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BACKGROUNDER

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Closing Guantanamo: A Legal and Policy Analysis of the Senate Provision

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Abstract

For the first time since the Guantanamo Bay terrorist detention facility was opened in January 2002, the Senate, through an amendment to the annual National Defense Authorization Act (NDAA), has mapped out a path to closure of the controversial facility. Section 1032 of the Senate-passed NDAA would allow the Administration to bring some of the 115 detainees to the United States as long as a number of conditions are met. Whether those conditions will be met, however, remains an open question. Even if the Administration should prove successful in moving detainees to the United States, America's enemies and those who oppose the law of war detention would likely shift their criticism from Guantanamo to the new locus of detention, undercutting one of the main arguments made in favor of closing the facility in the first place.

For the first time since the Guantanamo Bay terrorist detention facility was opened in January 2002, the Senate, through an amendment to the annual National Defense Authorization Act (NDAA), has mapped out a path to closure of the controversial facility. The legislative equivalent of an olive branch, Section 1032 of the Senate-passed NDAA would allow the Administration to bring some of the 115 detainees to the United States as long as a number of conditions are met.[1]

Section 1032 would allow the Secretary of Defense to transfer detainees to the United States for continued detention or trial but would prohibit them from applying for asylum or from accruing or gaining lawful immigration status. It also would limit judicial review of detainee cases and require the Administration to

Key Points

- For the past 10 years, the Guantanamo Bay detainee facility has been a "model prison" and in compliance with Common Article 3 of the Geneva Conventions.
- If detainees were moved from Guantanamo Bay to a secure facility in the United States, those same jihadists would use the new location as a proxy for their contempt and hatred toward the United States and Western values.
- There is little evidence that the existence of Guantanamo hampers crucial relationships between America's intelligence professionals and those of its allies.
- The fiscal argument that Guantanamo is too expensive to maintain rings hollow, especially coming from an Administration that has almost doubled the national debt in seven years and has failed to reform Medicaid, Medicare, and Social Security.
- Regrettably, however, Congress and the Administration remain fixated on *where* the enemy should be kept rather than on how best to incapacitate non-state actors lawfully for the long war against terrorism.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3067**

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produce a comprehensive plan on the disposition of each detainee, including costs, legal implications, threat assessment, and a plan for what to do with them if or (more likely) when the armed conflict ends.

Once the comprehensive plan is submitted to Congress, under the amendment as written, Congress must approve it, or the plan is rejected. Section 1032 passed the Senate on June 18, 2015—before the Senate received the Administration's promised Guantanamo Bay "closure" plan.

Whether the Senate-passed amendment will become law is anyone's guess, as it must survive the House/Senate conference committee meeting on the House and Senate versions of the NDAA.[2] There was no similar provision in the House-passed NDAA. The conference meeting has occurred, but no resolution has been reached. Moreover, even if the amendment survives and is signed into law, Congress may not vote to approve the Administration's closure plan if Members do not believe it is sufficiently detailed or contains adequate national security measures.

Whether the Administration will be able to close Guantanamo Bay by January 2017 is also an open question. The answer depends, in part, on how the word "close" is defined; even if the vast majority of detainees are transferred off the island, it is more than likely that military commission proceedings will continue. Closure also depends on the extent to which the President is willing to defy existing transfer restrictions or work with Congress within the framework of the Senate amendment and closure plan. There also are, as detailed in this paper, myriad other obstacles along the way, not the least of which is bipartisan skepticism toward the Administration—hardly a surprise, given the last seven years of broken promises and misjudgments with respect to Guantanamo.

Finally, even if the Administration should prove successful in moving detainees to the United States, America's enemies and those who oppose the law of war detention would likely shift their criticism from Guantanamo to the new locus of detention, undercutting one of the main arguments made in favor of closing the facility in the first place.

Guantanamo Detainee Transfer History

Before analyzing Section 1032, it is important to provide some context for the Senate amendment and the Obama Administration's Guantanamo Bay detention policy.

Since the 9/11 attacks, the United States has held just over 100,000 detainees. The vast majority of those were in Iraq—around 75,000.[3] In Afghanistan, the United States held around 25,000 detainees, and, in total, the United States has held 780 detainees at Guantanamo.[4] Today, no detainees are held by the United States in Iraq or Afghanistan, and only 115 detainees are held at Guantanamo.[5] The youngest detainee is 30, from Yemen; the oldest is 67, from Pakistan. Fifty-seven of the 115 detainees have been cleared by the Obama Administration for transfer to other countries.

