

Plan for Closing the Guantanamo Bay Detention Facility

As the President has made clear, closing the Guantanamo Bay detention facility is a national security imperative. Its continued operation weakens our national security by furthering the recruiting propaganda of violent extremists, hindering relations with key allies and partners, and draining Department of Defense resources.

Of the nearly 800 detainees at one time held at Guantanamo Bay, more than 85 percent have been transferred, including more than 500 detainees transferred by the prior Administration and 147 detainees transferred by this Administration. As of February 23, 2016, 91 detainees remain at Guantanamo Bay. To close the Guantanamo Bay detention facility, the U.S. Government is pursuing three lines of effort simultaneously: (1) identifying transfer opportunities for detainees designated for transfer; (2) continuing to review the threat posed by those detainees who are not currently eligible for transfer and who are not currently facing military commission charges; and (3) continuing with ongoing military commissions prosecutions and, for those detainees who remain designated for continued law of war detention, identifying individualized dispositions where available, including military commission prosecution, transfer to third countries, foreign prosecutions or, should Congress lift the ban on transfers to the United States, transfer to the United States for prosecution in Article III courts and to serve sentences.

Notwithstanding these efforts, the Administration expects there to remain a limited number of detainees who will not be designated for transfer, subject to ongoing military commission prosecutions, serving any adjudged sentences, or candidates for prosecution in Article III courts, and who cannot safely be transferred to third countries in the near term. For these detainees, the Administration intends to work with the Congress to relocate them from the Guantanamo Bay detention facility to an appropriate site in the continental United States while continuing to identify other appropriate and lawful dispositions.

(1) Securely Transferring Detainees Designated for Transfer by the President's National Security Team

Of the 91 detainees who remain at Guantanamo, 35 have been determined to be eligible for transfer by relevant national security departments and agencies (Departments of Defense, State, Justice, and Homeland Security, the Office of the Chairman Joint Chiefs of Staff, and the Office of the Director of National Intelligence) through the interagency 2009 Executive Order 13492 Task Force or the ongoing Periodic Review Board process. A decision to designate a detainee for transfer reflects the best judgment of U.S. Government experts, including counterterrorism, intelligence, and law enforcement professionals, that, to the extent a detainee poses a continuing threat to the United States, the threat could be sufficiently mitigated – and the national interest would be served – if the detainee were transferred to another country under appropriate security measures. Consistent with current law, the Department of Defense transfers detainees following certification by the Secretary of Defense, pursuant to section 1034 of the National Defense Authorization Act (NDAA) for Fiscal Year 2016, that actions were taken or are planned to be taken that will substantially mitigate the risk of these individuals engaging or reengaging in any

terrorist or other hostile activity that threatens the United States or U.S. persons or interests, and that the transfer is in the national security interests of the United States. In making each certification, the Secretary of Defense consults with the Attorney General, the Secretary of State, the Secretary of Homeland Security, the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence. The NDAA prohibits the use of Department of Defense funds to transfer a detainee from Guantanamo Bay unless the Secretary submits the required certification not later than 30 days before the transfer of the detainee.

The United States obtains two types of assurances from a receiving country: *security assurances* (i.e., measures to sufficiently mitigate the threat posed by the detainee) and *humane treatment assurances* (i.e., measures to ensure that the transfer comports with the U.S. Government's humane treatment policy). These assurances are obtained following consultations among diplomatic, military, law enforcement, and intelligence professionals from the United States and the receiving country.

This Administration works extensively with receiving governments to obtain their assurances that appropriate security measures will be in place to substantially mitigate the risk that the transferred individual will engage or reengage in any terrorist or other hostile activity that threatens the United States or U.S. persons or interests. In particular, the Administration seeks assurances from receiving governments that they will take certain security measures that, in the U.S. Government's experience, have proven to be effective in mitigating threats posed by former detainees. The specific measures that are ultimately negotiated vary depending on a range of factors, including the specific threat a detainee may pose, the geographic location of the receiving country, the receiving country's domestic laws, the receiving country's capabilities and resources, and, where applicable, the receiving country's international legal obligations.

Importantly, the Administration will transfer a detainee only if it determines that the transfer is in the national security interest of the United States, the threat posed by the detainee will be substantially mitigated, and the transfer is consistent with our humane treatment policy. The security assurances obtained from receiving countries generally cover:

- restrictions on travel, which can include the denial of travel documents and other measures to prevent transferred detainees from leaving the country (or specific cities or regions in the country) for a specified period of time;
- monitoring of the detainee, which may include physical and electronic monitoring, or other measures available under the receiving country's domestic laws;
- periodic sharing of information concerning the individual with the U.S. Government, including any information regarding attempts to travel outside of the receiving country; and
- other measures to satisfy the United States' national security interests and to aid the detainee in reentering society, such as medical support, skills training, language training, enrollment of the detainee in a reintegration or rehabilitation program, family relocation, and assistance in accessing a variety of public services.

In each case, the specific security assurances negotiated take into account the individual facts and circumstances of the transfer, including the detainee's specific threat profile, as well as the capabilities and domestic legal authorities of the receiving government.

Approach to Transfers. Of the 147 detainees transferred during the current Administration: 81 have been transferred to countries in the Middle East, Africa, and the Arabian Peninsula; 47 have been transferred to countries in Europe and Asia, 13 have been transferred to the Americas; and 6 have been transferred to the South Pacific. The Administration generally aims to transfer detainees to their home countries. Where that is not feasible, the Administration seeks resettlement opportunities in third countries. The Administration intends to continue working to secure transfer and security commitments from countries around the world, including transfers to rehabilitation programs, so long as these arrangements satisfy security and humane treatment requirements.

