transferred GTMO detainees.⁶⁹² With that being said, *Kiyemba v. Obama* left the courts little authority to challenge executive decisions regarding the likelihood of torture or prosecution in the receiving country, as explained elsewhere in this Report.⁶⁹³

More generally, post-9/11 trends indicate a willingness to expand both terrorism-related grounds for inadmissibility and the definitions underpinning assessments of terrorism-related organizations and activities.⁶⁹⁴ Such efforts to broaden terrorism-related grounds for inadmissibility and removal were incorporated in the USA PATRIOT Act as well as the REAL ID Act.⁶⁹⁵ In a notable shift, the 2008 Consolidated Appropriations Act modified certain terrorism-related provisions of the INA, excluded ten groups from the "terrorist organization" category, and expanded immigration authorities' ability to waive terrorism-related exemptions. Although terrorism grounds for inadmissibility can be waived, the political climate surrounding GTMO may prevent such actions from being taken.⁶⁹⁶

⁶⁸⁸ Michael John Garcia & Ruth Ellen Wasem, Cong. Research Serv., RL32564, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens* (2010); Garcia et al., *supra* note 293.

⁶⁸⁹ Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014 (US DOJ, May 14, 2014).

⁶⁹⁰ *Id.* at 2.

⁶⁹¹ 8 U.S.C. § 1158.

⁶⁹² Weiner, *supra* note 673; Garcia et al., *supra* note 293.

⁶⁹³ See Part V.D.2 of this Report. *See also* *Kiyemba v. Obama*, 561 F.3d 509 (2009); *Kiyemba v. Obama*, 605 F.3d 1046 (2010). Further discussion of transferring GTMO detainees to other countries can be found in Part VII.A of this Report.

⁶⁹⁴ Garcia & Wasem, *supra* note 688.

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.*

4. *Combatant Review Tribunals and Periodic Review Boards*

The aforementioned exemptions from immigration relief seem to be premised, at least in part, on detainees' enemy combatant status. Following the *Rasul* and *Hamdi* decisions, the Bush administration established the Combatant Status Review Tribunal (CSRT) as a "one-time administrative process designed to determine whether each detainee under the control of the Department of Defense at Guantánamo meets the criteria to be designated as an enemy combatant."⁶⁹⁷ President Barack Obama, pursuant to Executive Order 13567, later established the Periodic Review Board (PRB) as "a discretionary, administrative interagency process to review whether continued detention of particular individuals held at Guantánamo remains necessary to protect against a continuing significant threat to the security of the United States."⁶⁹⁸ The PRB can recommend that detainees be held in continued law of war detention or transferred to another country. Such determinations can be reconsidered by a Review Committee if:

(1977) (1) a member of the Review Committee seeks review within 30 days of the PRB's determination, or (2) the PRB cannot reach consensus. The Review Committee is composed of the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. Once a PRB determination becomes final, the detainee may not appeal.⁶⁹⁹

Given the Biden administration's intention to close GTMO, it is likely that this policy position will be reflected in PRB determinations. If cleared for release, GTMO detainees would either be relocated to another country or held in continued detention while transfer negotiations are underway.⁷⁰⁰ Transfers, however, are not solely determined by the PRB. The president can transfer detainees, so long as such decisions comply with congressional requirements and statutory bans.⁷⁰¹

5. *Detention and Removal of Detainees Transferred to Immigration Custody*

Immigration considerations would be especially relevant if a detainee were released from law-of-war detention and subsequently transferred from military to immigration custody.⁷⁰² Such circumstances would be predicated on the repeal of key statutory prohibitions, as described elsewhere in this Report. If this occurred, the detainee may be taken into immigration custody on the mainland United States until relocation is secured.

Once the detainee is under immigration authorities, several barriers could prevent their transfer to another country, which could inadvertently result in indefinite immigration detention. After a final removal order is issued, former

⁶⁹⁷ Kristin Roberts, *U.S. Accuses Detainee of Carrying Jakarta Bomb Funds*, REUTERS (Mar. 23, 2007), <https://www.reuters.com/article/us-guantanamo-zubair/u-s-accuses-detainee-of-carrying-jakarta-bomb-funds-idUSN2329864620070324>.

⁶⁹⁸ *Periodic Review Board*, Dep't of Defense, <https://www.prs.mil/About-the-PRB/>; Exec. Order No. 13567, 76 Fed. Reg. 13275 (Mar. 7, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba>.

⁶⁹⁹ Periodic Review Board, *supra* note 698.

⁷⁰⁰ Further discussion can be found in Part VII of this Report.

⁷⁰¹ Further discussion can be found in Part X of this Report.

⁷⁰² Donna Cassata & Eric Tucker, *White House Weighs Legal Implications of Bringing GTMO Detainees onto U.S. Soil*, PBS (May 16, 2014), <https://www.pbs.org/newshour/politics/white-house-weighs-legal-implications-bringing-GTMO-detainees-onto-u-s-soil>.

law of war detainees can be held in custody for ninety days; further detention may be authorized subject to administrative review. As earlier noted, in *Zadvydas v. Davis*, the Supreme Court held that the Constitution limits post-removal to a reasonable period but “does not permit indefinite detention.”

After the *Zadvydas* decision, Congress enacted a statute, 8 U.S.C. § 1226a, which expressly authorizes continued detention, for a period of six months beyond the removal period (and renewable indefinitely), of any alien (1) whose removal is not reasonably foreseeable and (2) who presents a national security threat or has been involved in terrorist activities.⁷⁰³

In 2005, the Supreme Court clarified the *Zadvydas* ruling in *Clark v. Martinez*:

Under §1231(a)(6), the Secretary may detain inadmissible aliens beyond the 90-day removal period, but only for so long as is reasonably necessary to achieve removal. Section 1231(a)(6)’s operative language, ‘may be detained beyond the removal period,’ applies equally to all aliens that are its subject, whether or not those aliens have been admitted to the country. In *Zadvydas v. Davis*, 533 U. S. 678, this Court interpreted §1231(a)(6) to authorize the detention of aliens who have been admitted to the country only as long as ‘reasonably necessary’ to effectuate their removal.⁷⁰⁴

Under these circumstances, might GTMO detainees be transferred from one type of indefinite detention to another?

In *Hassoun v. Searls*, the Second Circuit acknowledged that terrorism or other factors might create circumstances that warrant preventive detention and heightened deference to political and national security decisions.⁷⁰⁵ Here, the court granted the government’s stay pending appeal to prevent Adham Amin Hassoun’s immediate release from immigration custody. (Hassoun was a convicted conspirator of José Padilla.⁷⁰⁶) The government invoked 8 U.S.C. § 1231(a)(6), 8 C.F.R. § 241.14(d), and 8 U.S.C. § 1226a to justify Hassoun’s continued detention after ninety days of the final removal order.⁷⁰⁷ Addressing the second the justification, the Second Circuit held that the district court erred in its determination that 8 C.F.R. § 241.14(d) was inconsistent with § 1231(a)(6). 8 C.F.R. § 241.14(d) is a regulation that

permits the detention of an alien who is inadmissible or removable for, or suspected of, among other things, terrorist activities, whose ‘release presents a significant threat to the national security or a significant risk of terrorism,’ and for whom ‘[n]o conditions of release can reasonably be expected to avoid the threat to the national security or the risk of terrorism.’ Other provisions of the same regulation also permit the detention of ‘[a]liens with a highly contagious disease that is a threat to public safety;’[a]

⁷⁰³ *Clark v. Martinez*, 543 U.S. 371 (2005).

⁷⁰⁴ *Id.*

⁷⁰⁵ *Hassoun v. Searls*, 968 F.3d 190 (2d Cir. 2020).

⁷⁰⁶ An unresolved issue identified by this report is whether former law of war detainees can be transferred from military to immigration custody. Were that to occur, detainees would be held in immigration custody until they are relocated. A further question would then be what entity would be responsible for continuing to secure their transfer to another country (e.g., DOD, DOS, or immigration authorities). Hassoun’s case provides a partial answer. He was held in the Buffalo Federal Detention Facility (BFDF)—a detention facility of ICE and the United States Marshals Service (USMS).

⁷⁰⁷ *Id.* at 195. Here, it is worth briefly mentioning the ruling in *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021), which concerned reinstated orders of removal under 8 U.S.C. § 1231.

liens detained on account of serious adverse foreign policy consequences of release,’ and aliens whose release would ‘pose a special danger to the public.’ 8 C.F.R. § 241.14(b)-(c), (f).⁷⁰⁸

§ 1231(a)(6) provides that

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).⁷⁰⁹

The court ruled that the interpretation of § 1231(a)(6) in *Zadvydas* and *Clark v. Martinez* avoided terrorism and other considerations that may warrant heightened deference on national security grounds and certain forms of preventive detention.⁷¹⁰ Therefore, the narrowly tailored statutory language of 8 C.F.R. § 241.14(d) “may reasonably be read to authorize the continued detention of *specially dangerous individuals* beyond the removal period upon a showing that their release would *threaten national security or pose a risk of terrorism*.”⁷¹¹ Despite the potential for indefinite detention, the Court affirmed the government’s compelling national security interests and found that the existing regulatory framework adequately provides for procedural due process.⁷¹² Terrorism-related justifications might not be applicable to all former law of war detainees; however, this case invites further questions regarding the likelihood of indefinite immigration detention for certain detainees pending transfer.

Importantly, indefinite detention is not unique to GTMO, or even to national security. According to July 2021 data, 26,771 individuals were held in Immigration and Customs Enforcement (ICE) detention.⁷¹³ As of December 2020, the American Immigration Council and American Immigration Lawyers Association identified 117 cases across eleven facilities where individuals were being detained beyond the legal limit.⁷¹⁴

Recent developments in immigration case law might affect the detention and removal of transferred detainees. In *Nielsen v. Preap*,⁷¹⁵ the Court noted:

Aliens who are arrested because they are believed to be deportable may generally apply for release on bond or parole while the question of their removal is being decided. These aliens may secure their release by proving to the satisfaction of a Department of Homeland Security officer or an immigration judge that they would not endanger others and would not flee if released from custody.

⁷⁰⁸ Hassoun, 968 F.3d at 194.

⁷⁰⁹ 8 U.S.C. § 1231.

⁷¹⁰ Hassoun, 968 F.3d at 200.

⁷¹¹ *Id.* (emphasis added).

⁷¹² *Id.* at 201.

⁷¹³ *Immigration Detention Quick Facts*, TRACIMMIGRATION, <https://trac.syr.edu/immigration/quickfacts/> (last visited Dec. 21, 2021).

⁷¹⁴ *Policy Brief: Increase in Indefinite ICE Detention Without Foreseeable Removal Dates During COVID-19 Pandemic*, AILA AND AM. IMMIGR. COUNCIL (Jan. 7, 2021), <https://www.aila.org/advo-media/aila-policy-briefs/indefinite-ice-detention>.

⁷¹⁵ *Nielsen v. Preap*, 139 S. Ct. 954 (2019).

Congress has decided, however, that this procedure is too risky in some instances. Congress therefore adopted a special rule for aliens who have committed certain dangerous crimes and those who have connections to terrorism. Under a statutory provision enacted in 1996, 110 Stat. 3009-585, 8 U. S. C. §1226(c), these aliens must be arrested ‘when [they are] released’ from custody on criminal charges and (with one narrow exception not involved in these cases) must be detained without a bond hearing until the question of their removal is resolved.⁷¹⁶

Mandatory detention under 8 U.S.C. § 1226(c) following release from criminal custody would seem to apply to former law of war detainees, even though they were never formally charged before the military commissions or in federal court. The *Preap* decision may in fact bolster arguments that detainees cannot apply for release on bond or conditional parole.

With that being said, several past proposals and provisions have been directed at limiting the immigration benefits available to GTMO detainees. The 2010 Department of Homeland Security Appropriations Act barred any funds

used to provide any immigration benefit (including a visa, admission into the United States or any of the United States territories, parole into the United States or any of the United States territories (other than parole for the purposes of prosecution and related detention), or classification as a refugee or applicant for asylum) to any individual who is detained, as of June 24, 2009, at Naval Station, Guantánamo Bay, Cuba.⁷¹⁷

Similar restrictions were included in the 2010 Consolidated Appropriations Act.⁷¹⁸

⁷¹⁶ *Id.* at 959.

⁷¹⁷ Pub. L. No. 111-83, §552(f), 123 Stat. 2142, 2179 (2009).

⁷¹⁸ Pub. L. No. 111-117, §532(f), 123 Stat. 3034, 3156 (2009).

VII.

TRANSFER OR RELEASE TO FOREIGN JURISDICTIONS OR INTERNATIONAL TRIBUNALS

A. Transfer to Other Countries

The United States claims that it detains individuals at Guantánamo Bay under the 2001 Authorization for the Use of Military Force as informed by the principles of the laws of war. The United States has long argued that its armed conflict with Al Qaeda and the Taliban is a non-international armed conflict governed by Common Article 3 of the 1949 Geneva Conventions. At the same time, the United States claims that it draws from the full panoply of international humanitarian law by analogy in detaining individuals at GTMO. Among other things, the Geneva Conventions establish a framework for repatriation and resettlement of individuals detained in the course of an armed conflict both during and after that armed conflict. The Geneva Conventions also establish separate detention regimes (with separate expectations for release from detention) based on the status of the individuals detained: Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GCIV) and Geneva Convention Relative to the Treatment of Prisoners of War (GCIII).

Regardless of governing regime, these legal frameworks define the outer limit of what states must do with respect to the individuals they detain in the course of their armed conflicts. While states may detain enemy soldiers—and, arguably, fighters in a non-international armed conflict—until the end of hostilities, states often release their detainees before the end of hostilities through a variety of arrangements. Historically, states have relinquished custody of individuals detained in the course of an armed conflict through parole, exchange, or simple release in the midst of armed conflict. Similarly, states have transferred individuals out of their own custody and into the custody of foreign governments during the pendency of an armed conflict in a variety of situations.

In the case of the individuals detained at Guantánamo Bay, the United States has already transferred approximately 95 percent of the nearly 780 men it once held there. The vast majority of the men who have been transferred from GTMO have been repatriated—that is, transferred to their country of origin. The United States has resettled approximately 150.

Transfers from U.S. custody at GTMO differ primarily on the basis of repatriation or resettlement. Whereas men who are repatriated may have violated the laws of their countries of origin prior to detention at GTMO, those who are resettled are unlikely to have violated the laws of countries to which they had no preexisting ties. This difference in legal status has important implications for the treatment to which they may be subject upon transfer. For example, Moroccan nationals repatriated to Morocco may face investigation and possible prosecution for pre-detention crimes. In contrast,

Yemeni nationals resettled in a third country like Ghana or Serbia are unlikely to face local criminal process on the basis of pre-detention activities. Nevertheless, in rare circumstances, a GTMO detainee may have engaged in activity that makes him susceptible to prosecution before a third state, making him potentially amenable to so-called foreign prosecution.

Regardless of repatriation or resettlement, two overarching principles define the scope of possible countries to which the United States may transfer GTMO detainees currently. First, as a matter of domestic American law—and absent a court order—the United States may transfer a detainee to a third country only when that country “has taken or agreed to take appropriate steps to substantially mitigate any risk the individual could attempt to reengage in terrorist activity or otherwise threaten the United States or its allies or interests.”⁷¹⁹ Second, the international law principle of non-refoulement prohibits the United States from transferring a detainee to a country where he is more likely than not to face torture or cruel, inhuman, or degrading treatment. This section briefly describes the legal framework that governs GTMO detainee transfers. First, this section explains the international legal framework obligating the United States to transfer detainees from its custody at the end of hostilities and, possibly, during ongoing hostilities. Second, this section explains the international legal principles that apply to a transfer from GTMO. Third, this section identifies the domestic legal framework governing transfers from GTMO. Fourth, this section provides a brief overview of the history of GTMO detainee transfers. Finally, this section suggests recommendations for improving GTMO detainee transfers.

B. International Legal Framework Obligating Transfer

To date, approximately 580 Guantánamo Bay detainees have been repatriated to their country of origin. While the details of repatriation agreements are not made public, Obama administration repatriations typically required the receiving country to restrict the ex-detainee’s travel abroad for a certain period and to continue to disclose information about the ex-detainee to the American government. In nations like Morocco, repatriated detainees have been investigated immediately upon transfer for supposed participation in terrorist activities and sometimes prosecuted. Yet, Ahmed Muhammed Haza al-Darbi, the single detainee repatriated during the Trump administration after making guilty plea in a military commission, will be serving out his remaining prison sentence in Saudi Arabia.

Parties to an armed conflict are obligated under GCIII to release and repatriate prisoners of war “without delay after the cessation of active hostilities.”⁷²⁰ The Commentary to GCIII provides that the release and repatriation obligation is unilateral “so that its implementation will not be frustrated by the necessity of obtaining the consent of both parties.”⁷²¹ Similarly, parties are obligated under GCIV to release civilians interned during the conflict “as soon as the reasons which necessitated [their] internment no longer exist.”⁷²² Those protected by GCIV “generally...enjoy the same rights to repatriation...as that enjoyed by prisoners of war” under GCIII.⁷²³ The right to repatriation, in addition to being codified

⁷¹⁹ Pub. L. No. 114–92, div. A, §1034(a)–(f), 129 Stat. 969, 970 (2015).

⁷²⁰ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁷²¹ Commentary III, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135, at 541-43.