In 2002 and 2003, the Bush Administration released some detainees from Guantanamo Bay.[6]

1. The Senate passed its version of the National Defense Authorization Act for Fiscal Year 2016 on June 18, 2015. See H.R. 1735, National Defense Authorization Act for Fiscal Year 2016, June 13, 2015, https://www.congress.gov/bill/114th-congress/house-bill/1735/text (accessed September 13, 2015).
2. As a joint resolution, in order to have the force of law, it would also have to be presented to the President for his signature or veto.
3. The detainees held in Iraq legally were not "detainees" or "unlawful enemy combatants," but rather "security internees."
4. Carol Rosenberg, "By the Numbers," *The Miami Herald,* September 19, 2014, updated September 17, 2015, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2163210.html (accessed September 17, 2015).
5. When President Obama took office, there were 240 detainees at Guantanamo Bay, Cuba. Office of the Director of National Intelligence, "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba," March 4, 2015, footnote a, http://www.dni.gov/files/documents/Guantanamo%20Unclassified%20Release_March%202015_FINAL.pdf (accessed September 7, 2015).
6. A "release" from Guantanamo is fundamentally different from a "transfer" from the detention facility. A release allows the detainee to return to his home country or another country without any written agreement between the United States and the receiving country that requires the former to mitigate any threat the detainee might pose. In contrast, when a detainee is transferred from Guantanamo, the receiving country agrees in writing to certain conditions negotiated with the United States, and those conditions are designed to mitigate the threat the detainee poses. All releases from Guantanamo took place early on during the Bush Administration.

Others were properly classified as unlawful enemy combatants[7] and held under the law of war,[8] while others were transferred from the island to their home country or a third country that agreed to accept them.

The Bush Administration transferred or released a total of 532 detainees prior to January 22, 2009—the day President Barack Obama was sworn into office.[9] The three largest populations of detainees at Guantanamo were from Saudi Arabia, Afghanistan, and Yemen. All told, Guantanamo held detained individuals from dozens of countries. No American citizen was ever held there.

Before each detainee transfer, the United States engaged in extensive confidential executive branch discussions with the country willing to receive the detainee. Those transfer agreements, reduced to writing, ensured that the terms of the transfer were clear to both sides and that, among other things, the receiving country would mitigate the threat that a particular detainee posed.[10] In addition to those countries that agreed to accept transfers of their own citizens, 22 nations have resettled or offered temporary residency to detainees transferred from Guantanamo Bay.[11]

During the Obama Administration, between January 23, 2009, and July 15, 2015, 121 detainees have been transferred from Guantanamo.[12] In order to focus efforts on closing Guantanamo, President Obama created two senior governmental positions to manage the transfer and closure process: the State Department Special Envoy for Guantanamo Closure and the Defense Department Special Envoy for Guantanamo Detention Closure.[13]

Section 307 of the Intelligence Authorization Act for Fiscal Year 2012 required the Director of National Intelligence (DNI) to publicize every six months an unclassified summary of recidivism of detainees formerly held at Guantanamo Bay.[14] It required the DNI to consult with the Central Intelligence Agency (CIA) and the Defense Intelligence Agency (DIA) before reporting the results. As of July 15, 2015, 17.9 percent (117 of 653) of detainees were confirmed to have reengaged in combatant activity, and 12.1 percent (79 of 653) were suspect-

7. The Obama Administration changed the nomenclature of Guantanamo detainees from the Bush-era "unlawful enemy combatants" to "unprivileged enemy belligerents."
8. Charles D. Stimson, "Law of Armed Conflict and the Use of Military Force," testimony before the Armed Services Committee, U.S. House of Representatives, May 16, 2013, http://www.heritage.org/research/testimony/2013/05/the-law-of-armed-conflict (accessed September 10, 2015).
9. Office of the Director of National Intelligence, "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba," p. 2.
10. Domestic and international legal requirements may constrain the ability of the United States to transfer persons to foreign countries if they might face torture or other forms of persecution. Most notably, Article 3 of the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and its implementing legislation prohibit transfer of persons to countries where there are substantial grounds for believing (i.e., it would be "more likely than not") that they would be subjected to torture. The Bush Administration took the position that CAT Article 3 and its implementing legislation did not cover the transfer of foreign persons held outside the United States in the war on terrorism. United States Department of State, "United States Written Response to Questions Asked by the Committee Against Torture," April 28, 2006, http://www.state.gov/g/drl/rls/68554.htm (accessed September 7, 2015). Both the Bush and Obama Administrations have stated that "it is the policy of the United States, consistent with the approach taken by the United States in implementing...[CAT], not to repatriate or transfer...[Guantanamo detainees] to other countries where it believes it is more likely than not that they will be tortured." Declaration of Joseph Benkert, Principal Deputy Assistant Secretary of Defense for Global Security Affairs, DOD, executed on June 8, 2007, at para. 3, *In re Guantanamo Bay* Detainee Litigation, Case No. 1:05-cv-01220 (D.D.C 2007). See also Michael John Garcia, Jennifer K. Elsea, R. Chuck Mason, and Edward C. Liu "Closing the Guantanamo Detention Center: Legal Issues," Congressional Research Service *Report for Congress*, May 30, 2013, pp. 9–12, https://www.fas.org/sgp/crs/natsec/R40139.pdf (accessed September 7, 2015).
11. Rosenberg, "By the Numbers."
12. Office of the Director of National Intelligence, "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba," September 3, 2015, http://www.dni.gov/index.php/newsroom/reports-and-publications/207-reports-publications-2015/1248-summary-of-the-reengagement-of-detainees-formerly-held-at-guantanamo-bay,-cuba-sept-2015 (accessed September 11, 2015).
13. Cliff Sloan was the first State Department Special Envoy for Guantanamo Closure. He was appointed in 2013, stepped down in 2014, and was replaced by Lee Wolsky on June 30, 2015. Paul Lewis was appointed in 2013 to be the Defense Department's Special Envoy for Guantanamo Closure and remains in that job.
14. Intelligence Authorization Act for Fiscal Year 2012, Public Law 112–87, § 307.