The Departments of State and Defense, through the offices of the Special Envoys for Guantanamo Closure, are implementing an engagement strategy for the 35 detainees currently approved for transfer, focused on engaging with countries that can accept detainees under conditions that satisfy both our national security requirements (to substantially mitigate the risk the detainees pose to the United States or U.S. persons or interests) and our humane treatment standards. In Fiscal Year 2015, the United States transferred 35 detainees from Guantanamo to ten countries: Afghanistan (4), Estonia (1), Georgia (3), Kazakhstan (5), Morocco (1), Oman (10), Saudi Arabia (2), Kuwait (1), Slovakia (2), and Uruguay (6). Thus far in Fiscal Year 2016, the United States has transferred 23 detainees from Guantanamo to nine countries: Mauritania (1), the United Kingdom (1), the United Arab Emirates (5), Ghana (2), Kuwait (1), Saudi Arabia (1), Oman (10), Montenegro (1), and Bosnia-Herzegovina (1). The Administration has commitments from, or is pursuing commitments from, foreign governments that account for the remaining 35 detainees approved for transfer.

The U.S. Government provides Congress with information on individual detainee cases as required by section 319 of the Supplemental Appropriations Act of 2009 (Public Law 111-32), enacted into law on June 24, 2009. Section 319 provides that the President shall provide to Congress, not later than 60 days after the date of the enactment and every 90 days thereafter, a current accounting of all the measures taken to transfer each eligible detainee to the individual's country of citizenship or another country. The most recent version of this classified report provides additional information on each detainee.

Once a foreign government has agreed to accept one or more detainees, the Administration works with that government to identify particular detainees whose circumstances – such as family ties and language – suggest they would be appropriate fits for that country. The Administration also negotiates security assurances – based on the detainee and the capabilities of the receiving country – to ensure that our national security interests are protected. Matching an individual detainee to a resettlement country is an interagency process, as described below.

- The Offices of the Special Envoy for Guantanamo Closure at both the Departments of State and Defense work with the recipient country to craft specific security and humane treatment assurances.

- To assist the foreign government in identifying particular detainees for resettlement, the U.S. Government provides intelligence reporting and other information about potential transfer candidates, to include medical and behavioral information, and facilitates visits, if desired, by representatives of these foreign governments to Guantanamo Bay to meet and interview potential transfer candidates.
- Prior to all transfers, relevant members of the President's national security team – including the Attorney General, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and the Secretaries of Homeland Security and State – review potential transfers to determine whether steps have been, or will be, taken through negotiated security assurances to substantially mitigate the risk of reengagement in any terrorist activity or otherwise threaten the United States or its allies or interests, and that the transfer is consistent with our humane treatment standards.
- Based on these inputs and his own judgment, the Secretary of Defense makes the final decision on whether to transfer each detainee. If the Secretary of Defense approves a detainee transfer, he is required to make the required written certification to Congress not later than 30 days before the transfer of the individual.

Although the Administration's policy preference is to repatriate detainees to their home countries, it is likely that the majority of future transfers will involve resettlements to third countries. For example, because the repatriation of the 29 Yemeni nationals currently eligible for transfer is not currently feasible and is not permitted by statute, the U.S. Government is working to identify other foreign countries where they may be resettled. To this end, the Department of State is negotiating with foreign governments to facilitate the transfer of designated detainees, provided that credible assurances of appropriate security and humane treatment measures can be obtained. The Departments of Defense and State will continue to regularly brief Congress on detainee transfers as additional information becomes available.

(2) Continued Review of Detainees by the Periodic Review Board

The Periodic Review Board (PRB) is an interagency body with representatives from the Department of Defense, the Department of Homeland Security, the Department of Justice, the Department of State, the Office of the Chairman of the Joint Chiefs of Staff, and the Office of the Director of National Intelligence. The PRB examines whether, given current intelligence and other information, the continued detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States. The Administration is committed to accelerating the review of those detainees who have not had an initial PRB review and are neither currently designated for transfer nor charged or convicted by military commission. The Administration plans to complete all initial reviews by fall of 2016 and will seek to identify responsible and humane transfer options in instances in which the PRB determines that a detainee is eligible for transfer. Even in cases where a detainee's status is not changed by an initial PRB review, that detainee will continue to receive PRB file reviews every six months and will continue to be a candidate for an individualized disposition option, as discussed below.

(3) Ongoing Military Commissions and Disposition Options for Remaining Detainees

Military commissions under the Military Commissions Act of 2009 (MCA) continue at Guantanamo Bay. Currently, three active cases involving seven accused are in the pretrial phase and there are two cases in which detainees have pled guilty and await sentencing. The three active cases are litigating pretrial matters – many involving complex facts or legal questions – and remain in discovery. Both prosecutors and defense counsel have explained to the presiding military judges that it will take significant additional time to properly identify, produce, and examine the substantial volume of classified material involved in these cases. These complex issues and the volume of classified discovery have resulted in the filing of hundreds of motions – many of which raise matters of first impression in the commissions system. Resolution of these motions and completion of discovery are necessary steps in order to effectuate a full and fair trial, and to seek justice for both the victims and the accused. We can expect lengthy appeals once the active cases go to trial and reach verdicts. All of this currently costs \$91 million per year and is expected to continue for several years.