⁷²² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 132, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁷²³ Albert J. Esgain & Waldemar A. Solf, *The Geneva Convention Relative to the Treatment of Prisoners of War 1949: Its Principles, Innovations, and Deficiencies*, 41 N.C. L. REV. 537, 556 (1963).

in the Geneva Conventions, is also embodied in several other major international declaration, treaties and conventions, which include Article 13 of the Universal Declaration of Human Rights, Article 12 of the International Covenant on Civil and Political Rights (which supplement IHL during armed conflict), and the 1951 Convention relating to the Status of Refugees.⁷²⁴ Accordingly, it is considered “obligatory” under customary international law. Some scholars argue that in most respects, even aside from the right to repatriation, the GCIV protections “are identical” to those in GCIII, such as the right to humane treatment, freedom from coercive interrogation, etc.⁷²⁵

What is tricky in this case in particular is the status decision: what is the status of GTMO detainees relative to the law of war? This is addressed in greater detail in Part IX of this Report, but suffice it to say here that the commentary to the GCIII provides as follows:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution—not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.⁷²⁶

Prisoners of war, pursuant to GCIII, are entitled to several legal protections, which include the right to release and repatriation upon the cessation of active hostilities

Civilians, pursuant to GCIV, are also entitled to international legal protections during armed conflict, including the right to repatriation (which involves the right to voluntarily leave enemy territory).⁷²⁷

The 2012 Principles and Guidelines of the Copenhagen Process on the Handling of Detainees in International Military Operations buttressed the international legal framework on treatment of detainees, applicable during both International Armed Conflict (IAC) and Non International Armed Conflict (NIAC), by providing for release of detainees “[w]hen circumstances justifying detention have ceased to exist,” prohibiting arbitrary detention, requiring assessment of the conditions of the receiving State, and allowing for the ICRC to serve as a post-transfer monitoring mechanism.⁷²⁸

GCIII requires release and repatriation of POWs who are sick or wounded even before the end of hostilities, based on the rationale that the purpose of detaining POWs—“prevent[ing] their further employment by the enemy”—is no longer served by detaining those individuals who are sick or wounded and whose chances of “full recovery are slight.”⁷²⁹ This rationale can, and should, be extended to detained “enemy combatants” who are not afforded POW status.

⁷²⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 12, Dec. 16, 1966, 999 U.N.T.S. 171; Convention relating to the Status of Refugees, 189 U.N.T.S. 137, Apr. 22, 1954.

⁷²⁵ See Derek Jinks, *The Declining Significance of Pow Status*, 45 HARV. INT’L L.J. 367 (2004).

⁷²⁶ Commentary IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 132 at 51.

⁷²⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 35-58, 77, 132-35., Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁷²⁸ Copenhagen Process on the Handling of Detainees in International Military Operations, Copenhagen Process Principles and Guidelines (Oct. 19, 2012), <https://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf>.

⁷²⁹ Esgain & Solf, *supra* note 723, at 589.

Article 109 of GCIII requires parties to the conflict to “to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel” and to “make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war.”⁷³⁰ Article 110 provides criteria for those eligible for direct repatriation, and those eligible for accommodation in neutral countries. The “seriously wounded and seriously sick prisoners of war eligible for direct repatriation” include:

- 1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.
- 2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.
- 3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

The “less seriously wounded and sick prisoners of war who may be accommodated in neutral countries” include:

- 1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery.
- 2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.⁷³¹

Article 112 of GCIII provides for appointment of mixed medical commissions that would examine sick and wounded POWs, though those detainees who, in the view of the medical authorities of the Detaining Power, are “manifestly seriously injured or seriously sick” can be “repatriated without having to be examined by a mixed medical commission.”⁷³²

In addition to the IHL-principles applicable to international armed conflicts that *arguably* apply by analogy to U.S. transfers from GTMO, the principle of *non-refoulement* prohibits a state from transferring an individual in its custody to another state where there are substantial grounds for believing that the individual would be in danger of being subjected to torture.⁷³³ This principle applies regardless of whether the individual has, or is suspected of having, committed serious crimes, “including when the individual is allegedly a member of a terrorist organization.”⁷³⁴ The party seeking to remove the individual, in relying on diplomatic assurances from the receiving state, must ensure that “all reasonable doubt” regarding risk and ill-treatment is eliminated, and should combine the assurances with monitoring procedures.⁷³⁵ According to the United States, “substantial grounds” require that it be “more likely than not” that the individual would be subjected to torture, and that the *non-refoulement* obligation does not extend to cruel, inhuman or degrading treatment

⁷³⁰ Geneva Convention Relative to the Treatment of Prisoners of War art. 109, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁷³¹ *Id.* art. 110.

⁷³² *Id.* art. 112.

⁷³³ *Id.*, art. 12; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 45; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3, 1465 U.N.T.S. 85.

⁷³⁴ OSCE Hum. Rts. Situation GTMO (November 2015), *supra* note 207.

⁷³⁵ *Id.*

or punishment.⁷³⁶ Moreover, the United States has affirmed that the principle of *non-refoulement* applies to the transfer of detainees from Guantánamo Bay.⁷³⁷

C. Domestic Legal Framework Governing Transfers

The 2016 National Defense Authorization Act establishes domestic legal requirements for transferring a detainee from Guantánamo Bay that continue to control the transfer process. These conditions, while reasonable, may partially account for the difficulty transferring those detainees—now numerous—that have been cleared for transfer but not yet in process. In particular, thirty days before a detainee transfer, the secretary of defense must certify to Congress that:

- (1) the transfer concerned is in the national security interests of the United States;
- (2) the government of the foreign country or the recognized leadership of the foreign entity to which the individual detained at Guantánamo concerned is to be transferred—
 - (A) is not a designated state sponsor of terrorism or a designated foreign terrorist organization;
 - (B) maintains control over each detention facility in which the individual is to be detained if the individual is to be housed in a detention facility;
 - (C) has taken or agreed to take appropriate steps to substantially mitigate any risk the individual could attempt to reengage in terrorist activity or otherwise threaten the United States or its allies or interests; and
 - (D) has agreed to share with the United States any information that is related to the individual.⁷³⁸

Condition (2)(A) poses a problem with regard to transfer to Afghanistan, now that the country is once more under Taliban control.

Where the United States intends to transfer a detainee to a country that has seen a former Guantánamo detainee “reengage,” the secretary of defense must further certify that the country in question has a plan to substantially mitigate any risk to the United States in light of the prior reengagement. In order to fulfill this certification, the secretary of

⁷³⁶ U.S. reservations, declarations, and understandings to the International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 para. II(2) (Apr. 2, 1992).

⁷³⁷ U.S. Dep’t of State, Fourth Periodic Report of the United States to the U.N. Committee on Human Rights at para 553 (Dec. 30, 2011) (“The United States will not transfer any person to a country where it determines it is more likely than not that the person will be tortured.”); *id.* at para 560 (“With respect to transfers from the Guantánamo Bay detention facility . . . ‘the U.S. Government will not transfer individuals to countries where it has determined that they are more likely than not to be tortured. In light of these policies, there are certain individuals who have been (or will be) approved for transfer out of U.S. custody but who the U.S. Government determines cannot be safely and/or responsibly returned to their home countries.’”).

⁷³⁸ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015).

defense must provide an intelligence assessment “of the capacity, willingness, and past practices (if applicable) of the foreign country or foreign entity concerned,” an “explanation why the transfer of the individual is in the national security interests of the United States,” a “description of actions taken to mitigate the risks of reengagement by the individual,” a “copy of any Periodic Review Board findings relating to the individual,” a “copy of the final recommendation by the Guantánamo Detainee Review Task Force,” an “assessment whether, as of the date of the certification, the country to which the individual is to be transferred is facing a threat that could substantially affect its ability to exercise control over the individual,” and a classified summary of “the individual’s record of cooperation, if any, while in the custody of or under the effective control of the Department of Defense; and any agreements and mechanisms in place to provide for continuing cooperation.”⁷³⁹

However, when a detainee is transferred pursuant to a court order or pretrial agreement, the president only has to fulfill a notification requirement as mandated by the Intelligence Authorization Act for fiscal year 2012. In the notice that must be given to Congress within 30 days before the intended transfer, the president must outline “(1) The name of the individual to be transferred or released. (2) The country or the freely associated State to which such individual is to be transferred or released. (3) The terms of any agreement with the country or the freely associated State for the acceptance of such individual, including the amount of any financial assistance related to such agreement. (4) The agencies or departments of the United States responsible for ensuring that the agreement described in paragraph (3) is carried out.”⁷⁴⁰

The fiscal year 2012 iteration of the NDAA also mandated that multiple requirements be met in order for detainees to be transferred to foreign countries in addition to being recommended for transfer by the PRB, created from former President Obama’s 2011 Executive Order 13567.⁷⁴¹ In order for funds to be secured for the transfer of a detainee to a foreign country, the secretary of defense, with the agreement of the secretary of state and after consultation with the director of national intelligence, must certify that a detainee has met the specified conditions within thirty days before intended transfer.⁷⁴² The conditions were as follows:

- (1) the government of the foreign country or the recognized leadership of the foreign entity to which the individual detained at Guantánamo is to be transferred—
 - (A) is not a designated state sponsor of terrorism or a designated foreign terrorist organization;
 - (B) maintains control over each detention facility in which the individual is to be detained;
 - (C) is not, as of the date of the certification, facing a threat that is likely to substantially affect its ability to exercise control over the individual;
 - (D) has taken or agreed to take effective actions to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future;

⁷³⁹ *Id.*, 129 Stat. at 969–70

⁷⁴⁰ Intelligence Authorization Act for Fiscal Year 2012, Pub. L. No. 112-87, 125 Stat. 1883 (2012).

⁷⁴¹ Exec. Order No. 13567, 76 Fed. Reg. 13275 (Mar. 7, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba>.

⁷⁴² National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, 1567 (2011)

(E) has taken or agreed to take such actions as the secretary of defense determines are necessary to ensure that the individual cannot engage or reengage in any terrorist activity; and

(F) has agreed to share with the United States any information that—

(i) is related to the individual or any associates of the individual; and

(ii) could affect the security of the United States, its citizens, or its allies; and

(2) includes an assessment, in classified or unclassified form, of the capacity, willingness, and past practices (if applicable) of the foreign country or entity in relation to the Secretary's certifications.⁷⁴³

However, these conditions needn't be met if the detainee is being transferred pursuant to a court order or pretrial agreement. Furthermore, the secretary of defense, in concurrence with the secretary of state and director of national intelligence, had the ability to waive criteria (D) and (E) if they could ensure "alternative actions will be taken to address the underlying purpose of the requirement or requirements to be waived; [the actions taken] will substantially mitigate such risks with regard to the individual to be transferred; [the actions taken] will substantially mitigate the risk of recidivism with regard to the individual to be transferred; and the transfer is in the national security interests of the United States."⁷⁴⁴

The restrictions and requirements, originally mandated by the 2011 NDAA,⁷⁴⁵ were carried through the 2012 and 2013 iterations of the NDAA.⁷⁴⁶ Before these restrictions were put in place, the Obama administration had reportedly transferred sixty-seven individuals from Guantánamo Bay. However, after the restrictions of the 2011 NDAA were put into place, the Obama administration was only able to transfer fifteen individuals from January 2011 to December 2013, and only two of those transfers were not special exceptions to these restrictions.⁷⁴⁷

The 2014 version of the NDAA relaxed some of the restrictions surrounding foreign transfers of Guantánamo Bay detainees. The 2014 NDAA mandated that a detainee could only be transferred with approval by the secretary of defense if "(1) the Secretary determines, following a review conducted in accordance with the requirements of section 1023 of the National Defense Authorization Act for Fiscal Year 2012 (10 U.S.C. 801 note) and Executive Order No. 13567 [executive order creating PRB], that the individual is no longer a threat to the national security of the United States; or (2) such transfer or release outside the United States is to effectuate an order affecting disposition of the individual by a court or competent tribunal of the United States having jurisdiction."⁷⁴⁸ While the NDAA noted the secretary of defense should take into account the same criteria that was posited in the three previous versions of the NDAA, Congress did not require a written certification that all the criteria were met. The secretary of defense still has to notify Congress of a transfer thirty days before its intended date.⁷⁴⁹

⁷⁴³ *Id.*

⁷⁴⁴ *Id.*

⁷⁴⁵ Ike Skelton National Defense Authorization Act for Fiscal Year 2011, § 1033, Pub. L. No. 111-383, 124 Stat. 4137, 4351 (2010).

⁷⁴⁶ Elsea & Garcia, *supra* note 318.

⁷⁴⁷ Towards the Closure of Guantánamo, Inter-American Commission on Human Rights § 116-17 (2015).

⁷⁴⁸ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 851-53 (2013).

⁷⁴⁹ *Id.*, 127 Stat. at 853.

The 2016 iteration of the NDAA again changed the requirements for a detainee foreign transfer from Guantánamo Bay. The 2016 NDAA repealed the transfer requirements set by the 2014 NDAA and reverted them to the requirements used previously, with some modification. Under this version of the NDAA, the secretary of defense no longer has the ability to use national security waiver to expedite a transfer. The secretary of defense has to provide Congress written certification stating that a set of detailed requirements mentioned above have been met for transfer thirty days prior to the intended transfer date.

The 2016 NDAA, which is still good law, also had a special set of requirements for certification of transfer if the intended country of transfer has experienced a case of reengagement in the past.

And in general, requirements for foreign transfer of detainees residing at Guantánamo Bay detention facility have remained the same throughout subsequent iterations of the NDAA because they are permanent law and do not expire. However, Congress passes yearly funding restrictions on transfers that do not comply with the certification and notification requirements.⁷⁵⁰

D. Resettlement

Approximately 150 Guantánamo Bay detainees have been resettled to a total of twenty-nine third-party countries where the ex-detainee never possessed citizenship or legal resident status to temporarily or permanently reside.⁷⁵¹ While each respective national government has approached the legal status, rights, freedoms, and support for transferred individuals in its own way, the jurisdictional limitations regarding non-nationals/refugees seem to be substantial.⁷⁵² Former chief of staff for the State Department's Guantánamo envoy Ian Moss stated that the United States "wanted these individuals after they were released to have a fresh start in life."⁷⁵³ Ireland, Bermuda, and Latvia have supported resettled detainees by giving them legal status, the opportunity to reunite with family, and monetary aid.⁷⁵⁴ Nations like Albania have been known not to offer much assistance, and countries like Kazakhstan have even been reported to closely monitor transferred detainees and not allow them to reunite with family.⁷⁵⁵ In the United Arab Emirates, some Yemeni ex-detainees have remained in detention in the notorious Al-Razeen prison.⁷⁵⁶ Yet, despite the range of possible treatment,

⁷⁵⁰ See, e.g., Consolidated Appropriations Act for FY2021, div. B, § 8101, Pub. L. No. 116-260, 134 Stat. 1182, 1328 (2020); Consolidated Appropriations Act, 2020, div. A § 8099, Pub. L. No. 116-93, 133 Stat. 2317, 2360 (2019).

⁷⁵¹ Gaia Rietveld, Joris van Wijk, & Maarten Bolhuis, *Who Wants "the Worst of the Worst"? Rationales for and Consequences of Third Country Resettlement of Guantánamo Bay Detainees*, 76 CRIME, L., & SOC. CHANGE 35 (2021), <https://doi.org/10.1007/s10611-020-09932-z>.

⁷⁵² *Id.*

⁷⁵³ Maggie Michael, *Sent from GTMO to UAE, Detainees Fear Final Stop: Yemen*, AP NEWS (Oct. 22, 2020), apnews.com/article/afghanistan-united-arab-emirates-prisons-taliban-only-on-ap-d5e8096a268e842c6e32d8b41a9e2f16.

⁷⁵⁴ Jonathan Bell, *Uighur Refugees Granted Citizenship*, ROYAL GAZETTE (Aug. 28, 2018), <http://www.royalgazette.com/politics/article/20180827/uighur-refugees-granted-citizenship>; Mary Fitzgerald, *Two Men Detained by US Resettle in Ireland*, IRISH TIMES (Sept. 28, 2009), <https://www.irishtimes.com/news/two-men-detained-by-us-resettle-in-ireland-1.746286>; *Latvia Agrees to Take Uzbek Inmate from Guantánamo*, RADIO FREE EUROPE/RADIO LIBERTY (Feb. 3, 2010), https://www.rferl.org/a/Latvia_Agrees_To_Take_Uzbek_Inmate_From_Guantanamo/1947402.html.

⁷⁵⁵ Jo Baker, *Uyghur Battles to Escape Painful Past While Building New Life in Albania*, SOUTH CHINA MORNING POST (Sept. 28, 2013), <https://www.scmp.com/news/world/article/1319410/uyghur-battles-escape-painful-past-while-building-new-life-albania>.

⁷⁵⁶ AL-RAZEEN PRISON: THE GUANTÁNAMO OF THE UA, THE INTERNATIONAL CAMPAIGN FOR FREEDOM IN THE UNITED ARAB EMIRATES (2018), http://icfuac.org.uk/upload_files/Quarterly%20Briefing%20AlRazeen%20Prison_%20The%20Guantanamo%20of%20the%20UAE.pdf.

former Guantánamo Bay detainees do not seem to be prosecuted in their resettling country for alleged actions in a third-party country before their detention and eventual transfer.

E. Legal and Political Hurdles to Foreign Transfers

The countries that can receive Guantánamo detainees are limited as transfers can only be carried out to nations that assure the human rights of the detainees will be maintained.⁷⁵⁷ Since the United States signed the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT), the United States is unable to “expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁷⁵⁸

Additionally, the 2010 Guantánamo Review Task Force’s final report directly refers to adhering to the UNCAT and further states that detainees with substantiated prospects of torture and prosecution upon transfer to their homeland must receive protection guaranteed by the 1967 Protocol Relating to the Status of Refugees.⁷⁵⁹ In a 2016 statement to the House Foreign Relations committee, former Special Envoy for Guantánamo Closure Lee Wolosky supported the notion that transfers of Guantánamo Bay detainees must remain “consistent with our long-standing policy on humane treatment.”⁷⁶⁰ In a 2021 human rights discussion in Paris, Secretary of State Antony Blinken stated that after “a country is identified” for the transfer of a detainee, “we must have a guarantee that the rights of these people will be protected in that country. That’s not easy, either.”⁷⁶¹ The transfer of a detainee where “Department of State assesses fears of torture and/or prosecution upon return to be grounded” will not be approved.⁷⁶²

The *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* indicates the State Department must ascertain “diplomatic assurances from the country of proposed removal that the alien will not be tortured” when transferring detainees and that the “Department of State is doing a good job of negotiating assurances from foreign governments and evaluating the factors that indicate the probability of torture or other harsh treatment of detainees subsequent to transfer to a foreign government’s control.”⁷⁶³

The American government will only transfer Guantánamo Bay detainees to nations where it believes a detainee will not constitute a threat to national security.⁷⁶⁴ The United States must be assured of the receiving nation’s willingness

⁷⁵⁷ Rietveld et al., *supra* note 751.