Criminal cases of this magnitude are often lengthy and costly, but some processes may be improved by legislative changes. Thus, the Administration is considering seeking changes to the MCA to improve the efficacy, efficiency, and fiscal accountability of the commission process fully in alignment with the interests of justice and consistent with our American values of fairness in judicial processes. Some of these changes are relatively simple. For example, changes that would provide flexibility in conducting certain proceedings may ease the burden on the parties and facilitate better management of the process. Additionally, the Administration is also considering whether there are other legislative changes outside the context of the MCA that might enable detainees who are interested in pleading guilty in Article III courts, and serving prison sentences according to our criminal laws, to do so. We look forward to working with Congress on these proposals.

Detainees who remain designated for law of war detention will be considered, on a case-by-case basis, for the following disposition options:

A. U.S. Prosecution or Transfers to Third Countries

- *Article III or Military Commission Prosecution.* Of the 46 detainees who currently are not eligible for transfer and are not in some stage of the military commissions process, 22 were initially referred by the Guantanamo Review Task Force for prosecution (either before a military commission or in an Article III court). In the event these detainees are transferred to the United States, it may be possible to prosecute some of them in one of these two fora. The Administration would work with Congress to establish a site for the ongoing military commission proceedings in a manner consistent with applicable domestic and international law. The Department of Justice would also consider whether it would be possible and appropriate to prosecute any of the other detainees in an Article III court. A number of federal district courts have an established track record of safely and securely conducting high-profile national security trials. Indeed, the record of Article III courts in terrorism cases – providing fair, thorough, and speedy disposition of these

cases – is outstanding. It is not clear how many, if any, detainees would be subject to prosecution in an Article III court; this issue has not been assessed since the statutory prohibition on bringing detainees to the United States was enacted.

- *Transfers to Third Countries.* Detainees not otherwise designated for transfer or subject to prosecution or conviction by military commissions or Article III courts will continue to be considered on a case-by-case basis for transfer to a foreign country, including for foreign prosecution. Any such transfer would be undertaken consistent with applicable domestic and international law and our humane treatment policy and would be carried out only where it was assessed that the conditions under which the detainee would be transferred would substantially mitigate the risk to the United States or U.S. persons or interests.

B. Law-of-War Detention in the United States

For the group of detainees who remain designated for continued detention and who are not candidates for U.S. prosecution or detention or transfer to a foreign country, the Administration will work with Congress to relocate them from the Guantanamo Bay detention facility to a secure detention facility in the United States, while continuing to identify other non-U.S. dispositions. These individuals would be detained under the Authorization for Use of Military Force (AUMF), P.L. 107-40, as informed by the law of war, and consistent with applicable domestic and international law for such detentions.

The Administration has already provided an analysis of the legal issues surrounding such detention. In response to the requirement set out in section 1039 of the NDAA for Fiscal Year 2014, the Department of Justice, in coordination with the Department of Defense, submitted to Congress a report considering whether a Guantanamo detainee relocated to the United States could be eligible for certain forms of relief from removal or release from immigration detention or could have related constitutional rights (the Section 1039 report). (Appendix 1) The Section 1039 report's analysis demonstrates that existing statutory safeguards and executive and congressional authorities provide robust protection of the national security.

Historically, the courts have treated detainees held under the law of war who are brought to the United States as outside the reach of immigration laws. In addition to the relevant judicial case law, Congress separately has the authority to provide expressly by statute that the immigration laws generally, or the particular forms of relief found in relevant provisions of the Immigration and Nationality Act (INA), are inapplicable to any detainees held in the United States pursuant to the AUMF as informed by the law of war. The AUMF provides authority to detain those individuals within the United States until the end of hostilities and then transfer them out of the United States. Thus, assuming detainees are held in the United States by the Department of Defense pursuant to the AUMF and that the immigration laws do not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in relevant provisions of the INA. Moreover, even in a scenario where a relocated Guantanamo detainee was in removal proceedings under the INA, there are numerous bars to such relief. The INA and Federal regulations include various bars to obtaining relief on national security and other grounds, and provide legal authority to hold a

detainee in immigration detention pending removal. The Section 1039 report is clear that the Department of Justice is “not aware of any case law, statute, or constitutional provision that would require the United States to grant any Guantanamo detainee the right to remain permanently in the United States,” and that in any event, “Congress could, moreover, enact legislation explicitly providing that no such statutory right exists.”

Based on past reviews and a 2015 survey of potential detention locations in the United States, the Department of Defense determined that, with modifications, a variety of Department of Defense, Bureau of Prisons, and state prison facilities could safely, securely, and humanely house Guantanamo detainees for the purpose of military commissions and continued law of war detention. For this plan, the Department of Defense identified 13 potential facilities for the purpose of building a cost estimate. This sample allowed the Department of Defense to assess Federal, Department of Defense, and state correctional facilities. As part of the assessment process, the Department of Defense examined ways to split the detainee population between sites, but concluded that a single detention center was the most efficient course of action. Additionally, the Department of Defense considered changes to achieve savings in operating (recurring) costs and facility requirements and modifications. Finally, the Department of Defense developed notional cost estimates for building a new detention center at an existing Department of Defense location.

The Department of Defense examined time needed for modifications; disruption to the existing mission at the site; access to troop housing and support; distance to a military airfield and military medical facilities; and force protection and anti-terrorism requirements. Any location would require modifications to meet the legal and policy standards for secure and humane treatment of detainees, at varying levels of cost. All sites would require significant security upgrades to cells, construction of or upgrades to medical facilities, additional surveillance equipment, and sensitive compartmented information facilities for classified work. All sites would also require the added construction or modification of buildings to create office spaces and a secure courtroom for military commissions.