⁷⁵⁸ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁷⁵⁹ Dep’t of Just., Dep’t of Defense, Dep’t of State, DHS, Off. of Dir. of Nat. Intel. & U.S. Joint Chief of Staff, Final Report (Guantánamo Review Task Force, 2010), <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>.

⁷⁶⁰ Lee Wolosky, Special Envoy for Guantánamo Closure, Statement to House Foreign Aff.’s Comm. Hearing on Guantánamo Bay (July 7, 2016), <https://docs.house.gov/meetings/FA/FA00/20160707/105158/HHRG-114-FA00-Wstate-WoloskyL-20160707.pdf>.

⁷⁶¹ Rosenberg & Savage, note 328.

⁷⁶² Amal De Chickera, Stefanie Grant, Dimitrina Petrova & Alice Leonard, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, Equal Rights Trust (2010), <https://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>.

⁷⁶³ U.S. Dep’t of State, *supra* note 737.

⁷⁶⁴ Rietveld et al., *supra* note 751.

and capability to “impose various security measures that will substantially mitigate the threat the detainee or detainees may pose after their transfer.”⁷⁶⁵ Accordingly, some nations are deemed unfit to receive detainees due to their perceived instability.⁷⁶⁶ The NDAA for fiscal year 2016 established blanket transfer bans of detainees to Libya, Somalia, Syria, and Yemen,⁷⁶⁷ a restriction that has been reenacted in subsequent NDAs and other legislation.⁷⁶⁸

According to the NDAA, the U.S. government must be assured that the receiving nation is not “a designated state sponsor of terrorism or a designated foreign terrorist organization” and will “take appropriate steps to substantially mitigate any risk the individual could attempt to reengage in terrorist activity or otherwise threaten the United States or its allies or interests.”⁷⁶⁹

For a Guantánamo Bay detainee transfer to be carried out, there must be a consensus among every national security agency.⁷⁷⁰ The Obama administration’s 2011 Executive Order 13567 mandates the Department of Defense, Office of the Director of National Intelligence, Joint Chiefs of Staff, Department of Homeland Security, Department of Justice, and State Department all must approve the transfer of each detainee.⁷⁷¹ The secretary of defense must then decide whether carrying out the detainee transfer is a national security interest and whether the security measures in place in the receiving country will substantially mitigate any future risk stemming from the transfer.⁷⁷²

Third-party countries are not obligated to accept the transfer of Guantánamo Bay detainees and thus must be swayed in negotiations by financial or political incentives.⁷⁷³ For example, Bulgaria was reportedly offered between \$50,000 and \$80,000 per Guantánamo Bay detainee and hoped the process would lead to the United States aiding Bulgarian citizens American visa waivers and stronger diplomatic law enforcement relations.⁷⁷⁴ The negotiations of transferring Guantánamo Bay detainees are especially paramount when detainees are de facto stateless, like Abu Zubaydah and the other four now former detainees from the Palestinian territories, and de jure stateless, like Muieen Abd Al Sattar.⁷⁷⁵

Additionally, transfers can be inhibited by the actions of those involved in foreign negotiations.⁷⁷⁶ Despite

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.*

⁷⁶⁷ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726, 968 (2015).

⁷⁶⁸ *See, e.g.*, National Defense Authorization Act for 2021, § 1043, Pub. L. No. 116-283 (extending § 1035 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1954, until Dec. 31, 2021).

⁷⁶⁹ National Defense Authorization Act for Fiscal Year 2016, § 1034, Pub. L. No. 114-92, 129 Stat. 726, 969 (2015).

⁷⁷⁰ *Facts About the Transfer of Guantánamo Detainees*, HUMAN RTS. FIRST (Oct. 10, 2018), www.humanrightsfirst.org/resource/facts-about-transfer-guantanamo-detainees.

⁷⁷¹ Exec. Order No. 13567, 3 C.F.R. 13275-13281 (Mar. 10, 2011).

⁷⁷² *Id.*

⁷⁷³ Rietveld et al., *supra* note 751.

⁷⁷⁴ Sofia, Bulgaria to Sec’y of Defense et al., *Bulgaria Responds Positively on Guantánamo*, WikiLeaks (Dec. 7, 2009), https://search.wikileaks.org/plusd/cables/09SOFIA690_a.html.

⁷⁷⁵ Abbas Shiblak, *Stateless Palestinians*, 26 FORCED MIGRATION REV. 8 (2006); *Guantánamo Docket*, *supra* note 3.

⁷⁷⁶ Benjamin Farley, *A Path for Renewing Guantánamo Closure*, JUST SEC. (Nov. 17, 2020), www.justsecurity.org/73311/a-path-for-renewing-guantanamo-closure/.

Guantánamo Bay detainee Sufyian Barhoumi and former detainee Abdul Latif Nasser receiving official approval for repatriation, the lack of diplomatic action by the Trump administration caused the transfers not to occur.⁷⁷⁷ Former President Obama’s unfavorable relations with former Afghan President Hamid Karzai are reported to have potentially derailed the transfer of Afghan detainees from Guantánamo Bay.⁷⁷⁸ There are even instances of detainees themselves, specifically Ridah bin Saleh alYazidi and Muieen Abd Al Sattar, delaying transfer efforts by deliberately not showing up to meetings with tentative host countries or the International Committee of the Red Cross.⁷⁷⁹

F. Necessary Improvements to the Detainee Transfer Process _____

The United States can take several steps to improve GTMO detainee transfers, including bringing those transfers in closer alignment with U.S. legal obligations and avowed views of law-of-war detention in non-international armed conflicts (IAC). Among other things, the president should apply the medical repatriation provisions applicable to POWs during an IAC to the detainees at Guantánamo Bay. Releasing and repatriating those detainees would be consistent with U.S. claims that it applies the law of IAC by analogy to GTMO. Doing so would also not prejudice U.S. efforts to mitigate the risk of reengagement to any appreciable degree. The president should also ensure that an office in the Department of State is charged with a continuing responsibility to monitor and assist with foreign-government compliance with transfer arrangements to ensure the best possible outcome for GTMO detainee transfers. An office charged with ongoing responsibility for GTMO detainee transfer arrangements may help avoid issues like those arising in Kazakhstan or the United Arab Emirates, or the sudden, apparently forcible repatriation of non-nationals to their unstable home countries.⁷⁸⁰

Congress should revert the transfer restrictions in the current version of the NDAA to the restrictions set forth in the 2014 NDAA. The 2014 NDAA mandated that the secretary of defense still consider the same criteria for foreign detainee transfer, but it did not require a written certification of these criteria to Congress. The heavy restrictions in the current NDAA mirror those set by the 2011 NDAA, which dramatically hindered the ability to transfer detainees from Guantánamo Bay. Prior to the 2011 NDAA, the Obama administration was able to transfer sixty-seven individuals from the detention facility. From January 2011 to December 2013, when the restrictions of the 2011 NDAA were in effect, the Obama administration was only able to transfer fifteen individuals from the facility, and only two of those were not due to special circumstance.⁷⁸¹

1. Medical Repatriation

As the purpose of detaining POWs is to “prevent their further employment by the enemy,” this purpose is no longer served by detaining those individuals who are sick or wounded and whose chances of “full recovery are slight.”⁷⁸²

⁷⁷⁷ *Id.*

⁷⁷⁸ Ken Gude, *Guantánamo’s Last Year*, CTR. FOR AM. PROGRESS (Jan. 26, 2016), www.americanprogress.org/issues/security/reports/2016/01/26/129668/guantanamos-last-year/.

⁷⁷⁹ Carol Rosenberg, *5 Were Cleared to Leave Guantánamo. Then Trump Was Elected*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/us/politics/guantanamo-prisoners-trump.html>.

⁷⁸⁰ Charlie Savage, Declan Walsh & Dionne Searcey, *Deported to Libya, Ex-Gitmo Detainees Vanish. Will Others Meet a Similar Fate?*, N.Y. TIMES (Apr. 23, 2018), <https://www.nytimes.com/2018/04/23/us/politics/guantanamo-detainees-repatriation-libya.html>.

⁷⁸¹ Inter-Am. Comm. on Hum. Rts., *supra* note 747.

⁷⁸² Esgain & Solf, *supra* note 723, at 589.

Such individuals are to be repatriated (so long as it is voluntary) or resettled in a neutral country, as required by Article 109 of GCIII:

Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel... Throughout the duration of hostilities, Parties to the conflict shall endeavor, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war.⁷⁸³

The type of injury that could trigger medical repatriation or resettlement is not limited to physical injuries; if an individual is vulnerable because of any mental conditions suffered from while in detention, that individual is eligible for medical repatriation or resettlement.⁷⁸⁴ Article 110 of GCIII requires repatriation of a POW if he is (1) “[i]ncurably wounded and sick [such that his] mental or physical fitness seems to have been gravely diminished”; (2) “[w]ounded and sick . . . [and] not likely to recover within one year”; and (3) recovered from being “[w]ounded and sick . . . , but [his] mental and physical fitness seems to have been gravely and permanently diminished.”⁷⁸⁵

Article 112 of GCIII provides for appointment of mixed medical commissions that would examine sick and wounded POWs, though those detainees who, in the view of the medical authorities of the detaining power, are “manifestly seriously injured or seriously sick” can be “repatriated without having to be examined by a mixed medical commission.”⁷⁸⁶ Wounded or sick detainees who fall into the following categories are entitled to present themselves for examination, and are to be examined before those who do not fall into these categories:

1. Wounded and sick proposed by a physician or surgeon who is of the same nationality, or a national of a party to the conflict allied with the power on which the said prisoners depend, and who exercises his functions in the camp.
2. Wounded and sick proposed by their prisoners’ representative.
3. Wounded and sick proposed by the power on which they depend, or by an organization duly recognized by the said power and giving assistance to the prisoners.⁷⁸⁷

2. *Refugee Convention*

The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol entitle those who have a well-founded fear of prosecution to protection against that persecution and provide for protection from refoulement.⁷⁸⁸ This

⁷⁸³ Geneva Convention Relative to the Treatment of Prisoners of War art. 109, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁷⁸⁴ Neil Krishan Aggarwal, *International Law and Mental Health Evaluations at Guantánamo: Is Medical Repatriation a Solution for Most Detainees?*, 76 INT’L J. L. PSYCH. 101682 (2021).

⁷⁸⁵ Geneva Convention Relative to the Treatment of Prisoners of War art. 110, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁷⁸⁶ *Id.* at 112.

⁷⁸⁷ *Id.* at 113.

⁷⁸⁸ 1951 Convention relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 137; 1967 Protocol relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

protection is afforded to anyone who meets the inclusion criteria for refugee status detailed in Article 1A(2)⁷⁸⁹ and does not fall within one of the exclusion criteria⁷⁹⁰ of the convention. Article 1F of the convention sets out the exclusion clauses on the basis of which individuals who would otherwise qualify for refugee status are said to be “undeserving” of such protections.⁷⁹¹ These clauses are to be interpreted “in a restrictive manner and with the utmost caution.”⁷⁹² Mere qualification of an individual’s act as “terrorist” is not enough to trigger exclusion if the act does not fall within the criteria set out in Article 1F. In this manner, Article 1F should not be read and interpreted as “a simple anti-terrorism provision.”⁷⁹³

A country can agree to receive a detainee for resettlement, either as a refugee or an asylee, or with a temporary entry with later processing of a refugee application.⁷⁹⁴ Article 33(2) of the 1951 Convention allows the host state, once it has accepted a refugee, to deny the benefit of the non-refoulement principle on reasonable ground that the refugee is regarded as a “danger to the security of the country.”⁷⁹⁵ This exception, however, does not affect the host country’s non-refoulement obligations under international human rights law that allows for no exceptions to the obligation if there is a risk of torture or ill treatment.⁷⁹⁶

G. International Fora for Prosecutions

One option that has been proposed for prosecuting the detainees still at Guantánamo in an international court or tribunal includes expanding the mandate of the International Criminal Tribunal for the Former Yugoslavia (ICTY)

⁷⁸⁹ The term “refugee” applies to any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it.”

⁷⁹⁰ Those denied refugee status are not eligible for protection under the Convention because they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention). Article 1F provides that this Convention shall not apply to any person with respect to whom there are serious reasons for considering that a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

⁷⁹¹ UNHCR, Statement on Article 1F of the 1951 Convention, at 6, <https://www.unhcr.org/en-us/protection/operations/4a5edac09/unhcr-statement-article-1f-1951-convention.html>.

⁷⁹² *Id.*

⁷⁹³ *Id.* at 8.

⁷⁹⁴ *Stranded at Guantánamo: FAQs Regarding International Protection for Guantánamo Prisoners Who Cannot be Repatriated Safely*, CTR. FOR CONST. RTS. (October 17, 2007), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-international-protection-guant-namo>.

⁷⁹⁵ Article 33(2) provides, “The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

⁷⁹⁶ UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol 4. (UNHCR, 2007), <https://www.unhcr.org/4d9486929.pdf>.

to include international terrorism suspects. This option is deemed “neither easy nor advisable” by some who argue that the United States “squandered” any goodwill it had with the United Nations after 9/11, and who point to the “peril” of broadening the ICTY’s scope such that it includes the actions of U.S. officials related to abuses at Guantánamo, Bagram, and Abu Ghraib.⁷⁹⁷ The Statute for the ICTY, adopted on May 23, 1993, by the United Nations Security Council, established the tribunal’s jurisdiction over “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia” since 1991.⁷⁹⁸ Though the ICTY started with a “modest” budget of \$276,000, it expanded such that it had a biennial budget of \$179,998,600 for 2014–2015, a decrease of 28 percent from its biennial budget for 2012–2013.⁷⁹⁹ The tribunal had its first indictment on November 4, 1994, but the accused did not come into the tribunal’s custody until 2000; he was sentenced in 2003 and had his sentence reduced in 2006.⁸⁰⁰ The tribunal signed its final indictments in 2004, and aimed to complete trials soon after the end of 2010, and appeals two years after that.⁸⁰¹ The tribunal completed its mandate in 2017. Though there have been criticisms raised about the costliness of the tribunal (as well as of the International Criminal Tribunal for Rwanda), comparisons of per-trial-day costs of the ICTY and U.S. criminal trials show that these costs do “not differ dramatically.”⁸⁰² Comparisons of the complexity of the trials show that, because even the “least complex ICTY trial is more complex than the average criminal trial in the United States,” comparing their costs is misleading, and that the ICTY is “much more efficient” than the comparable domestic trials of mass atrocity events.⁸⁰³

Another option explores the possibility of a Lockerbie-style tribunal, which would be based in a third country, use U.S. law, and be presided over by U.S. judges, just as the Lockerbie tribunal, though based in The Netherlands, was presided over by Scottish judges and used Scottish law.⁸⁰⁴ The idea behind the Lockerbie tribunal was to find a host country that could be seen as neutral. A trial in the United States of the two Libyan suspects was seen as not “politically acceptable” because of the possibility of the imposition of the death penalty.⁸⁰⁵ This option for prosecution of Guantánamo detainees, in so far as it would require exclusive operation under U.S. law, would not assuage the fair trial concerns—regarding the use of the death penalty and possible admissibility of tainted evidence—that attend prosecution proceedings in the United States.

A Special Tribunal for International Terrorist Suspects has also been proposed, which would require the United

⁷⁹⁷ Ken Gude, *After Guantánamo: A Special Tribunal for International Terrorist Suspects* 7-8, CTR. FOR AM. PROGRESS (2006).

⁷⁹⁸ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 1, May 25, 1993, available at https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

⁷⁹⁹ David Wippman, *The Costs of International Justice*, 100 AM. J. INT’L L. 861, 861 (2006); *The Cost of Justice*, UN INT’L. RESIDUAL MECHANISM FOR CRIM. TRIB., (latest figures as of July 26, 2021), <https://www.icty.org/en/about/tribunal/the-cost-of-justice>.

⁸⁰⁰ UN Int’l. Crim. Trib. for the Former Yugoslavia, *History*, <https://www.icty.org/en/about/office-of-the-prosecutor/history> (last visited, Dec. 21, 2021); *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-A, Judgment on Sentencing Appeal (Int’l. Crim. Trib. for the Former Yugoslavia Feb. 4, 2005).

⁸⁰¹ *Id.*

⁸⁰² Wippman, *supra* note 799, at 862–63.

⁸⁰³ Stuart Ford, Complexity and Efficiency at International Criminal Courts, 29 EMORY INT’L L. REV. 1, 62 (2014).

⁸⁰⁴ *See id.* at 8 (“The Lockerbie Tribunal was created by an agreement between Britain and Libya to establish a tribunal to hear the case of those accused of bombing Pan Am flight 103 over Lockerbie, Scotland.”); *see also* David R. Andrews, *A Thorn on the Tulip—A Scottish Trial in the Netherlands: The Story behind the Lockerbie Trial*, 36 CASE W. RES. J. INT’L L. 307 (2004).

⁸⁰⁵ Andrews, *supra* note 804, at 312.

States to enter bilateral agreements with Afghanistan and other allies to establish the tribunal and its jurisdiction over crimes such as grave breaches of the Geneva Conventions, war crimes, crimes against humanity, and membership in a terrorist organization.⁸⁰⁶ The tribunal would have an Office of the Prosecutor whose team of investigators would obtain its own evidence, thus “freeing [it] from dependence on information obtained during tainted interrogations.”⁸⁰⁷ The procedures for the trials, especially regarding sensitive information, would be modeled on those of the ICTY, which “has a sterling record of protecting that sensitive information, even while maintaining the rights of the accused.”⁸⁰⁸ Doing so would ensure that concerns regarding the fairness of the trials are assuaged.

Some, citing the concern about having “powerful and effective” prosecutions of terrorist suspects while ensuring that states do not “subvert fundamental human rights and freedoms,” have argued for prosecutions of terrorist suspects at the International Criminal Court (ICC).⁸⁰⁹ Though terrorism was left out of the Rome Statute because of disagreements over its definition, this option proposes that it be brought under the ICC’s jurisdiction by including it as a crime against humanity.⁸¹⁰ Others, however, point to Article 22 of the Rome Statute, which provides that “[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted,” thereby “foreclose[ing] manipulations of the definition of “crimes against humanity” to include terrorism.⁸¹¹ Even if the Rome Statute is revised to include terrorism as a crime under the ICC’s jurisdiction, the investigation and prosecution of those crimes would be limited by the temporal and geographical scope of the ICC’s investigation authorization.