The Fiscal Year 2015 cost to operate the Guantanamo Bay detention mission was approximately \$445 million. In addition to annual operating costs, maintaining this mission in the future would require approximately \$200 million in military construction that has been deferred in recent years, and \$25 million for related furnishings. Based on site surveys and an in-depth review of every major cost center associated with detention operations, the Administration assesses that executing this plan, including the transfers described above, and then shifting to the operation of a U.S.-based detention facility for 30 to 60 detainees, would lower costs by between \$140 million and \$180 million annually, as compared to FY 2015 Guantanamo operations costs. The exact cost reductions would depend on whether the detention facility was relocated to an existing U.S. military facility or to a non-Department of Defense location that may not have preexisting support infrastructure or security.

Most of the savings would result from a decrease in the number of U.S. personnel necessary to guard and care for a smaller detainee population, and associated reductions in operations and facility costs. In addition, costs related to travel, information technology (IT), contracted support, headquarters activities in the National Capital Region, and detainee case reviews would

be reduced. The Administration continues to assess whether further savings can be realized in these and additional areas. While reducing the population at Guantanamo to 30 to 60 detainees would also reduce costs, the Administration estimates that recurring costs at Guantanamo would be between \$65 million and \$85 million higher annually than at a U.S. facility, primarily due to higher Guantanamo costs associated with facility maintenance and sustainment, personnel, travel, and base support.

Transitioning to a U.S. detention facility would entail certain one-time costs. These one-time costs would include facility construction/modifications, security enhancements, IT development, detainee transportation from Guantanamo, and, if necessary, the cost to lease or purchase property or existing facilities. In total, the Administration estimates these one-time transition costs at a U.S. facility could be between \$290 million and \$475 million. However, within three to five years the lower operating costs of a U.S. facility with fewer detainees (compared to operating Guantanamo with the same number of detainees and the deferred military construction) could fully offset these transition costs, and generate at least \$335 million in net savings over 10 years and up to \$1.7 billion in net savings over 20 years.

C. Disposition of Future Detainees

The Administration approaches new captures on a case-by-case basis with a range of options, including: prosecution in the military commission system or in Federal court; transfer to another country for an appropriate disposition there; or law of war detention, in appropriate cases. For each potential or actual capture, the appropriate Departments would review the pertinent information and make a determination on the best course of action for the individual case. This has been the policy of this Administration and it has allowed commanders the flexibility to respond to the complexities of today's conflicts. Our national security team has repeatedly chosen Article III courts in appropriate circumstances and the results have been clear – our court system has resolved cases involving some of the most hardened terrorists in the highest-profile cases. Consideration of whether future prosecutions should be pursued in a military commission or in an Article III court will take into account the demonstrated ability of the Article III courts to effectively deal with the enormous complexity and challenges of international terrorism cases, and the struggles of the military commissions to address the complicated issues they face - and to achieve recognition as being an effective forum.

D. Legislative Change

To accomplish this plan, the Administration will work with Congress to lift unnecessary prohibitions in current law. Additionally, the Administration is considering requesting changes to the Military Commissions Act of 2009 that would facilitate the efficacy and fiscal accountability of military commission proceedings while ensuring that they continue to operate in a fair and impartial manner.

As the President has said, it is time to bring this chapter of American history to a close. We must close the detention facility at Guantanamo and with it bring an end to the detention of detainees

who can be safely, humanely, and responsibly transferred overseas, deprive terrorists of a propaganda tool, reduce costs, and permit more of our brave men and women in uniform serving at Guantanamo Bay to return to meeting the challenges of the 21st century around the globe.

Appendix

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RECEIVED MAY 14 2014

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 14, 2014

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Buck McKeon
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Messrs. Chairmen:

We are submitting herewith, in consultation with the Department of Defense, the report required by Section 1039 of the National Defense Authorization Act for Fiscal Year 2014.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable James M. Inhofe
Ranking Minority Member
Senate Committee on Armed Services

The Honorable Charles E. Grassley
Ranking Minority Member
Senate Committee on the Judiciary
The Honorable Adam Smith
Ranking Minority Member

House Committee on Armed Services

The Honorable John Conyers, Jr.
Ranking Minority Member
House Committee on the Judiciary

The Honorable Chuck Hagel
Secretary of Defense

**Report Pursuant to Section 1039 of the
National Defense Authorization Act for Fiscal Year 2014**

May 14, 2014

Introduction

The Attorney General, in consultation with the Secretary of Defense, hereby submits this report pursuant to section 1039 of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013). Section 1039(b)(1) seeks an assessment of whether relocation of a detainee currently held at the detention facility at Guantanamo Bay, Cuba, into the United States could result in eligibility for: “(A) relief from removal from the United States, including pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (B) any required release from immigration detention, including pursuant to the decision of the Supreme Court in *Zadvydas v. Davis*; (C) asylum or withholding of removal; or (D) any additional constitutional right.”

As required under section 1039, this report considers whether a Guantanamo detainee relocated to the United States could be eligible for certain forms of relief from removal or release from immigration detention or could have related constitutional rights.¹ The analysis provided below demonstrates that existing statutory safeguards and executive and congressional authorities provide robust protection of the national security.

Historically, the courts have treated detainees held under the laws of war who are brought to the United States as outside the reach of the immigration laws. In addition to the relevant case law, Congress separately has the authority to expressly provide by statute that the immigration laws generally, or the particular forms of relief identified in section 1039(b)(1)(A)-(C), are inapplicable to any Guantanamo detainees held in the United States pursuant to the Authorization for Use of Military Force (“AUMF”)² as informed by the laws of war. The AUMF provides authority to detain these individuals within the United States and transfer them out of the United States. Assuming that detainees are held in the United States by the Department of Defense pursuant to the AUMF, and that the immigration laws do not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in section 1039(b)(1)(A)-(C).