H. Responsibility toward Defendants Transferred Abroad

Despite a lack of precedent or legal guidelines regarding the potential responsibility for a transferring country, the United States bears responsibility for inflicting torture and the consequences of harsh interrogations inflicted on defendants and detainees. The United States has incurred the burden to provide appropriate and necessary medical care including primary care, specialized medical care, psychiatric and psychological care, and rehabilitation for torture. It is unlikely and inconceivable that the United States can provide appropriate treatment and rehabilitation in Guantánamo with current personnel that are associated to past cruel, inhuman, and degrading handling. Accordingly, transfer to appropriate sites in the United States or other countries must be considered to provide rehabilitation and treatment and fulfill duties and obligations for having inflicted torture and harm of enhanced interrogations.

There are no provisions in the Geneva Conventions III and IV that set out post-repatriation medical and/or rehabilitation obligations of the state transferring its detainees. Article 45 of GCIV does provide that those civilians can be transferred only once the transferring state has “satisfied itself of the willingness and ability of such transferee [state] to

⁸⁰⁶ Gude, *supra* note 797, at 8–9.

⁸⁰⁷ *Id.* at 9.

⁸⁰⁸ *Id.* at 10.

⁸⁰⁹ Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 14 (2003).

⁸¹⁰ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (“[A]cts...committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”).

⁸¹¹ Eric Bales, *Torturing the Rome Statute: The Attempt to Bring Guantánamo’s Detainees within the Jurisdiction of the International Criminal Court*, 16 TULSA J. COMP. & INT’L L. 173, 188 (2008).

apply the present convention,” which includes the provision on humane treatment of those in custody. The responsibility for ensuring that the protections guaranteed in the convention apply is placed on the transferee state, though if that state fails to do so “in any important respect,” then the transferring state is obligated to “take effective measures to correct the situation or shall request the return” of the persons transferred.⁸¹² However, whether this provision is applicable to the individuals detained at Guantánamo as “enemy combatants” during the course of a non-international armed conflict is in question.

Regardless of whether the mentioned provisions of GCIV apply to the individuals detained at Guantánamo Bay, the most important element of U.S. responsibility to them lies in the torture they endured. The United States did not simply allow torture to take place, but actively inflicted torture that was sexual, psychological, and physical in nature and has had lasting effects (physical and psychological) on the detainees.⁸¹³ As the United States was directly responsible for the torture and harm brought to these detainees, it is responsible for providing redress to the torture victims, which may include “compensation, rehabilitation, restitution, satisfaction, and guarantees of non-repetition.”⁸¹⁴ Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, states that the state must “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”⁸¹⁵ It is important to note that per international law, Organization for Security and Co-operation in Europe (OSCE) identifies monetary compensation as being inadequate on its own as redress for torture, and that rehabilitation includes medical, legal, psychological, and social services.⁸¹⁶ Under international law, it may be unclear what responsibility the United States has as a transferring nation, but the United States has a clear responsibility to provide redress and rehabilitation to those detainees who are victims of torture.

U.S. laws and statutes about standards of medical care in U.S. prisons, and derivatively at GTMO, are more complex. In 1976, the Supreme Court held that “deliberate indifference to serious medical needs of prisoners” is a violation of the Eighth Amendment’s protection against cruel and unusual punishment.⁸¹⁷ Cases following this Supreme Court decision clarified what classified as “deliberate indifference,” such as prison medical staff or prison guards denying or delaying treatment or interfering with treatment.⁸¹⁸ Additionally, in 1991, the Supreme Court ruled on the standards of confinement, holding that an incarcerated person may, under the Eighth Amendment, bring forth a claim if the basic needs of “food, warmth, or exercise” have been deliberately violated by their condition of confinement, applying the

⁸¹² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 45, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁸¹³ *Deprivation and Despair: The Crisis of Medical Care at Guantánamo*, CTR. FOR VICTIMS OF TORTURE AND PHYSICIANS FOR HUM. RTS. (2019) [hereinafter *Deprivation and Despair*], https://www.cvt.org/sites/default/files/attachments/u131/downloads/2019_phr-medical-report_v5.pdf.

⁸¹⁴ OSCE Hum. Rts. Situation GTMO (November 2015), *supra* note 207.

⁸¹⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027.

⁸¹⁶ OSCE Hum. Rts. Situation GTMO (November 2015), *supra* note 207, at 246.

⁸¹⁷ *Estelle v. Gamble*, 429 U.S. 97, 104–105 (1976) (“We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ proscribed by the [8th] Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”).

⁸¹⁸ *See Farmer v. Brennan*, 511 U.S. 825, (1994).

standard of indifference by prison guards to these “identifiable human need[s].”⁸¹⁹ The Court foreclosed the possibility of bringing a successful negligence cause of action under the Eighth Amendment in 1994 when it held that a prison official must have 1) known that a substantial risk of serious harm to the incarcerated individual existed, and 2) ignored that risk.⁸²⁰

Despite these cases providing prisoners with constitutionally protected rights, Physicians for Human Rights identifies that it is yet unclear whether the Constitution applies at Guantánamo Bay.⁸²¹ While these protections would apply if there were significant changes to the NDAA allowing for the transfer of prisoners to facilities on the U.S. mainland, they may or may not apply while the prisoners remain in detention at Guantánamo Bay. Despite this lack of constitutional clarity, there have been court rulings that directly address care for prisoners at Guantánamo Bay, including *Abdulrazzaq v. Trump*⁸²² and *al Qahtani v. Obama*.⁸²³ In *Abdulrazzaq*, the petitioner alleged in his habeas corpus petition that the conditions of his confinement violated the Eighth Amendment. The district court used the Supreme Court and Second Circuit precedent to evaluate the petitioner’s claim and dismissed it, reasoning that the petitioner did not state a case of deliberate indifference and that “a claim of negligent medical treatment does not state an Eighth Amendment claim.”⁸²⁴ In *al-Qahtani*, the petitioner filed a motion in 2017 to compel the government to convene a “mixed medical commission,” as required by U.S. Army Regulations and the Third Geneva Convention, to evaluate whether the petitioner qualified for medical repatriation because of his psychiatric condition.⁸²⁵ The district court judge granted the motion in March 2020; the government appealed; the petitioner moved for the appeal to be dismissed as premature; and the appellate court granted the petitioner’s motion, dismissing the government’s appeal. The mixed medical commission, if convened (the government moved to vacate the District Court’s order in January 2021), would be composed of three medical practitioners, two of whom would be from a neutral country, whose recommendations could compel the petitioner’s repatriation.

There is significant ambiguity in not only what U.S. laws, statutes, and protections are applicable to detainees while at Guantánamo Bay, but within the protections and rights afforded by *Estelle*, which will likely result in continued harms against the detainees.

Despite a thorough examination of international and domestic law regarding the international transfer of prisoners, there seems to be no mention of the responsibility of the transferring nation after the transfer. The only available mentions of medical care are in the basis for medical repatriation and the responsibility for the transferring nation to evaluate the prisoner and inform the other nation about any relevant medical concerns according to the U.S. International Prisoner Transfer Program.⁸²⁶ However, as previously mentioned, it is unclear how much of U.S. domestic

⁸¹⁹ *Wilson v. Seiter*, 501 U.S. 294, 303–4 (1991).

⁸²⁰ *Farmer*, 511 U.S. at 837 (“We hold instead that a prison official cannot be found liable under the [8th] Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.”).

⁸²¹ *Deprivation and Despair*, *supra* note 813, at 10.

⁸²² *Abdulrazzaq v. Trump*, 422 F. Supp. 3d 281 (D.D.C. 2019).

⁸²³ *Al Qahtani v. Obama*, 604 F. Supp. 2d 101 (D.D.C. 2009).

⁸²⁴ *Abdulrazzaq*, 422 F. Supp. 3d at 289.

⁸²⁵ Motion to Compel Examination by a Mixed Medical Commission, *al-Qahtani v. Obama*, 443 F. Supp. 3d 116 (D.D.C. Mar. 6, 2020) (No. 05-CV-1971 (RMC)).

⁸²⁶ *International Prisoner Transfer Program*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/criminal-oia/iptu> (last visited Dec. 21, 2021).

law applies to the Guantánamo Bay detainees, especially as related to standards of care. Aside from this initial evaluation and communication with the accepting country, there is no mention of medical or health care for the transferred individual.

Internationally, the only mentions of medical-related issues in the *Handbook on the International Transfer of Sentenced Persons*⁸²⁷ are the grounds for mental health transfers and the requirement for the transferring state to inform the accepting state of any relevant medical reports regarding the prisoner, and the right of the accepting states to consider the health of the prisoners when making their decision whether or not to accept the transfer.⁸²⁸ Through use of the word “appropriate,” the UN provides too much discretion to the transferring state to decide what is relevant to be communicated to the accepting state, making this sole requirement for transferring states vague and open to broad interpretation.

There are also moral and ethical questions in addition to the legal concerns about U.S. responsibility for these detainees once they have been transferred. One major concern comes in the basis of national resources of the country to which they are transferred. For example, a detainee transferred to Jordan may not have access to necessary care. While Jordan has been known to have high-quality health care, 31 percent of people do not have health insurance and immigration and population increases have led to a deficiency in hospital “bed availability.”⁸²⁹ If a detainee is transferred there, does the United States have the responsibility to ensure that he has access to care that meets U.S. standards—or even Jordan’s highest standards? If so, what does that mean for the local Jordanians who also need health care but are suffering as a reaction to the deficiency in bed availability? And what about transfer of detainees to nations with standards of medical care much lower than Jordan’s: must the United States demand that these nations divert resources from their own populations to meet transferees’ medical and torture-rehabilitation needs? Or should the United States be obliged, pursuant to its torture-rehabilitation obligations under international law, to provide the resources needed to enable the transferee nation to meet U.S.-level standards of care? We believe that such an obligation represents the best understanding of U.S. rehabilitation responsibilities, but we are mindful of the inequities this would create between the medical care received by transferees and nationals of poorer, less-developed transferee countries.

Under Article 12 of the International Covenant on Economic, Social, and Cultural Rights, all individuals are guaranteed the right to health.⁸³⁰ Despite championing human rights across the globe, the United States has signed but not ratified this agreement, meaning that it is only “obliged to refrain from acts which would defeat [the treaty’s] object and purpose.”⁸³¹ While the United States has continued to treat detainees at Guantánamo Bay with a level of care that many say violates medical ethics,⁸³² OSCE argues that international law protects detainees and guarantees them the right to “adequate medical attention and healthy living conditions.”⁸³³

⁸²⁷ HANDBOOK ON THE INTERNATIONAL TRANSFER OF SENTENCED PERSONS, UN OFF. ON DRUGS AND CRIME (2012), https://www.unodc.org/documents/organized-crime/Publications/Transfer_of_Sentenced_Persons_Ebook_E.pdf.

⁸²⁸ *Id.* at 38–39.

⁸²⁹ Muhannad H. Yousef et al., *The Fair Allocation of Scarce Medical Resources: A Comparative Study from Jordan*, 7 FRONTIERS IN MEDICINE 1 (Jan. 12, 2021), <https://doi.org/10.3389/fmed.2020.603406>.

⁸³⁰ International Covenant on Economic, Social, and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3.

⁸³¹ Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

⁸³² Post-Conference Summary, *Medical Care and Medical Ethics at Guantánamo*, CONST. PROJ. AND GLOB. LAW’S AND PHYSICIANS (2013), <http://detaineetaskforce.org/wp-content/uploads/2013/12/12-2-Conference-Summary-FINAL.pdf>.

⁸³³ OSCE Hum. Rts. Situation GTMO (November 2015), *supra* note 207, at 116.

Under the NDAA,⁸³⁴ DOD funds may not be expended to transfer Guantánamo Bay detainees to the United States. This means that any medical care that they require must be either already available to them at the camp or transported to them from the US mainland. This complicates matters as it requires not only the transport of qualified medical personnel but also equipment, for example the MRI temporarily transported to the facility in 2017.⁸³⁵ While required under the NDAA, this complicates care received by the detainees and increases the cost to the United States. The MRI incident cost \$370,000,⁸³⁶ whereas each round-trip flight to Guantánamo Bay costs \$185,000.⁸³⁷ This is especially problematic as U.S. personnel stationed at Guantánamo Bay may be airlifted out in the case of medical emergency, while the detainees housed there may not. In 2019, a judge serving on the 9/11 case had to be airlifted to Miami, FL, for emergency eye surgery,⁸³⁸ demonstrating this possibility. While the judge had to wait sixteen hours due to aircraft shortage, DOD stated that they have moved to address that timespan and reduce it for future emergencies.⁸³⁹ Detainees with similar conditions would instead be forced to wait as required equipment and medical personnel are identified and made available, transportation has been arranged, the care and transport has been approved in addition to the time required for the transportation to Guantánamo Bay.

In addition to prohibiting the transport of detainees to the United States, the NDAA specifically prohibits the modification or construction of facilities on the United States to house these detainees.⁸⁴⁰ As a 2019 report by the Center for Victims of Torture and Physicians for Human Rights report found, medical care at Guantánamo is severely lacking, violating the Mandela rules for the treatment of prisoners.⁸⁴¹ Among these ethics violations are failure to take and document patient health histories, failure to provide and ensure consistent and prompt access to urgent care, and failure to provide consistent care that meets appropriate standards of care, especially for those detainees who have been victims of torture.⁸⁴² These are some of the many deficiencies in medical care provided to the detainees, all of which amount to a great need for medical care that encompasses torture rehabilitation, general care, psychological and psychiatric care.

While transfer of these detainees to any facility on the U.S. mainland is currently prohibited by the NDAA, if it were to happen, the care owed to these detainees becomes slightly better defined. These detainees will become entitled to the rights and protections given to incarcerated individuals in the Constitution, and existing statutes and laws regarding prisoner health care will have to be applied to them. While prison health care is still lacking, this is a higher and better-defined standard of care than they are currently receiving at the Guantánamo Bay detention facility. If these inmates

⁸³⁴ National Defense Authorization Act for Fiscal Year 2021, § 1041, Pub. L. No. 116-283, 134 Stat. 3388 (2020).

⁸³⁵ See Part VII.F.1.

⁸³⁶ *Id.*

⁸³⁷ *Id.*

⁸³⁸ Carol Rosenberg, *Sept. 11 Trial Judge Cancels Guantánamo Hearing, Is Airlifted to US for Emergency Eye Surgery*, McCLATCHY (Jan. 29, 2019), <https://www.mcclatchydc.com/news/nation-world/national/national-security/guantanamo/article225257050.html>.

⁸³⁹ *Id.*

⁸⁴⁰ National Defense Authorization Act for Fiscal Year 2022, PL 117-81 section 1034, 135 STAT. 1901 (2021)

⁸⁴¹ *Deprivation and Despair*, *supra* note 813, at 28.

⁸⁴² *Id.*

were transferred to locations outside the United States, the U.S. responsibility is less clear. Without any clear precedent or laws detailing this potential responsibility, the country will find itself facing criticism regardless of the path it chooses: to ensure a certain standard of care and be seen to be overlooking the medical and economic needs of others within the country the detainee has been transferred to, or to leave the detainee's needs and care within the jurisdiction of the other country, and be seen as refusing to address the harms done to these individuals while in U.S. custody, dismissing the human rights the country has previously committed to upholding.

The 2019 Report by Physicians for Human Rights and the Center for Victims of Torture recommends that the Congress should lift the restrictions on transferring detainees to the U.S. mainland, at a minimum for those detainees who require more intensive health care.⁸⁴³ The report also recommends that the Executive Branch should ensure that any medical treatment given to detainees transferred to U.S. soil meets acceptable medical care as evaluated and agreed upon by medical experts and peer-reviewed literature in the applicable field.⁸⁴⁴ One way that the U.S. can extend care to these detainees who were harmed by and during their detention at Guantánamo Bay is through ensuring that they receive care in the country to which they are transferred. Some detainees face more serious health issues than others, and by nature of these health issues, pose an extremely low risk of recidivism. These detainees deserve to be released from custody as recommended by Physicians for Human Rights and the Center for Victims of Torture.⁸⁴⁵

There needs to be a more individualized assessment regarding the needs of each detainee as they are transferred out of Guantánamo Bay. Each detainee has different health conditions and needs, has different requirements of care due to potential torture while in U.S. custody, and may pose different levels of threat to the United States and other actors. The United States has the responsibility to provide care and rehabilitation for detainees who were tortured, and bears responsibility for the health and status of these detainees after they have been transferred. In torturing these detainees, the United States violated international law, therefore while international law does not explicitly set out responsibility for a transferring nation after the transfer has occurred, the United States has the responsibility to go beyond the letter of the law and assume some responsibility for the care of transferred detainees who were tortured.

One recommendation is that the secretary of defense should direct the Periodic Review Board (PRB) to conduct a thorough review of the status of each detainee currently interned at Guantánamo and to publicly release the findings of such review. The PRB's review should identify a mechanism of resolution for each ongoing case as well as to assess the detainees' health and physical conditions as needed to conduct successful repatriation or transfer. This would provide the detainees with rehabilitative care and allow the United States to fulfill its responsibility to the detainees while mitigating the risks to the detainees created by differing health care and national resources.

The torture these detainees faced is crucial to determining the responsibility the United States holds in providing rehabilitation or redress, which determines the level of care and responsibility the United States must provide once the detainees have been transferred. However, while all detainees at Guantánamo Bay have suffered years of mistreatment, they have not all survived torture. This is an important distinction as it identifies further questions of responsibility. It must be determined whether their mistreatment is enough in the eyes of the law, both domestic and international, to warrant care from and administer responsibility from the United States. Regardless of the specific conditions and needs

⁸⁴³ *Id.*

⁸⁴⁴ *Id.*

⁸⁴⁵ *Id.*

of each detainee as compounded by their treatment by the United States, the United States has the obligation and responsibility to ensure that the standard of care of these detainees does not deteriorate as a result of transfer and to ensure that proper medical ethics and standards are being met. The United States must also assume responsibility for rehabilitation and redress for those detainees who are victims of U.S. torture, in accordance with international law and basic principles of human rights.

VIII.

EFFECTS OF U.S. GOVERNMENT CLASSIFICATION PRACTICES AND CLAIMS OF PRIVILEGE

A. Impact of Classification Practices

Progress toward resolution of the pending cases and efficiency of the military commission system is impeded by many factors previously discussed in detail: government interference with the defense; the involvement of multiple bureaucracies; and the location and infrastructure at the detention facilities at the base, to name a few.⁸⁴⁶ Another major factor impeding the progress of court proceedings is the government's classification of nearly all information associated with detention and military commissions.

Although defense counsel hold security clearances appropriate to permit them to review the classified, evidence, they are rarely permitted to see original evidence. Rather, as set out below, they are presented summaries or excerpts from classified material, which means defense counsel will never have the opportunity to see or review millions of pages of classified evidence used to support the prosecutions. The nature of some of the withheld evidence and the procedures used to proceed without defense counsel review are set out below.

1. Nature of the Classified Evidence

Although it is widely recognized that the intelligence community engaged in torture against detainees while they were held at black sites, the prosecution has deemed the defendants' memories of their torture at the hands of the U.S. government to be classified.⁸⁴⁷ This unusual approach to classification reverberates through the military commissions process. In 2012, for example, the prosecution argued that "any and all statements" made by the five 9/11 defendants via testimony and discussion with their lawyers should be kept classified. This argument was based on the claim that the detainees had been exposed to "classified sources, methods, and activities" when in CIA custody and that it could not be predicted whether "the accused intends to disclose classified information at arraignment or during subsequent public proceedings in this case."⁸⁴⁸

⁸⁴⁶ See Part III.C *supra*.

⁸⁴⁷ See discussion of SSCI report in Part II of this Report.

⁸⁴⁸ Gov't. Motion to Protect Against Disclosure of Nat'l Sec. Info. at 11, *United States v. Khalid Shaikh Mohammad*, AE013 (filed Apr. 26, 2012), [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE013\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013).pdf).

Access to information about the rendition, detention, and interrogation (RDI) program is critical to enable defense teams to represent their clients properly. Documentation about the RDI program consists of several million cables and memos that were circulated while the program was ongoing. The few documents that have become publicly available demonstrate the relevance of the documents to the defendant's cases, both for findings and sentencing.⁸⁴⁹

Another troubling issue is classification of information regarding the detainees' medical histories, medical conditions, and treatment. Although medical policy guidelines recognize a patient's right to their own personal medical information, defense counsel routinely report that requests for their client's medical records are denied completely or only partially released.⁸⁵⁰ It is unclear why providing counsel with detainees' medical information would harm national security, but by asserting the classification of these records, that is the argument the prosecution is making. Perhaps even more troubling, even military medical personnel lacking sufficiently high-level clearance may not be able to review the medical records.⁸⁵¹ This lack of information for attending medical personnel negatively affects their ability to provide appropriate physical and psychological care to the detainees. Military doctors have even reported being instructed not to ask detainees what they had experienced during interrogations, which results in compromised standards of care. For example, detainee al-Nashiri suffered from chronic nightmares, but the contents of his dreams were classified, so his medical team was unable to fully address his medical needs.⁸⁵²

The above examples illustrate the application of the U.S. government's "presumptive classification" policy that results in every utterance of Guantánamo detainees being classified at a high level until reviewed and declared unclassified by a formal process.⁸⁵³ The general policy and the specific examples set out above may or may not actually protect U.S. national security interests but, as illustrated below, they are at the heart of a series of complex procedures and issues that have exacerbated delays in the prosecution of military commission cases.

2. *Alternatives to Classified Evidence*

The 2019 *Manual for Military Commissions* states, "Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security."⁸⁵⁴ In an effort to balance national security needs and the right of accused to review evidence used to prosecute them, the United States passed the Classified Information Procedures Act (CIPA).⁸⁵⁵ Procedures for dealing with classified evidence in military commissions cases are patterned after CIPA. While CIPA was established to permit some use of redacted or summarized evidence in criminal prosecutions, it is not clear that the drafters contemplated limiting defense discovery to such a great degree. Defense counsel in military

⁸⁴⁹ See discussion of SSCI report in Part II of this Report.

⁸⁵⁰ SCOTT ROEHM ET AL., DEPRIVATION AND DESPAIR: THE CRISIS OF MEDICAL CARE AT GUANTANAMO, (Physicians for Human Rights, 2019), <https://phr.org/our-work/resources/deprivation-and-despair/>

⁸⁵¹ *Id.*

⁸⁵² Fink, *supra* note 155.

⁸⁵³ Cora Currier, *Classified in Gitmo Trials: Detainees' Every Word*, PROPUBLICA (July 17, 2012), <https://www.propublica.org/article/classified-in-gitmo-trials-detainees-every-word>.

⁸⁵⁴ *Man. for Mil. Comm.*, 46 (2019).

⁸⁵⁵ 18a U.S. Code § 9A; 2054. *Synopsis of Classified Information Procedures Act (CIPA)*, DEP'T OF JUST., <https://www.justice.gov/archives/jm/criminal-resource-manual-2054-synopsis-classified-information-procedures-act-cipa> (last visited Dec. 21, 2021).

commissions cases have asserted that they are not permitted to see millions of pages of potentially relevant evidence.⁸⁵⁶ Application of CIPA procedures in capital criminal cases such as the two major military commission cases also raises issues of fundamental fairness.⁸⁵⁷

Military commissions classified evidence procedures are set out in the 2019 *Manual for Military Commissions*, pp. II-43—II-45 and in Military Commissions Rule of Evidence 505. When the prosecution asserts the national security privilege to protect information subject to discovery from disclosure in order to protect national security, the military judge first determines that the subject information's disclosure is, in fact, properly classified. If that is the case, the judge determines whether deletion, substitution, or stipulation would be appropriate in the interests of justice. A common part of the decision process in Commissions cases is for the prosecution to make an *ex parte* (i.e., not in the presence of the defense) presentation to the judge to advocate for the appropriate treatment of the classified evidence, which is often a summary of the information authored by the prosecution.⁸⁵⁸ It is relevant to note that the defense has no opportunity to advocate during the initial procedure (although there is an appeals process), and because defense strategies and evidence are privileged, the military judge and prosecutor, even if fair-minded, may be unaware of defense strategies that excluded evidence might support. A potential result of the classification procedures could be that defendants are convicted and sentenced without access to source exculpatory documents.

3. *Benefits of Greater Transparency*

Well over a decade after the official termination of the RDI program, the government continues to assert that information associated with the program is classified at the top secret or higher level. The government's classification of information associated with the detainees extends beyond the RDI program as well, classifying much of the evidence forming the basis of the prosecutions and, in fact, every utterance of the detainees. This approach does nothing to dispel the reputation for opacity and unfairness the commissions have gained over the course of their existence. An approach to the classification of evidence informed by the effect of the passage of time on the damage that might result from the release of information should be considered. Further, after two decades of detention, the ability of detainees to damage U.S. national security with statements is surely much reduced. A recognition that detainees can obtain medical care and legal services without every statement being subject to a security review would both speed the trial process and reestablish a connection between the military commissions and the press.

Although the 9/11 defendants were arraigned in May 2012, the case is still in the pretrial phase. The delay is due in part to extensive litigation surrounding the defendants' right to review classified evidence. In both the 9/11 and *U.S.S. Cole* cases, the prosecution and defense have traded motions and arguments for close to a decade, attempting to determine what information should be produced to the defense. As of July 19, 2021, there have been 10,040 documents filed for the 9/11 case, many of which relate to the classification and disclosure of particular evidence.⁸⁵⁹

⁸⁵⁶ Carol Rosenberg, *Guantánamo Judge: 9/11 Prosecutor's Proposed Trial Evidence Is So Far Inadequate*, MIA. HERALD (Jul. 25, 2016), <https://www.miamiherald.com/news/nationworld/world/americas/guantanamo/article91807252.html>.

⁸⁵⁷ Christopher W. Behan, *Military Commissions and the Commissions and the Conundrum of Classified Evidence: A Semi-Panglossian Solution*, 37 S. Ill. L.J. 642 (2013).

⁸⁵⁸ 10 U.S.C. § 949 p-4 (2010), <https://www.govinfo.gov/content/pkg/USCODE-2009-title10/pdf/USCODE-2009-title10-subtitleA-partII-chap47A-subchapV-sec949p-4.pdf>; Mil. Comm. R. Evid. 505.

⁸⁵⁹ *Cases*, OFF. OF MIL. COMM., <https://www.mc.mil/CASES/MilitaryCommissions.aspx> (last visited Dec. 21, 2021).

IX.

STATUS OF DETAINEES AT GUANTÁNAMO: IMPLICATIONS OF CATEGORIZATION

In armed conflict, no one is without a distinct status and an accompanying level of humanitarian protection, as articulated under the law of armed conflict (LOAC).⁸⁶⁰ In Article 155 of his widely known 1863 Code, Francis Lieber wrote, “All enemies in regular war are divided into two general classes—that is to say, into combatants and noncombatants...” Modern warfare has complicated Lieber’s recitation of nineteenth-century customary law of war, but in broad terms it remains true that where the law of war is concerned, the available categories divide into combatants and civilians, where each category itself possessing several subcategories. Accordingly, there are numerous possible individual battlefield statuses, but they are all subsets of the two basic statuses in armed conflict, civilian and combatant. Despite the clarity of the law of war, the status of detainees at GTMO has been persistently muddled, due in part to deliberate obfuscation by the Bush administration about their status in the early days of detention, as well as the inherent difficulty of classifying violent non-state actors in asymmetric conflict. Opinions on the status of GTMO detainees range from the view that they are prisoners of war, to unprivileged enemy combatants, unlawful combatants, civilians participating in hostilities, civilians serving a continuous combat function, to civilians tout court. Which status one assigns is critical for understanding the treatment to which detainees are entitled under the LOAC.

On one end of the spectrum, as prisoners of war they would not be entitled to due process or any of the trappings of civilian protections under U.S. law, however they would be entitled to prisoner of war (POW) status while in custody, and to release or repatriation once hostilities had ceased. On the other hand, if they were regarded as civilians, tout court, then their detention must be based on the fact that they are suspected of engagement in criminal activity, and they should be charged and tried according to U.S. law, with the full panoply of rights to which criminal defendants are entitled. Ambiguity stems from the fact that GTMO detainees have long been regarded as neither combatants in the traditional sense, nor civilian suspects accused of a crime.

As discussed above, there is division within the Working Group with regard to the issue of status. The differing views could be significant in the following sense. As unprivileged belligerents, the detainees would fall under law of war jurisdiction, and as such it would be easier to justify indefinite detention pending cessation of hostilities, as well as denial

⁸⁶⁰ Uhler et al., *supra* note 188.

of access to the guarantees of civilian process, such as due process and fair trial guarantees. By contrast, if they were to be considered civilians participating in hostilities, they would be subject to civilian law enforcement guarantees, and under U.S. law that would be an entitlement to a trial process that satisfied due process as well as speedy trial requirements.

The majority of the Working Group is inclined to adopt the latter view. Civilians who directly participate in armed conflict, including armed opposition group fighters, lose civilian protections and may be targeted and killed, or captured, during such time as they are directly participating in hostilities. If captured, they are detainees,⁸⁶¹ with the “humane treatment” protections of Common Article 3, and they are triable in domestic or military courts for their precapture acts. The following discussion explains how the majority of the Working Group reached this conclusion and what it viewed as the implications of the status designation. As will be clear from the discussion that follows, rejecting the status of GTMO detainees as POWs leaves the civilian category of “participating in hostilities” as the next best option.

A. Status Analysis

1977 Additional Protocol (A.P.) I, Article 43.2, defines combatants in an international armed conflict (IAC) as “members of the armed forces of a Party to a conflict other than medical personnel and chaplains. . . are combatants, that is to say, they have the right to participate directly in hostilities.”⁸⁶² A defining distinction of the lawful combatant’s status is that, upon capture, he or she is entitled to the protections of a POW, one of the most valuable rights of combatants under LOAC. Because they are not lawful combatants, combatants in a noninteractional armed conflict (NIAC) have no right to engage in hostilities. Accordingly, LOAC makes no provision for POWs in the case of a NIAC.

In NIACs, unprivileged belligerents, often referred to interchangeably as “unlawful combatants,” have neither the combatant’s privilege nor the lawful right to attack opposing lawful combatants.⁸⁶³ Upon capture they are not POWs unless they satisfy the four conditions enumerated in Article 4 of the Third Geneva Convention—a rarely met circumstance. “Combatants may be attacked at any time until they surrender or are otherwise hors de combat, and not only when actually threatening the enemy.”⁸⁶⁴ A combatant remains a combatant when he or she is not actually fighting. When a soldier is bivouacked and sleeping, he remains a combatant and may be lawfully targeted by an opposing lawful combatant. If a combatant is targeted far behind the front lines (not a common IAC event) he continues to be a legitimate target for opposing lawful combatants. That illustrates the downside of being a combatant: a lawful combatant has the combatant’s privilege, but also is a continuing lawful target.

The question then arises: what is the status under LOAC of the current Guantánamo detainees? Arguably, at least for most of them, Guantánamo detainees are civilians who have directly participated in hostilities. Civilians, including those alleged to have committed international war crimes, have LOAC rights and duties, protections, and responsibilities.

⁸⁶¹ Dep’t of Defense Directive 2310.01E, *Dep’t of Defense Detainee Program* (Aug. 19, 2014) (change 2 of Sept. 18, 2020, at Part II. Definitions).

⁸⁶² Medical personnel and chaplains, referred to as “retainees,” are excepted and, upon capture, are given the same rights and protections of POWs. It is their *precapture* conduct that is proscribed by their detainee status—they may not lawfully kill or wound or damage or destroy objects.

⁸⁶³ Arguably the terms “unprivileged belligerent” and “unlawful combatant” should not be used interchangeably, especially given the usage of the latter term from the early days of the Bush administration.

⁸⁶⁴ Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non international Armed Conflicts*, 871 INT’L REV. OF THE RED CROSS 599, 605–6 (Sept. 2008).

What might be the first rule of LOAC is the principle of distinction, namely that civilians may never be the object of attack, unless they are taking direct part in hostilities. “Targeting civilians or civilian property is an offence when not justified by military necessity.”⁸⁶⁵ On a NIAC battlefield, however, the question of status quickly becomes extremely complicated. Who are the combatants and who civilians? The Geneva Conventions do not define the terms. 1977 A.P. I, Article 50, however, says, “A civilian is any person who does not belong to one of the categories of persons referred to in [Article 4 of the Third Geneva Convention as a potential prisoner of war].” The *Department of Defense Law of War Manual* defines a civilian as “a person who is neither part of nor associated with an armed force or group, nor otherwise engaging in hostilities.”⁸⁶⁶ If the individual’s status is unclear, Article 50.1, A.P. I requires that, “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” However, this rule applies only in an IAC. In U.S. military practice, that standard is applied. “Internees” are protected persons—civilians—who are confined or assigned to a specific residence for security reasons in the course of an IAC.⁸⁶⁷ Guantánamo detainees clearly are not internees. In insurgencies, where armed opposition group fighters routinely pose as civilians, the requirement to distinguish civilians from combatants is particularly challenging. Civilians are critical actors on the insurgency battlefield and their safety must be an important operational consideration. The problem is differentiating the civilian from various other statuses, such as unprivileged belligerents and unlawful combatants.

Today, other than the levy en masse, civilians who employ armed force in an armed conflict are said to directly participate in hostilities. In either a NIAC or an IAC, other than levies en masse, a civilian who directly participates in the armed conflict has “unprivileged belligerent” status. How is that status determined applicable to specific individuals? Defining the phrase “direct participation in hostilities” has vexed LOAC students and practitioners since it was included in 1977 A. P. I. Article 51.3 of Protocol I reads, “Civilians shall enjoy the protection afforded by this Section, [General Protection Against Effects of Hostilities], unless and for such time as they take a direct part in hostilities.” A. P. II, Article 13.3, applicable in NIACs, reads the same. Practitioners and scholars have debated the meaning of the phrases, “for such time” and “direct part” since the initial publication of the protocols.

The armed forces of many states were long frustrated by the “revolving door” nature of direct participation. In a NIAC, for instance, imagine a civilian who is participating in hostilities by manufacturing explosives, in particular deadly roadside improvised explosive devices. But his “office,” where he makes his bombs and where he could be apprehended or targeted because building bombs constitutes taking a direct part in hostilities, could not be discovered. He is, however, regularly seen entering and leaving a certain restaurant for lunch—a time when he is *not* taking a direct part in hostilities and could not, under the terms of Article 13.3, be targeted. After lunch, he always slips into the casbah and disappears into his tucked-away “office,” to build more bombs. The watching drone is foiled by its inability to locate him when he is directly participating—foiled by his ever-changing status, now a civilian, now an unlawful combatant, now a civilian.

Have Guantánamo detainees taken a direct part in hostilities in contravention of 1977 A. P. II, Article 13.3? According to the International Committee of the Red Cross’s influential *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, in either an IAC or NIAC, three criteria must be met for a civilian to be considered directly participating in hostilities. All three criteria must be met to satisfy this category.

First, the civilian’s act must be likely to adversely affect the military operations of a party to the conflict or,

⁸⁶⁵ Trial Chamber Judgment, ICTY Prosecutor v. Blaškić, IT-95-14 para.180 (Mar. 3, 2000).

⁸⁶⁶ *U.S. Dep’t of Def., L. of War Manual* §4.8.1.5 [hereinafter *DOD Law of War Manual*]

⁸⁶⁷ Micah Smith, USAF, ed., *Operational Law Handbook* 2020 196 (Judge Adv. Gen.’s Legal Ctr. and Sch., 2021).

alternatively, be likely to inflict death, injury or destruction of persons or objects protected against direct attack. That the harm actually occur is not required, only that there is an objective *likelihood* that it will occur. Attempts and sabotage meet this criterion, as do clearing mines, guarding captured military personnel, and cyberattacks. Violent acts directed against civilians or civilian objects, such as sniper attacks or the bombardment of civilian residential areas, satisfy this criterion.⁸⁶⁸

Second, there must be a direct causal link between the act and the harm likely to result. This is a requirement of “direct causation.” Direct causal links are acts that objectively contribute in a direct way to the defeat of an opposing armed force. The bombmaker satisfies this criterion, as well. A frequent classroom example of a direct causal link is a civilian volunteer driving a military ammunition truck to operationally engaged fighters. The driver’s act is a direct causal link to a likely adverse effect on the military operations of the opposing party to the conflict. The civilian forfeits his civilian protection and, in terms of status, becomes a lawful target because, as he drives, he’s taking a direct part in hostilities.