Even in a scenario where a relocated Guantanamo detainee were in removal proceedings under the Immigration and Nationality Act (“INA”), there are numerous bars to the relief identified in section 1039(b)(1)(A)-(C). As described in greater detail below, the INA and

¹ This report focuses on the specific information sought by the reporting requirements in section 1039 and does not purport to address all issues presented by, or that may arise from, the relocation of detainees from Guantanamo to the United States.

² Pub. L. No. 107-40, 115 Stat. 224 (2001) (50 U.S.C. § 1541 note); *see also* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (10 U.S.C. § 801 note).

federal regulations include various bars to obtaining relief on national security and other grounds, and provide legal authority to hold a detainee in immigration detention pending removal. We are not aware of any case law, statute, or constitutional provision that would require the United States to grant any Guantanamo detainee the right to remain permanently in the United States, and Congress could, moreover, enact legislation explicitly providing that no such statutory right exists.

1. Asylum

No Guantanamo detainee relocated to the United States would have a right to receive a grant of asylum in the United States. Asylum is a discretionary form of relief generally available to an alien who demonstrates, *inter alia*, that he was persecuted or has a well-founded fear of persecution in his country of nationality on account of his actual or imputed race, religion, nationality, membership in a particular social group, or political opinion.³ Although an alien who is physically present in the United States may, with limited exceptions,⁴ file an application for asylum, that application may be denied as a matter of discretion even if the alien were able to satisfy the eligibility requirements. With respect to those eligibility requirements, there are a number of bars to asylum relief. For example, an alien who has engaged in terrorist activity as described in INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), is ineligible for asylum. 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.⁵

Asylum applications are generally assessed through an individualized, case-by-case determination by the Department of Homeland Security (“DHS”) or an immigration court; however, a determination regarding asylum could be made with respect to a category of aliens (such as individuals formerly detained at Guantanamo).⁶ Thus, for example, the Executive Branch could promulgate a regulation that would bar Guantanamo detainees relocated to the

³ See generally INA §§ 101(a)(42), 208, 8 U.S.C. §§ 1101(a)(42), 1158 (2012); 8 C.F.R. §§ 208.13(b), 1208.13(b) (2013).

⁴ See INA § 208(a)(2), 8 U.S.C. § 1158(a)(2).

⁵ The bars to asylum are listed at INA § 208(b)(2)(A)(i)-(vi), 8 U.S.C. § 1158(b)(2)(A)(i)-(vi). See also INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (excluding persecutors from refugee definition). Once evidence indicates the applicability of a bar to asylum, the alien bears the burden of proving its inapplicability by a preponderance of the evidence. 8 C.F.R. § 1240.8(d).

⁶ See INA § 103(a), (g), 8 U.S.C. § 1103(a), (g) (describing the immigration authorities of the Attorney General and the Secretary of Homeland Security).

United States from receiving asylum.⁷ Alternatively, Congress could enact legislation to that effect.

2. Withholding of Removal

Section 1039 asks about withholding of removal under the INA, which is a statutory form of protection from removal that is available only when individuals are placed into proceedings under that statute.⁸ This protection is rooted in the United States' *non-refoulement* obligations under the 1967 Protocol relating to the Status of Refugees.⁹ Pursuant to that treaty, the United States is obligated not to return an individual (with some exceptions noted below) to a territory where his life or freedom would be threatened because of his race, religion, nationality, membership in a particular social group, or political opinion (the five "protected grounds").¹⁰ In order to prevail on a claim for withholding of removal, the applicant bears the burden of showing that it is more likely than not that were he removed to the country designated for removal, he would be persecuted on account of one of the protected grounds. Withholding of removal limits only the government's ability to remove an alien to the specific country or countries where the threat to life or freedom exists,¹¹ and thus would not prevent removal of a detainee to a third country where no such threat is posed.¹²

⁷ The INA also gives the Executive Branch the authority to put in place other limitations and conditions for asylum. See INA § 208(b)(2)(C), 8 U.S.C. § 1158(b)(2)(C) ("The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)."); see also *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001) (observing that "[e]ven if a statutory scheme requires individualized determinations . . . the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority") (quotation omitted). Since 2003, the Secretary of Homeland Security has also had the authority to issue asylum regulations. See 6 U.S.C. §§ 202, 271, 557; INA § 103(a)(1), (3), 8 U.S.C. § 1103(a)(1), (3).

⁸ INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). Statutory withholding under the INA is only applicable once an alien is physically present in the United States and subject to a removal order, whether or not he has been formally admitted under the immigration laws.

⁹ 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (incorporating Article 33 of the 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954)); see also INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16. Although the United States is not a party to the 1951 Convention, it became a party to the 1967 Protocol, which incorporates all of the substantive provisions of the Convention, in 1968.

¹⁰ Assuming that a relocated detainee were being transferred to a foreign country pursuant to AUMF authorities and not immigration authorities, the implementing mechanisms under the INA and federal regulations would be inapplicable. The United States could employ an alternate mechanism based on the existing inter-agency process, discussed below, for addressing torture and other humane treatment concerns with respect to detainees relocated from Guantanamo.

¹¹ See *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999).

¹² 8 C.F.R. § 1208.16(f).