Moving ammunition from the factory where it is manufactured to a port for shipment to a warehouse in the conflict zone is *not* a direct causal link. It is too indirect an act. Political, economic, and media activities, such as propaganda dissemination, and supportive financial transactions, although war-sustaining, are also too indirect to result in a civilian’s loss of protection.⁸⁶⁹ The design, production, assembly, or shipment of weapons and military equipment are part of the general war effort but, according to the *Interpretive Guidance*, do not constitute a sufficiently *direct* causal link likely to adversely affect the military operations of an opposing party.

The planting or detonation of bombs, mines, booby traps, or improvised explosive devices are acts that *do* have a direct link. The *Interpretive Guidance* holds that, in a combat zone, assembling an IED is not direct participation, an opinion with which the U.S. and other states disagree. Identifying and marking targets and transmission of tactical intelligence are direct causal links. The *Interpretive Guidance* cautiously holds that “[w]here civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they *could* directly cross the threshold of harm required for a qualification as direct participation.”⁸⁷⁰ While the possible death or wounding of civilians, including voluntary human shields, always figures in proportionality calculations, opposing commanders are likely to take a harsher view of human shield volunteers.

Disturbingly, the *Department of Defense Law of War Manual* would have attackers who encounter human shields not consider proportionality in weighing whether to continue or break off a developing attack: “If the proportionality rule were interpreted to permit the use of human shields to prohibit attacks,” the manual holds, “such an interpretation would perversely encourage the use of human shields and allow violations by the defending force to increase the legal obligations on the attacking force.”⁸⁷¹

A civilian’s provision to an armed terrorist group of financial contributions or construction materials, alone, is too attenuated to rise to the direct causal link required to constitute direct participation. The same may be said of scientific research and design of weapons and equipment. The recruitment and general training of personnel “may be

⁸⁶⁸ *Id.* at 1016–19.

⁸⁶⁹ *Id.* at 1020.

⁸⁷⁰ *Id.* at 1024 (emphasis added) (The human shield, voluntary or otherwise, is not the targeted object. That which they attempt to shield (or are forced to shield) is the targeted military object. A commander’s proportionality question is whether the military object remains a lawful target despite the presence of the human shield?).

⁸⁷¹ Compare *DOD Law of War Manual*, *supra* note 866, para 5.12.3.3, with *id.* para. 5.5.4.

indispensable, but [is] not directly causal, to the subsequent infliction of harm.”⁸⁷² Cooks and housekeepers provide no direct causal relation, a targeting position with which the U.S. strongly disagrees.

Not only must the civilian’s act objectively be likely to adversely affect the military operations of a party to the conflict, or be likely to inflict death, injury, or destruction of persons or objects protected against direct attack and have a direct link between the act and the harm likely to result, it must (third), specifically be designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another. In other words, there must be a “belligerent nexus” between the civilian’s act and the resultant harm. For example, “although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another.”⁸⁷³ In such an instance, civilians employing armed force against rogue soldiers would not constitute direct participation in hostilities because the force employed by the civilian is not employed to support any Party to the conflict. The bomb-maker, however, strikes out; his acts are specifically designed to directly cause or exceed a threshold of harm in support of a Party to the conflict.

In either an IAC or a NIAC, the three criteria include a civilian’s actions preparatory to acts of direct participation. That is, the status of direct participation in hostilities includes deployment to and return from the location of the direct participation. It includes the preparatory collection of tactical intelligence, the transport of personnel, the transport and positioning of weapons and equipment, as well as the loading of explosives in a suicide vehicle—although not, without more, the hiding or smuggling of weapons, nor financial or political support of armed individuals.

These three criteria—threshold of harm, direct causation, and belligerent nexus—constitute a broad description of “direct participation” status; one that, in a non-international armed conflict against an enemy without uniforms or insignia, who moves among, and depends upon, civilians for concealment, gives the unlawful combatant’s opponent guidance that offers significant targeting latitude.

Late in the U.S. conflict against armed opposition groups in Afghanistan, there was a large contingent of CIA personnel in Afghanistan advising Afghan military units.

There are thought to be several hundred CIA officers and contractors in Afghanistan, a number that fluctuates often, and it is perceived as one of the agency’s largest presences outside of the Washington area. . . CIA personnel operate in various places around the country, advising militia groups. . . as part of an effort to hunt Al Qaeda. . . including the Haqqani Taliban. . .⁸⁷⁴

The CIA’s actions are specifically designed to be causal links to deadly adverse effects on the operations of armed opposition groups opposing the Afghan government. That is to say, CIA civilian personnel in Afghanistan were directly participating in hostilities. They are not combatants—members of the armed forces of a Party to the conflict—but civilians who are engaged in the fight alongside combatants.

Currently, seven Guantánamo detainees are charged with LOAC violations relating to their unprivileged and

⁸⁷² *Id.* at 1022.

⁸⁷³ *Id.* at 1028.

⁸⁷⁴ Thomas Gibbons-Neff & Julian E. Barnes, *To Save Peace Deal with Taliban, U.S. May Reduce C.I.A. Presence in Afghanistan*, N.Y. TIMES, Apr. 18, 2020, at A17.

unlawful acts while directly participating in hostilities. The remaining detainees are presumably suspected of similar wrongful acts, but there may be insufficient evidence to charge them. Finally, the remainder have not been charged at all, in direct violation of the law of armed conflict, particularly following the cessation of hostilities. Detainees who fit into the latter category must either be charged or released.

B. *Jus in Bello* Protections Due Captured Civilians Participating in Hostilities —

What protections does LOAC mandate for captured armed civilian opposition group fighters, per Common Article 3? A reading of that text indicates it is applicable only in non-international armed conflicts (NIACs), but today Common Article 3 is considered customary international law applicable in all armed conflicts, regardless of their nature. 1977 Additional Protocol I is applicable to IACs. Article 75 of that document specifies a number of human rights, or “fundamental guarantees”, that pertain in IACs. Those guarantees, along with the humane treatment requirements of Common Article 3, are basic rights due every prisoner, detainee, unlawful combatant, and enemy combatant in an IAC. Today, most states accept them as customary law and thus have begun to apply them to NIACS. The guarantees in Article 75 of A.P. I, as well as Common Article 3, are the minimum protections due captured unlawful combatants, though it is worth noting that strictly speaking A.P. I applies only to IACS, and that the United States is not a party to A.P. I.

The United States has made clear that it holds fast to the position that Article 75 of A.P. I is customary law in IACS, but not in NIACs. The *Department of Defense Law of War Manual* notes:

Although not a Party to A.P. I, the United States has stated that the U.S. government will choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well. This statement was intended to contribute to the crystallization of the principles contained in Article 75 as rules of customary international law. . .⁸⁷⁵

A footnote to this *Law of War Manual* paragraph makes explicit that the government’s “sense of legal obligation” to provide Article 75 rights only extends to common Article 2 international armed conflicts, that is, only to IACs, not to NIACS. Captured unlawful combatants, however, may look to Common Article 3’s customary international law assurances of humane treatment, which holds true in a NIAC as well.

Such examples include treatment with all due regard to the person’s sex, respect for convictions and religious practices, provision of adequate food and drinking water as well as clothing, safeguards for health and hygiene, provisions of suitable medical care, protection from violence and against the dangers of the armed conflict, and appropriate contacts with the outside world.⁸⁷⁶

Other countries have arguably accepted Article 75 as customary law, and the United States should as well.⁸⁷⁷ The *Law of War Manual* disagrees but that manual is the law of war according to the Department of

⁸⁷⁵ DOD *Law of War Manual*, *supra* note 866, para. 8.1.4.2. *See id.* para. 18.21.3. for relevant Art. 75 protections that apply regardless of conflict characterization.

⁸⁷⁶ INT’L COMM. RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION Commentary on the First Geneva Convention para. 558 (Cambridge Univ. Press, 2016).

⁸⁷⁷ At the time, Matheson was the U.S. State Department Deputy Legal Advisor. No retreat or disavowal of Matheson’s announcement has ever been issued. Nor has it been repeated, however. Mike Matheson, *Additional Protocol I as Expressions of Customary International Law*, 2-2 AM. U.J. INT’L L. & POL’Y 415 (1987).

Defense, not the entire United States.⁸⁷⁸ Nevertheless, the current U.S. position appears to be that A.P. I, Article 75 rights apply only in IACs, a position it is high time to revise.

A DOD directive applicable to all U.S. Armed Forces, and in all conflicts no matter how characterized, sets a policy that “all persons subject to this directive will, without regard to a detainee’s legal status, at a minimum apply: (1) The standards established in Common Article 3 to [the 1949 Geneva Conventions]. (2) The principles in Articles 4-6 of [Additional Protocol II] during non-international armed conflict. (3) The principles in Article 75 of [Additional Protocol I] during international armed conflict and occupation.”⁸⁷⁹ The 2019 *Manual for Courts-Martial* requires that an accused be brought to trial within 120 days after the earlier of preferral of charges or the imposition of restraint.⁸⁸⁰ Current Guantánamo detainees, those few who have been charged, are beyond 120 *months* of preferral or restraint.

There are other LOAC issues that bear on Guantánamo detainee cases, of course. Common Article 3’s requirement of “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”⁸⁸¹ provides an example. Military commission shortcomings highlighted by the Supreme Court in the first Hamdan case were supposedly cured by the 2006 MCA, as well as by the 2005 Detainee Treatment Act. But these legislative schemes for the treatment of detainees in U.S. custody falls far short of addressing the question of whether GTMO detainees should have civilian due process rights, and whether, if such rights apply, the current Military Commission process would satisfy such rights.

C. Due Process Rights of Uncharged Detainees

While there are currently thirty-six detainees held in GTMO, only ten of these individuals are on track to be tried within the GTMO military commission system.⁸⁸² Seven defendants have already been undergoing pretrial proceedings: the 9/11 defendants, al-Nashiri (accused of perpetuating the bombing of the *U.S.S. Cole*), and al-Iraqi (accused of commanding Al Qaeda or Taliban forces). Three additional detainees have been arraigned.⁸⁸³ Twenty-four detainees remain in GTMO having never been charged with a crime, of which nineteen have been recommended for release. Five detainees held in continued law of war detention are not currently recommended for transfer.

There are a variety of reasons why so many detainees currently held at GTMO were never charged, many of which revolve around the feasibility of a successful prosecution within the military commissions. In many cases, there is simply not enough evidence to successfully prosecute the detainee. As the Guantánamo Review Task Force described in 2010, many detainees were captured in active combat zones when the focus was “the gathering of intelligence and their

⁸⁷⁸ William H. Boothby & Wolff Heintschel von Heinegg, *The Law of War: A Detailed Assessment of the U.S. Department of Defense Law of War Manual* xix (Cambridge Univ. Press, 2018) (“...[T]he document does not describe itself as expressing the U.S. national position on law of war matters.”). See also Michael A. Newton, ed., *The United States Department of Defense Law of War Manual: Commentary and Critique* 22 (Cambridge Univ. Press, 2018) (“The Manual’s consideration of the human rights dimension of modern military operations is perhaps its most fundamental flaw...”).

⁸⁷⁹ Dep’t of Defense Directive 2310.01E, *supra* note 1015, at (3.a)-(3.b).

⁸⁸⁰ R.C.M. § 304.

⁸⁸¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 564 (plurality opinion) (2006).

⁸⁸² *Guantánamo Docket*, *supra* note 3.

⁸⁸³ These detainees are Encep Nurjaman, Mohammed Farik Bin Amin, and Mohammed Nazir Bin Lep. All three are being charged for their alleged participation in a conspiracy related to “two deadly bombings in Indonesia in 2002 and 2003.” *Id.*

removal from the fight” rather than the completion of “formal criminal investigations.”⁸⁸⁴ As such, evidence “was neither gathered nor preserved with an eye toward prosecuting them.”⁸⁸⁵ This lack of evidence is likely even more challenging in cases in which individuals were turned over to the United States by other forces—the United States would have little admissible evidence given that they did not participate in the initial capture of the detainee themselves. The many years that detainees have spent in GTMO also contributes to evidentiary difficulties; contacting potential witnesses or collecting evidence two decades after an alleged crime is very difficult and there is a distinct lack of witnesses in many of the GTMO cases.⁸⁸⁶ Even in cases where the U.S. government does have some evidence collected, it may not be enough to satisfy a criminal burden of proof in either a military commission or federal court.⁸⁸⁷

The central factor contributing to the lack of available evidence is the taint of torture on the testimony of many detainees. Former Convening Authority Susan Crawford refused to refer al-Qahtani’s case to trial, ultimately explaining that “his treatment met the legal definition of torture. And that’s why I did not refer the case.”⁸⁸⁸ Crawford cited the medical impact of torture on al-Qahtani, although she never expanded as to whether al-Qahtani’s ability to stand trial or the inability to use torture-derived evidence was her main concern in not filing charges.⁸⁸⁹

A recent ruling in the *United States v. al-Nashiri* case indicated that while evidence tainted by torture could be heard during pretrial proceedings, statements obtained from torture could not be admitted into evidence at trial.⁸⁹⁰ Whether admissible for pretrial proceedings or not, the inadmissibility of evidence derived from torture at trial casts a long shadow on any effort to bring new charges against uncharged detainees and will likely thoroughly discourage any such effort. Moreover, as noted above, in further proceedings in *al-Nashiri*, the government has reconsidered its position and has concluded that the prohibition on “admission of statements obtained through torture or cruel, inhuman, or degrading treatment” applies to all stages of a military commission case, including pretrial proceedings.⁸⁹¹ The vast majority of U.S. and international jurisprudence also favors this conclusion.

In addition to lack of usable, reliable evidence, military commissions are very limited in their jurisdiction. Military commissions can only pursue charges based on the international law governing armed conflict. Thus, only actions which are in violation of the law of war (rather than just U.S. federal law) can be prosecuted via military commission.⁸⁹² The government has struggled to adhere to these rules, historically attempting to pursue charges which are materially deficit—such as conspiracy, which has been surrounded by legal issues.⁸⁹³ These legal issues were famously highlighted in

⁸⁸⁴ Guantánamo Review Task Force, Guantánamo Review Dispositions, (Jan. 22, 2010), <https://int.nyt.com/data/documenttools/guantanamo-review-task-force-determination/f77c873e5f28c769/full.pdf>.

⁸⁸⁵ *Id.*

⁸⁸⁶ *Id.*

⁸⁸⁷ *Id.*

⁸⁸⁸ William Glaberson, *Detainee Was Tortured, a Bush Official Confirms*, N.Y. TIMES (Jan. 14, 2009), <https://www.nytimes.com/2009/01/14/us/14gitmo.html>.

⁸⁸⁹ *Id.*

⁸⁹⁰ Ruling, Def. Motion to Strike AE 353V for Inclusion of Statements and Derivative Evidence Obtained by Torture or Cruel, Inhuman, or Degrading Treatment at 6, *United States v. Nashiri*, AE 353AA (Mil. Comm. Trial Judiciary, May 18, 2021).

⁸⁹¹ Tess Bridgeman, *Biden Team Gets It Right on Inadmissibility of Torture Evidence in Al-Nashiri Case*, JUST SEC. (Feb. 1, 2022), <https://www.justsecurity.org/80047/biden-team-gets-it-right-on-inadmissibility-of-torture-evidence-in-al-nashiri-case/>.

⁸⁹² David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Military Commissions*, 75 OHIO STATE L. J. 903 (2014).

⁸⁹³ *Id.*

Hamdan v. Rumsfeld, in which the plurality opinion dictated that Hamdan could not be charged with conspiracy because conspiracy was not triable via military commission. Justice John Paul Stevens wrote that conspiracy had “rarely if ever been tried... in this country by any law-of-war military commission not exercising some other form of jurisdiction.”⁸⁹⁴ Conspiracy had also been established at Nuremberg not to be a violation of the law of war.⁸⁹⁵

The difficulty of the charging instrument in the military commission system is highlighted by various cases that have improperly made use of the conspiracy charge in a military context. For example, Mohammed al-Qahtani was accused of “conspiracy to commit terrorism, attacking civilians and civilian objects, as well as murder in violation of the laws of war, destruction of property in violation of the laws of war, hijacking, terrorism, and providing material support for terrorism.”⁸⁹⁶ The matter of the charges in the commissions has been a welter of confusion. For example, the military commissions have taken the position that directly participating in hostilities (DPH) by civilians that results in the death of U.S. forces constitutes “murder, in violation of the laws of war.” But DPH by civilians is not a violation of the law of war per se; it is a violation of civilian, not international law.

Although Salim Ahmed Hamdan is no longer held at Guantánamo, his case presents another example of a jurisdictional issue with charges in the military commissions—as mentioned earlier in tandem with *Hamdan v. Rumsfeld*. Hamdan was initially charged with conspiracy before the Supreme Court ruled that conspiracy was not triable via military commission because it did not fall under the commission’s law of war jurisdiction.

Some of the limitations that have forced prosecutors to leave GTMO detainees uncharged could be resolved if GTMO cases were managed in federal court, rather than the military commissions. Prosecutors would be enabled to charge detainees for a wider variety of offenses beyond just violations of the law of war.⁸⁹⁷ However, as discussed earlier in this Report, several barriers stand before this option, including that GTMO detainees are currently banned from being transferred to the U.S. mainland.⁸⁹⁸ Furthermore, the rules of evidence in federal court are much stricter than the military commission system. For example, the fruit of the poisonous tree doctrine is much more limiting in federal court, whereas, in the military commissions, lawyers can introduce evidence derived from torture in some contexts, though this issue is on appeal in the *al-Nashiri* case.⁸⁹⁹ Further, hearsay rules are loosened in military commissions.⁹⁰⁰ Transfer to a federal court could also result in detainees gaining more due process rights than the government is prepared to offer.

Ultimately, it is unlikely that the U.S. government will bring new charges against any of the five individuals remaining in GTMO without charges who have not also been cleared for transfer. After so many years, it is difficult to collect any more evidence than is already available and some of this evidence may not be admissible due to issues with torture. Even for allegedly dangerous individuals with ties to Al Qaeda or the Taliban, unless the United States can prove that the individual also violated the law of war, jurisdiction would make it difficult to complete a trial via military commission. While federal courts offer more charging options, transferring an individual to federal jurisdiction comes with further complications of its own.