An alien who has engaged in terrorist activity, as defined in the INA, is ineligible for withholding of removal under the INA.¹³ An alien is also barred from the remedy of withholding of removal (1) for ordering, inciting, assisting, or otherwise participating in the persecution of others on account of a protected ground; (2) when, having been convicted of a particularly serious crime, the alien poses a danger to the community; (3) where there are serious reasons for believing that the alien committed a serious nonpolitical crime outside of the United States; or (4) where there are reasonable grounds to believe that the alien is a danger to the security of the United States.¹⁴ Unlike asylum, if an alien is eligible for withholding of removal, it cannot be denied as a matter of discretion, but the individual can be removed to a third country, consistent with our *non-refoulement* obligations.

3. Convention Against Torture (“CAT”)

Section 1039 also asks about relief from removal under the immigration laws, including pursuant to the CAT. Focusing on the CAT, under article 3 of the Convention, as implemented through immigration regulations, the United States may not return an alien to a country where he is “more likely than not” to be tortured. The United States already applies this standard as a matter of policy to all transfers from Guantanamo, pursuant to an existing inter-agency process.¹⁵ Federal law does not provide for judicial review of the United States’ compliance with its CAT *non-refoulement* obligations except in immigration cases arising out of review of a final order of removal under the INA.¹⁶ Thus, existing law contains no provision for judicial review of the

¹³ See INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (cross referencing to grounds of deportation based on terrorist activity in INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B), which, in turn, refers to the terrorism-related inadmissibility grounds in INA § 212(a)(3)(B), (F), 8 U.S.C. § 1182(a)(3)(B), (F)).

¹⁴ See INA § 241(b)(3)(B)(i)-(iv), 8 U.S.C. § 1231(b)(3)(B)(i)-(iv); 8 C.F.R. § 1208.16(d)(2). The INA specifies that an alien described in section 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) – which then references INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), rendering inadmissible aliens engaged in terrorist activity – will be considered a danger to the security of the United States and thus barred. Where the evidence indicates that one of these bars applies, the alien has the burden of proving its inapplicability by a preponderance of the evidence. 8 C.F.R. § 1208.16(d)(2).

¹⁵ See, e.g., Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681, 2681-822 (8 U.S.C.A. § 1231 note) (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”). Since the Guantanamo Bay detention facility opened in 2002, more than 500 detainees have been transferred to other countries for repatriation or resettlement. Since 2009, these transfers have been effectuated through a thorough inter-agency process that considers various factors, including whether the threat the detainee may pose can be sufficiently mitigated, as well as whether the transfer can be conducted consistent with our humane treatment policy. The United States would continue to apply such a process with respect to detainees held in the United States.

¹⁶ See FARRA div. G, § 2242(d) (8 U.S.C.A. § 1231 note); *Kiyemba v. Obama*, 561 F.3d 509, 514-15 (D.C. Cir. 2009) (“Congress limited judicial review under the Convention to claims raised in a challenge to a final order of removal . . . Here the detainees are not challenging a final order of removal. As a consequence, they cannot succeed on their claims under the FARR Act.”).

merits of CAT claims filed by Guantanamo detainees relocated to the United States and detained pursuant to the AUMF, as informed by the laws of war.

Even if a Guantanamo detainee relocated to the United States were placed in removal proceedings, and were eligible for one of the forms of CAT protection, the detainee could be removed to any country that did not trigger such protection. Immigration regulations provide two types of CAT-related protection: withholding of removal and deferral of removal.¹⁷ Such protection bars removal only to the country or countries in which it is shown to be more likely than not that the individual would be tortured, allowing for removal to a third country. Thus, if a Guantanamo detainee relocated to the United States were placed in removal proceedings, and were eligible for one of these forms of CAT protection, the detainee could nonetheless be removed to any country where there is no showing that it is more likely than not that the individual would be tortured.

The bars that apply to withholding of removal under the INA¹⁸ also apply to withholding of removal under the CAT regulations.¹⁹ As discussed above, these bars include engaging in terrorist activity, as well as involvement in serious criminal activity. Deferral of removal, by contrast, is not subject to any bars based on the conduct of the applicant; thus, an individual eligible for CAT protection but ineligible for withholding of removal would be granted deferral of removal.²⁰ However, even if deferral of removal is granted, the United States may, as noted above, effect removal to any third country if there is no showing that it is more likely than not that the individual would be tortured in that country. Additionally, DHS could seek termination of deferral if additional evidence relevant to the possibility of torture becomes available.²¹ The United States could also consider whether to pursue diplomatic assurances and other measures related to humane treatment with the goal of addressing concerns and ensuring that the United States satisfies its treaty obligations and its humane treatment policy.²²

¹⁷ The regulations regarding the availability of CAT withholding and deferral of removal may be found at 8 C.F.R. §§ 208.16-208.18, 1208.16-1208.18. Deferral of removal is available to aliens who are “subject to the provisions for mandatory denial of withholding of removal,” but who nonetheless are at risk of torture if removed to a particular country. 8 C.F.R. §§ 208.17(a), 1208.17(a). More so than withholding, deferral is a temporary form of protection that can be more easily and quickly terminated if circumstances change.

¹⁸ INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B).

¹⁹ See FARRA div. G, § 2242(c) (8 U.S.C.A. § 1231 note); 8 C.F.R. § 1208.16(d)(2). For both withholding and deferral, the burden of proof rests with the applicant to show that it is more likely than not that he would be tortured if removed to a particular country. 8 C.F.R. § 1208.16(b), (c)(2).

²⁰ 8 C.F.R. § 1208.17(a).

²¹ See 8 C.F.R. §§ 208.17(d), 1208.17(d).