⁸⁹⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 558, 564 (2006) (plurality opinion).

⁸⁹⁵ *Id.* at 565.

⁸⁹⁶ *Mohammed al-Qahtani*, HUMAN RTS. WATCH (Oct. 25, 2012, 3:21 PM), <https://www.hrw.org/news/2012/10/25/mohammed-al-qahtani>.

⁸⁹⁷ Glazier, *supra* note 892, at 905–6.

⁸⁹⁸ See Part VI of this Report.

⁸⁹⁹ Further discussion can be found in Part VII of this Report.

⁹⁰⁰ Military Commissions Act of 2006, 120 Stat. 2600, 37 (2006).

X.

RECOMMENDATIONS

The Working Group unanimously concludes that closing the Guantánamo Bay detention facility (GTMO) is both feasible and desirable and that such closure would better advance the national security interests of the United States than continuing to detain the small number of individuals captured in the war on terror that remain at this facility. Guantánamo is currently home to thirty-six detainees: nineteen are recommended for transfer, ten are in the military commission prosecution process, five are being held pursuant to a determination that if released they will return to hostilities, and two are serving penal sentences as the result of conviction by the military commissions. A number of these individuals suffer from the psychological and physical consequences of abusive treatment, practices federal judges, convening authorities, and even a former U.S. president has referred to as “torture.”⁹⁰¹ This abuse represents a clear violation of protections established by both international and domestic law.

This history of abuse overshadows so many of the legal, medical and political decisions the federal government makes relating to Guantánamo Bay. The impact of detainee abuse has complicated the prosecutorial process by creating issues related to the admissibility of both confessions and direct and derivative evidence, classification of evidence, and access to potentially favorable information held by the government. At the same time, the option of simply releasing all remaining detainees remains both unrealistic and undesirable from the standpoint of national security. The essential question is how to balance the legitimate national security concerns the U.S. faces against the need to restore both the reality and the perception of U.S. commitment to rule of law values in the wake of many years of improper conduct on the part of the U.S. government, conduct that likely violated the international law of armed conflict, federal law, and the U.S. Uniform Code of Military Justice (UCMJ). The Working Group had developed the following recommendations to advance these ends.

⁹⁰¹ President Obama famously announced early in his presidency that “we tortured some folks.” Josh Gerstein, *Obama: “We Tortured Some Folks,”* POLITICO (Aug. 1, 2014), <https://www.politico.com/story/2014/08/john-brennan-torture-cia-109654>. Former Convening Authority Susan Crawford said of the treatment of Mohammed al-Qahtani that “his treatment met the legal definition of torture,” further explaining that this was why she did not refer his case for prosecution. Bob Woodard, *Guantánamo Detainee Was Tortured, Says Official Overseeing Military Trials,* WASH. POST (Jan. 14, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.

A. Recommendations for the Executive Branch

1. **President Biden should rescind Executive Order (EO) 13823 and make closing Guantánamo Bay detention facility a national priority. He should give the secretary of defense the overall authority and responsibility to close the Guantánamo prison and end the military commissions process. He should direct the Department of Defense (DOD) to close the military commissions and the detention facility no later than the end of the 2022–23 fiscal year—September 30, 2023.**

Executive Order 13823 revoked the order to close the detention facilities at Guantánamo Bay contained in Executive Order 13492 and all but established the military commissions and detention facility as permanent parts of U.S. national security.

The Guantánamo Bay military commissions have accomplished only eight verdicts in over two decades and are arguably now more of a threat to national security than any of the remaining detainees. September 30, 2023, is sufficiently far in the future to give the commissions time to complete or transfer any cases the DOD deems worthy of continued pursuit, bearing in mind that the continued detention at Guantánamo Bay contributes to the radicalization of young men and women in the Middle East and elsewhere against the United States as well as a public stain on the United States commitment to International Humanitarian Law. September 30 is the last day of the government fiscal year and seems the appropriate balance of conflicting priorities as well as drawing attention to the significant drain the commissions and detention facility place on our national defense funds. It was not the task of this Working Group to study the specific modalities of closure but we endorse the recommendations presented by Working Group member Ben Farley.⁹⁰²

2. **DOD should attempt to resolve as many cases as possible by guilty plea, whether by pleas conducted in the commissions or in federal court by videoconference. In order to facilitate such pleas, DOD should eliminate the death penalty from the range of possible sentences for defendants willing to plead guilty.**

Plea bargains should be offered in exchange for abandonment of the death penalty as an available punishment at sentencing. In order to resolve the state of prolonged and in some cases likely indefinite detention in which Guantánamo detainees are currently held, DOD should accelerate resolution of the commission cases by offering plea deals, predicated on abandonment of the death penalty as an available sentence. Such guilty pleas can take place either in the commissions, or upon transfer to federal court. Although the National Defense Authorization Act (NDAA) restriction prohibits the use of appropriated funds to bring about a transfer of detainees to federal court, nevertheless it allows for appearance for the purpose of guilty pleas by teleconference. Conducting guilty pleas by teleconference is both legal and feasible, and, in the view of the Working Group, provides the only realistic option for resolving current pending cases with any alacrity.

Using videoconferencing for guilty pleas before federal court offers several advantages. It would effectuate a transfer to federal court without expending funds, and thus is legally permissible under the NDAA. It would allow transfer to federal court, which would be an advantage where sentencing is concerned, as it would enable sentencing and eventually incarceration to take place within the federal system, presumably at a swifter pace and lower cost than could be obtained in the commissions. And it would provide a basis for the U.S. government back off the death penalty as an

⁹⁰² Benjamin Farley, *A Path for Renewing Guantánamo Closure*, JUST SEC. (Nov. 17, 2020), <https://www.justsecurity.org/73311/a-path-for-renewing-guantanamo-closure/>.

available punishment at the same time that it took a stance to provide justice for the victim families. Taking the death penalty off the table for those willing to plead guilty is critical for the United States, given the history of torture and detainee abuse that permeates the experience of the detainees at the hands of U.S. officials. The oral and legal taint of attempting to execute defendants who have been abused in U.S. custody is one that the United States should use every means at its disposal to avoid.

3. If bringing detainees into federal court remains foreclosed, DOD should consider invocation of general courts-martial jurisdiction to prosecute any individual whose case is not resolved through guilty plea or repatriation or release.

Since Article 102 of the Third Geneva Convention requires that prisoners of war be tried within the same system as servicemembers of the detaining country, GTMO detainees arguably should be charged in the Uniform Code of Military Justice (UCMJ) courts-martial system. The courts-martial system boasts several advantages over the current military commission system. While the GTMO military commission system has struggled with a lack of precedent, general courts-martial have existed for at least seventy years. U.S. servicemembers are already tried in the UCMJ system for war crimes, although war crimes are usually prosecuted via common-law charges. Rights of the accused are also built into the military justice system, which would provide more due process rights to the detainees. Given the international outcry regarding detainee abuse at GTMO, providing detainees with this increased due process and a better-established court system would likely protect the reputation of the U.S. abroad.

Another advantage of the courts-martial system has to do with video conferencing. As in federal courts, the use of video teleconferencing to conduct certain proceedings is permitted in courts-martial. Specifically, it is authorized for Article 39(a) sessions, provided that an accused individual “has a defense counsel physically present [in the same location] or when the accused [individual] consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding.” In an Article 39(a) session, a military judge is authorized to hold arraignments, receive pleas from accused individuals, conduct sentencing proceedings, and sentence accused individuals through video teleconferencing.

Because the structure of military commissions is “based upon the procedures for trial by general courts-martial under the . . . U.C.M.J.[,]” it may be possible to utilize video teleconferencing for arraignments, the acceptance of guilty pleas, and sentencing hearings if it would expedite the resolution of detainees’ cases and if it is not feasible to conduct these hearings in federal district courts through video teleconferencing. However, the UCMJ “does not, by its terms, apply to trial by military commissions except as specifically provided in the U.C.M.J. or in [the 2009 MCA.]” Under the 2009 MCA, the secretary of defense is authorized to prescribe “[p]retrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission . . . [as long as they are not] contrary to or inconsistent with [the 2009 MCA].” As a result, since the 2009 MCA does not reference video teleconferencing, the secretary of defense has the discretion over whether to authorize it.

There may be hurdles to using video teleconferencing for arraignments, guilty pleas, and sentencing in military commissions. In addition, the use of video teleconferencing to conduct arraignments, the entering of guilty pleas, and sentencing proceedings in federal court is not yet possible because it has not been authorized except during the COVID emergency. Nonetheless, the narrow use of this technology when a detainee consents to it could prove useful in resolving some of the remaining cases related to detainees at Guantánamo Bay as federal courts, courts-martial, and the military commission system have all begun or continued holding proceedings entirely through video teleconferencing, including arraignments, the entering of guilty pleas, and sentencing proceedings.

This seems a solid recommendation from the standpoint of policy, however an amendment to Article 2 of the UCMJ raises the question of whether such a transfer would be legally possible. Amendment 2(13) provides that “persons subject to this chapter” include “individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war.” This provision arguably bars the courts-martial system from taking jurisdiction of unlawful combatants. Against this concern, it is worth noting that the above provision appears to contradict Article 18 of the chapter which says that a general courts-martial has jurisdiction to try any person who is “subject to trial by military tribunal pursuant to the law of war.” Thus, this recommendation must be accompanied by a secondary recommendation that Article 2(13) in no way qualifies the jurisdiction provided by Article 18.

4. The president should restore the office of the Special Envoy for Guantánamo Closure within the Department of State (DOS) to work exclusively on closing Guantánamo as a national priority.

The Office of the Special Envoy for Guantánamo Closure at the State Department tasked with the job of detainee transfer was shut down and it has not reopened. It is the recommendation of the Working Group that this office be restored. The State Department office for the special envoy relating to Guantánamo closure was itself closed in 2013.⁹⁰³ The last such special envoy, Daniel Fried, devoted many years traveling the globe to try to convince other countries to accept Guantánamo detainees. He managed to convince foreign countries to accept thirty-one low-level detainees. With nineteen detainees currently cleared for transfer the intercession of the Department of State to manage the diplomatic challenges incident to transfer and repatriation seems like a critical first step to further reducing the population of Guantánamo Bay, ultimately enabling closure.

5. The secretary of defense (SecDef) should direct the Periodic Review Board (PRB) to conduct a thorough review of the status of each detainee currently interned at Guantánamo and to release publicly the findings of such review. The PRB’s review should identify a mechanism of resolution for each ongoing case as well as to assess the detainees’ health and physical conditions as needed to conduct successful repatriation or transfer. The SecDef should also work with the Department of Justice on case resolutions and DOS or other agencies/ departments to identify countries that are willing to accept detainees for transfer or release and then serve as a coordinating body to facilitate such transfers to be completed no later than the end of the 2022–23 fiscal year.

The PRB performs the critical work of conducting an individualized assessment regarding the needs of each detainee as they are transferred out of Guantánamo Bay. This is critical not only to determine which detainees can safely be repatriated or transferred to other countries, but also in light of the ongoing medical and psychological challenges the detainees continue to experience due to their abuse in U.S. custody as well as their lengthy incarceration. Some members of the Working Group are of the view that the United States has both moral and legal responsibility to provide care and rehabilitation for those detainees who were tortured, and, moreover, that the U.S. government should accept responsibility for the health and status of these detainees even after they have been transferred. Arguably, by torturing detainees, in violation of U.S. and international law, the United States has to assume some responsibility for the care of transferred detainees who were tortured. At the very least, some care and rehabilitation will be needed to ensure the

⁹⁰³ Charlie Savage, *Office Working to Close Guantánamo Is Shuttered*, N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/us/politics/state-dept-closes-office-working-on-closing-guantanamo-prison.html>.

success of transfer to other countries. Thus appropriate medical treatment would at a minimum be indicated as part of the process of transfer or repatriation for those detainees to whom it applies.

Moreover, regardless of the specific conditions and needs of each detainee as compounded by their treatment by the United States, the United States has the obligation and responsibility to ensure that the standard of care of these detainees does not deteriorate as a result of transfer and to ensure that proper medical ethics and standards are being met.

Finally, the PRB should clarify the legal status of any detainee currently labeled as either “unprivileged belligerent,” “unlawful combatant” for any comparable classification and should abandon such classification in favor of “civilian participating in hostilities.” While the 2009 MCA constituted an improvement over the 2006 version of the same legislation, it still contains the basic framework of “unprivileged enemy belligerent” as applied to the detainees from the war on terror. President Biden, working with the Department of Justice, is in a position to rectify the damage to the rule of law by asking the PRB to speak clearly and with one voice with regard to status designations.

- 6. Any currently uncharged individuals should either be charged or transferred to other countries, at least to the extent that hostilities with that detainee’s nation of origin have ceased. This recommendation does not purport to make any assessment of the president’s authority to detain uncharged individuals past the end of hostilities, but rather constitutes a recommendation that is specific to the current Guantánamo detainees and the history and length of their incarceration.**

This recommendation emerges from the status discussion the Report addresses and the general question of legal protections for individuals detained in the war on terror. The current state of detainees who have not been cleared for transfer, but who are also not in the military commission system, is that of indefinite detention. Such detainees are left with no access to the commission process, and limited ability to access federal habeas proceedings to challenge the basis for their detention. Detention without a fixed end date may have a role to play in the detention of prisoners of war pending the cessation of hostilities, as long as the right to repatriation thereafter is clearly recognized. As discussed above, even Justice Sandra Day O’Connor recognized as much in her majority opinion in the *Hamdi* case. The other possibility would be to bring formal charges against the detainee in question, based on a prima facie case that domestic or international crimes have been committed. But detention that is indefinite, meaning not linked to ongoing hostilities, but also not based upon suspicion of criminal activity, is no part of our tradition or law. As Justice Antonin Scalia recognized in the *Hamdi* case, “Absent suspension of the writ [of habeas corpus], a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.”⁹⁰⁴ What goes for citizens should arguably go for other detainees in U.S. custody.

- 7. President Biden should issue an EO to mandate widespread declassification of the RDI program and direct the attorney general to issue a memorandum imposing presumption of declassification of all government documents relating to torture or other forms of illegal treatment of detainees in U.S. custody associated with the war on terror. This presumption should be rebutted only based on legitimate, specific, and concretely described classification concerns and not for the purpose of concealing illegal or improper government conduct.**

⁹⁰⁴ *Rumsfeld v. Hamdi*, 542 U.S. 507 (2004) (Scalia, J., dissenting).

Classification affects almost every aspect of the military commission system and unless the classification structures can be modified, the military commissions' stated goals of fairness, transparency and justice cannot be met. As this Report details, the military commission system is deeply flawed, and each flaw is exacerbated by the pervasiveness of classification. The ability of the government to censor and approve every piece of information given to cleared defense counsel undermines progress toward trial and the possibility of a detainee receiving a fair trial. Because the government has an interest in keeping the details of the CIA torture program secret despite the fact that the program ended in 2009, its review of information is inherently biased and results in over-classification. This results in paralysis in the commissions, as the defense cannot function effectively and therefore the prosecution cannot proceed with its tasks either, given the lack of a functioning adversarial process. If records and reports relating to the RDI program were declassified, the process in the commissions would be dramatically changed and the testimony of defendants and others could then be corroborated by these reports.

A reformed system would require the government to produce the underlying source documents to the cleared defense counsel. This would be done in a secure facility, such as the one used by the staff of the Senate Select Committee on Intelligence, with the appropriate safeguards. In closed sessions, both sides would then litigate what pieces of evidence could be produced in trial. It must be reiterated that all members of the defense teams hold security clearances sufficient to allow them to view such classified material. There is no practical reason to withhold this information from defense counsel who, with their clearances, presumably can be trusted to honor their obligations, just as the prosecution is.

At a minimum, in order to allow the defense to effectively represent its clients, the government must provide to the defense (and the public) the entire report on the CIA's RDI program conducted by the Senate Select Committee on Intelligence as well as the CIA's internal evaluation of that program, entitled *The Panetta Review*.⁹⁰⁵

The Biden administration also has a legal obligation to declassify certain information, if not to the public, to at least the defense and the detainee. In February, over forty prominent U.S. organizations penned a letter to President Biden, suggesting various courses of action needed to secure transparency within the executive branch.⁹⁰⁶ First, they urge the administration to "direct agencies to proactively disclose records," rather than reactively approving Freedom of Information Act (FOIA) requests. The authors also discuss the need to follow the "foreseeable harm standard," in which the government automatically discloses information unless it "reasonably foresees that disclosure would actually cause harm to an interest protected by the relevant FOIA exemption." The Biden administration must advocate for the declassification of relevant documents to the defense counsel in the military commissions, as this surely would not jeopardize national security.

8. The federal government should revise its position to explicitly affirm that due process does apply to Guantánamo detainees. Accordingly, the Office of Legal Counsel (OLC) should make clear that due process applies to all American tribunals capable of adjudicating detention as a punishment as well as to habeas proceedings.

OLC should make clear that due process applies to all American tribunals capable of adjudicating detention as a punishment. This question is currently before the District of Columbia Circuit Court in *Al-Hela v. Biden*, which

⁹⁰⁵ Ali Watkins, *The Other Torture Report: The Secret CIA Document That Could Unravel the Case for Torture*, HUFFPOST (Jan. 23, 2015), https://www.huffpost.com/entry/panetta-review-cia_n_6334728.

⁹⁰⁶ ACLU et al., Re: Request for Swift Presidential Leadership to Make Transparency a Top Priority for the Biden Administration (2021), <https://www.aclu.org/letter/coalition-letter-president-biden-transparency>.

is considering the question whether a federal court exercising its habeas jurisdiction over GTMO detainees should recognize the due process rights of such individuals. It is a further question of what process is due, and that one must recognize could vary depending on the nature of the procedure in question, the status of the defendant, and so on. The significant question that arises with regard to the content of any due process right made applicable to GTMO detainees, would be whether GTMO defendants possess the right to view the government's evidence against them and the right to exclude unreliable information from a determination about whether detention is justified.