²² The immigration regulations implementing the United States’ obligations under article 3 of the CAT provide that the United States may attempt to obtain credible diplomatic assurances from the government of the specific country at issue that the alien would not be tortured if removed to that country. See 8 C.F.R. §§ 208.18(c), 1208.18(c). Upon receipt of diplomatic assurances obtained by the Secretary of State, the Secretary of Homeland Security “shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of the [CAT].” *Id.*; see 8 C.F.R. §§ 208.18(c),

4. Possible Rights to Release from Immigration Detention and Related Constitutional Rights

As explained above, assuming that detainees are held in the United States by the Department of Defense pursuant to the AUMF, as informed by the laws of war, and that the immigration laws do not apply to their detention and subsequent transfer from the United States, Guantanamo detainees relocated to the United States would not have a right to a grant of the relief described in section 1039(b)(1)(A)-(C). In light of the focus in section 1039 on certain forms of relief from removal or release from immigration detention, however, we assume for purposes of this subsection of the report that a detainee relocated to the United States from Guantanamo is being held in immigration detention in the United States, pending the individual's removal under the INA. Such an alien could be detained under one of several different INA provisions pending a determination of his removability.²³

Detention during the pendency of removal efforts is generally governed by sections 236(a), 236(c), and 235(b) of the INA. Aliens detained during routine section 240 removal proceedings will typically be detained under INA § 236(a), 8 U.S.C. § 1226(a), which grants DHS the authority to detain or release the alien on bond pending a final removal determination. DHS's decision to detain an alien or release that alien on bond is subject to redetermination by the Attorney General.²⁴

Under certain circumstances, DHS may also invoke the more narrowly tailored detention provisions under sections 235(b) or 236(c) of the INA, 8 U.S.C. §§ 1225(b), 1226(c). Certain criminal aliens or aliens who engaged in terrorist activity are subject to detention under INA § 236(c), 8 U.S.C. § 1226(c). Aliens detained under that section can only be released in limited circumstances where necessary to provide protection to a witness, and where the alien satisfies the Secretary of Homeland Security that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."²⁵ Additionally, section

1208.18(c). With the enactment of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2273, and subsequent amendments, Pub. L. No 108-7, div. L, 117 Stat. 531, 526-32 (2003), the Secretary of Homeland Security has assumed the former authorities of the Attorney General relating to diplomatic assurances in removal cases. See generally 6 U.S.C. §§ 202, 251, 551, 557; INA § 103(a), 8 U.S.C. § 1103(a).

²³ See INA § 235(b)(1)(B)(iii)(IV), (b)(2)(A), 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), (b)(2)(A) (detention of certain applicants for admission); INA § 236(a), (c), 8 U.S.C. § 1226(a), (c) (detention while removal proceedings are pending).

²⁴ At a bond re-determination hearing under INA § 236(a), 8 U.S.C. § 1226(a), the Attorney General must be satisfied that the alien does not pose a danger to the community, or a risk of flight, if released. The Attorney General has broad discretion in bond proceedings to determine whether to release an alien on bond. See *Matter of D-J-*, 23 I. & N. Dec. 572, 575 (AG 2003). Bond hearings are conducted by immigration judges, to whom the Attorney General has delegated the authority to conduct such hearings, and whose decisions can be appealed to the Board of Immigration Appeals (Board). 8 C.F.R. § 1003.19(f). The Board's decisions can then be referred to the Attorney General for review. 8 C.F.R. § 1003.1(h).

²⁵ INA § 236(c)(2), 8 U.S.C. § 1226(c)(2). In applying section 236(c), some courts have held that bond hearings are required in circumstances where an extended period of time has passed. See, e.g., *Ly v. Hansen*, 351 F.3d 263, 270-

235(b) of the INA, 8 U.S.C. § 1225(b), provides for the detention of aliens intercepted at the border and other aliens subject to expedited removal under INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

Once a removal order has become final, Congress has mandated detention of certain criminal aliens, and aliens who have engaged in terrorist activity, during the ninety-day removal period following a final order of removal.²⁶ After that period expires, the government has discretionary authority to continue detention,²⁷ during which time the government could continue to seek suitable removal arrangements. In *Zadvydas v. Davis*, the Supreme Court construed INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), which by its text allows for detention of aliens beyond the ordinary ninety-day removal period, to contain a presumptive six-month limit on detention if there is “no significant likelihood of removal in the reasonably foreseeable future.”²⁸ The Court reached this result based in part on its conclusion that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem.”²⁹

A relocated Guantanamo detainee, if held in immigration detention in the United States, might cite *Zadvydas* or *Clark v. Martinez*,³⁰ in an effort to challenge his continued immigration detention after six months if removal were not significantly likely in the reasonably foreseeable future.³¹ The Supreme Court specifically noted in *Zadvydas*, however, that its decision did not preclude longer periods of detention in cases of “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”³²

71 (6th Cir. 2003) (declining to set a “bright-line time limitation” but requiring bond hearing when length of detention is unreasonable); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233-34 (3d Cir. 2011) (same); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1139, 1144 (9th Cir. 2013) (affirming preliminary injunction requiring bond hearings). An individual in immigration custody who disputes that he is properly categorized as an alien subject to section 236(c) may do so in a proceeding before the Secretary of Homeland Security and in a hearing before the Attorney General. *See* 8 C.F.R. § 1003.19(a), (b), (h)(2)(ii); 8 C.F.R. § 236.1(c)(10), (d)(1); *Matter of Joseph*, 22 I. & N. Dec. 799, 805 (BIA 1999).