As it currently stands, detainees are in limbo, governed by two distinct legal standards, making it difficult to understand to what rights they are truly entitled. After the *Boumediene v. Bush* decision, the courts found that detainees are entitled to a writ of habeas corpus as well as substantial due process. However, the extent of detainees' rights to due process has not been clearly defined. By establishing an unambiguous legal standard regarding what due process and constitutional rights detainees are entitled to, detainees can be tried and either charged or found that their detention is unwarranted much more quickly. If the D.C. Court of Appeals follows the government's recommendation of applying constitutional avoidance in the *Al-Hela* case, the OLC should produce a public memorandum making clear that due process rights apply to the GTMO detainees.

9. OLC should issue an opinion advising that the state secrets privilege cannot be legitimately invoked when doing so would serve to obscure U.S. involvement in inappropriate or potentially unlawful activity.

The Working Group recommends that the U.S. should embrace the position expressed in *Husayn v. Mitchell* by the U.S. Court of Appeals for the Ninth Circuit. “[The state secrets privilege does] not apply when the alleged state secret is no secret at all, but rather a matter that is sensitive or embarrassing to the government. In other words, the rationale behind the state secrets privilege is to protect legitimate government interests, not to shield the government from uncomfortable facts that may be disclosed or discussed in litigation.”

The Office of Legal Counsel should issue guidance on the application of the state secret doctrine with the purpose of obscuring illegal activity. That office should make clear for the Biden administration and subsequent administrations that the state secrets privilege should never be invoked for the purpose of obscuring illegal activity.

B. Recommendations for Congress

10. In order to allow the president to make use of the broadest range of options in attempting to close the Guantánamo prison, Congress should remove the prohibition on using federal funds to transfer detainees to other U.S. jurisdictions from Guantánamo Bay from future NDAA's, starting with the 2023 NDAA.

The recently passed 2022 NDAA still contains this prohibition. The Working Group strongly recommends that Congress pass the House version with regard to this point. Congress has passed this restriction from one NDAA to the next since 2011 without much debate or consideration of this provision. This matter needs to be carefully rethought, with respect to both the Guantánamo detainees and future defendants in other parts of the world whose cases may best be heard in U.S. federal court. In the case of Guantánamo, lifting this restriction would have allowed many detainees to be tried in federal courts in the United States under traditional rules of evidence and court procedures. Federal courts have had vastly more success at achieving convictions in a timely fashion than the military commissions, with significantly greater respect for the rights of the accused. It is ironic that the military commission process was adopted

in part to ensure sufficiently strenuous prosecution of suspected terrorists and to enable evidence that did not meet the constitutional standards of the Fourth Amendment and other protections such as the due process clause of the Fifth Amendment. Yet despite the additional protections for the rights of defendants in Article III courts, the track record on convictions on terrorism-related charges is significantly better in that context than in the military commissions.

Unlike civilian criminal law system, military justice is commander driven. As commander in chief, the president has significant authority to affect the cases before the military commissions. For example, although the Military Commissions Act does not apply the right to a speedy trial to the military commissions, the president could do so unilaterally by declaring an intent to dismiss charges if the prosecution does not move cases forward efficiently. In order to pressure Congress to remove the NDAA prohibition against transfers to federal court, in theory, President Biden could publicly declare his intent to dismiss charges against all individuals remaining before the military commissions on September 30, 2022. This would potentially put the onus on Congress to permit transfers to the federal court for resolution lest high profile detainees completely escape punishment.

11. Congress should mandate that evidence derived from any illegal activity, including torture, cruel, inhuman, or degrading treatment, or the use of interrogation practices prohibited by U.S. law be excluded from all stages of military tribunal proceedings and for all purposes, except as evidence of the illegal activity.

One of the difficult legal questions that has impacted the military commissions is a debate about whether the fruit of the poisonous tree doctrine applies to military commissions. While the government concedes that statements directly obtained by torture or other coercive measures is inadmissible, the government's simultaneous and seemingly inconsistent assertion that evidence derived from such statements—to include subsequent statements obtained by FBI “clean teams”—is properly admissible, frustrates any conclusive legal analysis on this point. This position has recently been retracted in the recent filing in the *al-Nashiri* case. This uncertainty could potentially be influenced by the pending D.C. Circuit Court of Appeals en banc review in the *Al-Hela* case addressing the question of whether detainees at Guantánamo are protected by substantive due process. However, even if the court holds that the due process clause is applicable to these detainees, it does not necessarily mean that the protection applied to them at the time they were subject to interrogation methods that unquestionably run afoul of the Supreme Court's involuntary confession jurisprudence. In short, the uncertainty as to the ultimate basis for the exclusion of such statements—purely statutory or constitutional—will likely remain unresolved. However, the government's continued reliance on FBI clean team statements is only one reason as to why this question is difficult to address. The substantial discretionary authority afforded military commissions judges to admit derivative evidence for the interests of justice indicate a potentially significant advantage to retaining military commission jurisdiction instead of shifting cases to federal court or to general courts-martial. A recent military commission's decision allowing the U.S. government to introduce torture-tainted evidence in pretrial discovery proceedings evidences this point. While it appears that the U.S. government could not withstand a motion to suppress for evidence directly obtained by coercion, the question of whether evidence derived from such statements is properly admissible lacks a similarly complete answer.

12. Congress should repeal the Military Commissions Act (MCA) of 2009. In the event that Congress is unwilling to repeal the MCA, Congress should consider a variety of amendments to that statute, including but not limited to reevaluation of the status distinctions for detainees; revision of the MCA Punitive Articles to remove offenses that are not closely aligned with widely accepted war crimes; and integration of a “fruit of the poisonous tree” exclusionary rule pertaining to admissible evidence.

The Supreme Court has recognized that the Guantánamo Bay Naval Base is under the “exclusive jurisdiction and control” of the United States, but the majority of U.S. law does not apply there. The Working Group recommends the closure of both the current military commissions and the detention facility at Guantánamo Bay. However, the base will continue to be a tempting option to future administrations to reopen these operations if its current legal situation is allowed to persist. The Working Group recommends that Congress, by statute, extend federal jurisdiction over the base for any and all U.S. government activities that occur there, similar to how the Military Extraterritorial Jurisdiction Act brought the acts of family members, Department of Defense civilians, and contractors overseas under federal jurisdiction.

13. The Senate Judiciary Committee should conduct hearings and issue a report, comparable to the Senate Armed Services Committee and Senate Select Committee on Intelligence reports, to consider and set future standards for the role of members of the legal profession in facilitating policy decisions related to the detention and interrogation practices that were and remain inconsistent with prevailing legal standards.

This recommendation is not a necessary part of closing Guantánamo, yet if Congress were to identify a basis for condemning the legal advice issued by the Office of Legal Counsel at the inception of the RDI program, it would help to dispel the narrative that “torture used to be legal,” but now it is not. Although there has been a Department of Justice (DOJ) report on the status of the individuals who lent their legal talent to supplying a distorted picture of the law, there has been no Congressional statement or finding on this matter, and the Office of Professional Responsibility Report was strictly limited to matters of professional responsibility, not criminal activity.⁹⁰⁷ While the role of the armed services and the Central Intelligence Agency have been carefully detailed by two congressional inquiries, the role of government lawyers as well as members of the judiciary in justifying and thereby helping to implement the RDI program have never been explored. The recognition that torture was never legal would help to motivate the necessary humility on the part of the U.S. government to offer appropriate plea deals as well as to offer repatriation or release where reasonably possible.

There have been only minimal attempts to conduct such an inquiry in the past. For example, during the 2008 Senate Armed Services Committee “Treatment of Detainees in U.S. Custody” hearings, some testimony relating to the matter of the responsibility of the OLC lawyers was heard. At the opening hearing, Professor David Luban of Georgetown University Law Center pointed out that the “golden shield [constructed by DOJ attorneys] ignored Supreme Court precedents, it misrepresented sources, and it pulled the organ failure definition [necessary to their reasoning justifying torture] out of a Medicare statute.”⁹⁰⁸ He argued that “playing the law straight is the lawyer’s basic ethical obligation,” and that the DOJ lawyers ultimately ignored the law in favor of meeting the wants of their client.⁹⁰⁹

At issue, however, was whether the DOJ lawyers acted in good faith, despite their mistaken analysis.⁹¹⁰ Although there have been some hearings, we have not had a clear statement by the congress on what are the expected professional standards for attorneys in future situations where there is a disagreement among attorneys concerning the interpretation

⁹⁰⁷ Off. Pro. Resp., Investigation into Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (Dep’t Just., 2009).

⁹⁰⁸ From the Department of Justice to Guantánamo Bay: Administration Lawyers and Administration Interrogation Rules: Hearing Before H. Comm. on Judiciary I, 110th Cong. 2 (2008) (statement of Prof. David Luban, Prof. of Law, Georgetown Univ. Law Cen.).

⁹⁰⁹ *Id.*

⁹¹⁰ *The Treatment of Detainees in U.S. Custody: Hearing Before S. Comm. on Armed Services*, 110th Cong. 2 (2008) (statement of Sen. Lindsey Graham, Mem. S. Comm. on Armed Serv.).

of legal standards.⁹¹¹ This is why we need a hearing.⁹¹²

In the face of this testimony, Senator Lindsey Graham remarked that “the guide that was provided during this period of time, I think will go down in history as some of the most irresponsible and shortsighted legal analysis ever provided to our nation’s military and intelligence communities.”⁹¹³ However, while the Committee was concerned with how the legal analysis provided by the DOJ made it difficult to hold U.S. personnel engaging in torture accountable, the Committee was less concerned with holding the lawyers who provided that reasoning accountable. Instead, the matter of holding the DOJ lawyers accountable was explored by the House Judiciary Committee from May to July 2008, when it held a series of hearings that sought to understand the role of administration lawyers in making the administration interrogation rules.⁹¹⁴ Throughout the hearings, the main question was whether the administration’s lawyers could be held accountable for their reasoning. This necessarily boiled down to questioning whether the lawyers acted in good faith or not, regardless of the soundness of their legal reasoning itself.⁹¹⁵

Ultimately, the Committee did not make any particular recommendations on the issue of accountability but emphasized the importance of adhering to the rule of law and properly handling dissenting views and suggested that the DOJ was best suited to conduct an investigation into these matters.⁹¹⁶ Leaving these questions to DOJ alone is not the best solution. Overall, while the Committee certainly questioned the accountability of administration lawyers and pushed in their questioning, the Committee seemed to view these hearings more as an opportunity to hear testimony and confirm the historical facts on the interrogation issue. In a prepared statement, Representative Maxine Waters stated that the work of the Committee was to ultimately ensure that no future administration or DOJ attempted a similar twisting of laws, saying that “in [her] mind, terror is having the law turned on its head and secretly manipulated to justify the terrible injustices that were practiced in the name of ‘protecting freedom.’”

In 2015, Senators John McCain and Dianne Feinstein introduced an amendment to the NDAA to strengthen the prohibition on torture, and it was signed into law in November of that year.⁹¹⁷ Although the amendment explicitly prevented the implementation of a torture program in the future, it did not specifically mention the role of or restrictions on administration lawyers.⁹¹⁸ It is important that there is an institutional solution and process for attorneys to fallow in the future if any similar questions should arise in the future.

⁹¹¹ From the Department of Justice to Guantánamo Bay: Administration Lawyers and Administration Interrogation Rules: Hearing Before H. Comm. on Judiciary II, 110th Cong. 2 (2008) (statement of Rep. Jerrold Nadler, Chairman, Subcomm. On Const. Civ. Rts., Civ. Lib.).

⁹¹² *Id.*

⁹¹³ *The Treatment of Detainees in U.S. Custody: Hearing Before S. Comm. on Armed Services*, 110th Cong. 2 (2008) (statement of Sen. Lindsey Graham, Mem. S. Comm. on Armed Serv.).

⁹¹⁴ From the Department of Justice to Guantánamo Bay: Administration Lawyers and Administration Interrogation Rules: Hearing Before H. Comm. on Judiciary I-V, 110th Cong. 2 (2008).

⁹¹⁵ From the Department of Justice to Guantánamo Bay: Administration Lawyers and Administration Interrogation Rules: Hearing Before H. Comm. on Judiciary I, 110th Cong. 2 (2008) (statement of Atty. David R. Rivkin, Jr., Partner at Baker Hostetler, LLP).

⁹¹⁶ From the Department of Justice to Guantánamo Bay: Administration Lawyers and Administration Interrogation Rules: Hearing Before H. Comm. on Judiciary V, 110th Cong. 2 (2008) (statement of Rep. John Conyers, Jr., Chairman, Comm. on Judiciary).

⁹¹⁷ “McCain Feinstein Anti-Torture Amendment: Strengthens U.S. Ban on Torture,” Ctr. for Victims of Torture (2015), https://www.cvt.org/sites/default/files/attachments/u11/downloads/McCain-Feinstein%20Amendment%20Factsheet_November%202015.pdf.

⁹¹⁸ *Id.*

XI.

CONCLUSION

The acts of terrorism inflicted on U.S. civilians and military personnel require justice and accountability. Justice for the survivors and the bringing of perpetrators to account was the *raison d'être* for the commissions. The use of abusive interrogation techniques as well as other problematic governmental behavior, such as excessive classification and secrecy-driven policymaking, has made such accounting and review significantly more difficult to achieve. It has complicated the prosecutorial process by creating issues related to the admissibility of both confessions and direct and derivative evidence, classification of evidence, and access to potentially favorable information held by the government. Moreover, the instances of prosecutorial violations of attorney-client privilege have never been fully vetted, and the reports of the investigations of these privilege violations remain classified. At the same time, the option of simply releasing all remaining detainees remains unrealistic from the standpoint of national security. The essential question is how to balance the legitimate national security concerns the United States faces against the need to restore both the reality and the perception that the United States is committed to rule of law values.

Debates abound over the scope of the president's authority to continue to detain those uncharged individuals who are not in the commissions process, particularly in the wake of the U.S. troop withdrawal from Afghanistan during the summer of 2021. The change in U.S. operations implies the cessation of hostilities in Afghanistan, and thus arguably under international law there is no remaining authority to detain individuals not charged with a crime. Nonetheless, many argue that despite the troop withdrawal, the "war" against terror continues, and that the president retains authority under the 2001 AUMF as well as Article II of the U.S. Constitution to continue the indefinite or "administrative" detention of uncharged detainees. Under the law of armed conflict, there is a duty to repatriate prisoners of war (POWs) upon cessation of hostilities, a duty that the Fourth Geneva Convention applies to those interned in war more generally. Though U.S. law may assert the authority to detain individuals captured in conflict indefinitely based on an assessment of dangerousness, historically, international law has not recognized this entitlement. The tradition of repatriation of belligerent detainees when war ends is of longstanding and is one the United States should continue to recognize.

Arguably, for Taliban detainees, this principle is clearly implicated by the U.S. withdrawal of troops from Afghanistan in August 2021. These detainees have never qualified for POW status, according to U.S. authorities, either because they have operated as a non-state group or because they have failed to meet the POW qualification requirements.

Nevertheless, the end of hostilities between the United States and the Taliban raises a legitimate question whether the underlying principle of post-hostilities repatriation applies in their case. At a minimum, it would be consistent with the withdrawal of the United States from active hostilities in Afghanistan to resolve the ambiguity of indefinite detention of those who are detained based on their involvement in this aspect of the war on terror. Continued retention should be made under color of law and an independent analysis of the threat posed by each detainee with respect to the war on terror.

The Working Group is unanimous in viewing the military commissions as dysfunctional, a system unlikely ever to produce meaningful trials and impartial verdicts. Whatever the original intention, the military commissions have failed to provide the justice that was promised, and most of the pending cases continue to languish in pretrial proceedings, showing little hope of resolution. The commissions have been beset by extreme and unacceptable delays, largely due to a number of factors this Report has flagged: the geographic location; the lack of a governing body of law; the involvement of multiple bureaucracies and agencies that render procedures cumbersome and inefficient; multiple rotating judges; the felt need on the part of the U.S. government to maintain high levels of secrecy; and repeated instances of governmental misconduct and interference with the process. This has created an indelible taint that calls into question the likelihood these tribunals will be capable of producing fair verdicts or outcomes perceived as legitimate. The question of whether any verdict will be sustained on appellate review also remains open. Although many lawyers and individuals of good will have tried over the last twenty years to make the commissions work, the facts are the facts. As the Report details above, the Working Group unanimously concludes that resolving cases by guilty plea is the preferred option whether the pleas are made in the commission system or in federal court. In either case, the desired outcome is most likely to be achieved by taking the death penalty charges off the table for those who are willing to plead guilty.

Where guilty pleas are unavailable, trial using the concurrent military jurisdiction over war crimes vested in general courts-martial authority pursuant to Article 18 of the UCMJ presents a feasible option, some of whose proceedings could occur by videoconference. Even the military commissions have allowed proceedings conducted entirely through video teleconferencing, including arraignments, and sentencing proceedings. Though most Working Group members do not believe impartial justice can be achieved by prosecution before the currently composed military commissions, the Working Group nevertheless maintains that if trials are to move forward in the facility, due process rights must apply to all military commission proceedings at Guantánamo. Of particular importance is the right of each defendant in the commissions process to view the government's evidence against him, a right of unquestioned stature in federal courts and one that is critical for determining whether continued detention is justified.

Improved clarity regarding the categorization of the remaining GTMO detainees is critical, not only for resolving current cases but for avoiding the legal confusion surrounding detainee status in future conflicts, especially against non-state organized armed groups. Despite these differing points of view on some of the issues, there is a consensus, both among members of the Working Group and across other experts in national security law and human rights groups, that the commissions and Guantánamo as a whole represent failed experiments. We urge the Biden Administration to do everything in its power to close on this deeply problematic chapter in U.S. history. Closing Guantánamo, accelerating the pace of transfers for those cleared for transfer to other countries, bringing remaining commission cases into either federal court or courts martials, attempting to facilitate guilty pleas and either charging or releasing those who pose little to no threat, and finally maximizing transparency by broad declassification of all reports that remain classified at present, would be a major step towards accountability and restoring public confidence in the integrity of U.S. counter-terrorism operations and the law of war.

XII.

TABLE OF AUTHORITIES

U.S. Constitution

U.S. Const. amend.V.
U.S. Const. amend.VI.
U.S. Const. amend.VIII.
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