²⁶ INA § 241(a)(2), 8 U.S.C. § 1231(a)(2).

²⁷ *See* INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) (providing that an inadmissible alien, an alien subject to detention under INA § 241(a)(2), 8 U.S.C. § 1231(a)(2), or an alien determined to be a risk to the community or unlikely to comply with a removal order, “may be detained beyond the removal period”); *see also* INA § 242(b)(8), 8 U.S.C. § 1252(b)(8) (instructing that INA judicial review provisions do not preclude continued detention of alien challenging removal order).

²⁸ 533 U.S. 678, 701 (2001).

²⁹ *Id.* at 690.

³⁰ 543 U.S. 371, 386 (2005).

³¹ In *Martinez*, the Court extended its *Zadvydas* 180-day statutory construction reasoning to inadmissible aliens. *Id.* at 385-86.

³² 533 U.S. at 696. The government has implemented this aspect of *Zadvydas* through the promulgation of regulations that interpret section 241(a) and provide for further detention with respect to certain aliens, including

Moreover, following the *Zadvydas* ruling, Congress expressly provided for detention during removal proceedings and beyond the presumptive six-month period of aliens who have been certified as endangering national security if their removal is unlikely in the reasonably foreseeable future. Section 236A of the INA, 8 U.S.C. § 1226a, authorizes the detention of an alien where it is certified that there are reasonable grounds to believe that the alien meets the terrorist grounds of removal or is “engaged in any other activity that endangers the national security of the United States.”³³

It is important to note that *Zadvydas* and *Martinez* address detention of individuals in the immigration removal context, and do not speak to the length of detention permissible for Guantanamo detainees who may be relocated to the United States and held under the AUMF, as informed by the laws of war. The Supreme Court in *Hamdi v. Rumsfeld*, which post-dates *Zadvydas*, made clear that detention pursuant to the laws of war is authorized for the duration of the conflict in which the detainee was captured.³⁴ Indeed, in the law of war setting, national security interests are paramount, the continued detention of enemy belligerents serves that compelling purpose, and deference to military judgments is substantial.

In general, any constitutional rights applicable in a particular context for a Guantanamo detainee relocated to the United States should be no greater than those that would normally apply to a similarly situated alien present in the United States in that same context. For example, if any relocated Guantanamo detainee were placed in immigration removal proceedings in the United States, he should enjoy no greater constitutional rights than other similarly situated aliens in the immigration removal context. Similarly, if a relocated Guantanamo detainee were subject to criminal proceedings in the United States, the same criminal trial rights would apply as for any other alien defendant in such a trial. As discussed above, there are a number of statutory provisions that should render Guantanamo detainees relocated to the United States inadmissible under the immigration laws. Such inadmissible aliens should generally have a limited set of statutory and constitutional rights, even when they are physically present in the United States.

aliens who pose a threat to national security. See 8 C.F.R. § 241.14. No court has held that the government lacks statutory authority to further detain individuals who pose a threat to national security, consistent with *Zadvydas*, though courts have differed on their views of the statutory authority for these regulations as applied in other circumstances. Compare *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1256-57 (10th Cir. 2008) (upholding the regulations), *cert. denied*, 558 U.S. 1092 (2009), with *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008) (finding continued detention of a specially dangerous mentally ill alien under 8 C.F.R. § 241.14(f) to be beyond the authority provided in the INA, while noting that Congress resolved the extended detention issue in national security cases in section 236A of the INA), and *Tuan Thai v. Ashcroft*, 366 F.3d 790, 798-99 (9th Cir.) (same), *reh'g en banc denied*, 389 F.3d 967 (9th Cir. 2004).

³³ The detention authority under section 236A of the INA, 8 U.S.C. § 1226a, has not previously been exercised. See also *Martinez*, 543 U.S. at 379 n.4, 386 n.8 (noting that interpretation of the statute in *Zadvydas* did not affect the detention of alien terrorists because sustained detention of alien terrorists is authorized by different statutory provisions – INA § 236A, 8 U.S.C. § 1226a, and the Alien Terrorist Removal Court provisions in INA § 507(b)(2)(C), 8 U.S.C. § 1537(b)(2)(C)).

³⁴ 542 U.S. 507, 521 (2004) (plurality).

Detainees in the United States, like detainees at Guantanamo, will have the right to maintain actions challenging their detention through writs of habeas corpus. For aliens detained under the AUMF, any arguably applicable constitutional provisions should be construed consistent with the individuals' status as detainees held pursuant to the laws of war, and the government's national security and foreign policy interests and judgments should be accorded great weight and deference by the courts.³⁵

Conclusion

Most of the questions posed by the section 1039 report requirement concern relief relating to immigration detention or removal. If, however, detainees are held in the United States by the Department of Defense pursuant to the AUMF, as informed by the laws of war, and the immigration framework does not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in section 1039(b)(1)(A)-(C). Congress could, moreover, expressly preclude those forms of relief by statute. Even if such relief were available, the immigration-related relief described in section 1039(b)(1)(A)-(C) is circumscribed by a variety of statutory and executive authorities that provide robust protection of our national security.

³⁵ See *Boumediene v. Bush*, 553 U.S. 723, 796-97 (2008) (“In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.”); see also *Hamdi*, 542 U.S. at 531 (plurality) (recognizing, in evaluating habeas corpus procedures in law of war detention context, that “[w]ithout doubt, our Constitution recognizes that core strategic matters of waramaking belong in the hands of those who are best positioned and most politically accountable for making them”); *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts “to intrude upon the authority of the Executive in military and national security affairs”).