ed of reengaging in combatant activity, for a total of 30.0 percent.[15]

Guantanamo Supreme Court Cases: A Short History

There have been four major U.S. Supreme Court cases dealing with Guantanamo detainee rights.[16]

- In 2004, in a 6–3 ruling, the Court held in *Rasul v. Bush*[17] that federal courts have statutory jurisdiction over Guantanamo habeas corpus petitions.

- In 2004, the Court held in *Hamdi v. Rumsfeld*[18] that the 2001 Authorization for Use of Military Force (AUMF) authorized law of war detention for enemy combatants, but the Fifth Amendment Due Process Clause gives a U.S. citizen held in the United States as an enemy combatant the right to contest his detention before a neutral arbiter.

- In 2006, the Court invalidated the military commissions used to try Salim Hamdan. In *Hamdan v. Rumsfeld*, the Court concluded that the military commission convened to try Hamdan "lacks power to proceed because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice] and the Geneva Conventions."[19]

- In 2008, the Court issued its decision in *Boumediene v. Bush*,[20] holding that Guantanamo detainees enjoy the constitutional right of habeas corpus. Specifically, the justices held that the procedures for review of detainees' status were not an adequate substitute for habeas corpus review and that the court-stripping provisions of the Military Commissions Act of 2006 operated as an unconstitutional suspension of the writ of habeas corpus.

Boumediene gave Guantanamo detainees the constitutional right of habeas corpus. After the *Boumediene* decision, detainees filed lawsuits in the federal district court in Washington, D.C., asking to be released and claiming that unless the government could prove to a federal judge that they are indeed unprivileged enemy belligerents, the court must grant the writ. Most detainees have lost their habeas cases because they are in fact unprivileged enemy belligerents.

The Debate over Closure

Conservatives opposed to its closure point out that Guantanamo Bay is a well-run, safe, and humane facility that should remain open during the ongoing armed conflict. The facility has been found to be in compliance with Common Article 3 of the Geneva Conventions by both the Bush and Obama Administrations.[21] Supporters argue that al-Qaeda waged war against the United States well before Guantanamo Bay became a terrorist detention facility. They also point out that there was no Guantanamo Bay when the World Trade Center was first bombed in 1993, when the U.S. embassies in East Africa were bombed in 1998, when the USS *Cole* was attacked in 2000, or for that matter on 9/11. They assert, therefore, that those who contend that the existence of the facility at Guantanamo Bay has fueled terrorism are misguided.

15. The actual number is not knowable because one is not classified as "confirmed" unless and until proof exists of reengagement. It is entirely possible, and indeed likely, that some percentage of Guantanamo detainees who have been released or transferred from the island have reengaged but have not been discovered to have done so. Office of the Director of National Intelligence, "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba," September 3, 2015, p. 1.
16. The Court decided one other detainee case in 2004. In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Court answered the narrow question of whether Padilla, a U.S. citizen held in the United States by the Department of Defense under the 2001 Authorization for Use of Military Force, had properly filed his habeas petition in the correct court. Since it was a fact-specific and narrow decision, it was not included in this discussion of the major relevant Supreme Court decisions.
17. *Rasul v. Bush*, 542 U.S. 466 (2004).
18. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
19. *Hamdan v. Rumsfeld*, 548 U.S. 557 at 558 (2006).
20. *Boumediene v. Bush*, 553 U.S. 723 (2008).
21. Charles Babington and Michael Abramowitz, "U.S. Shifts Policy on Geneva Conventions," *The Washington Post*, July 12, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071100094.htm (accessed September 8, 2015); Peter Finn and Del Quentin Wilber, "Pentagon Review Finds Guantanamo Conditions Meet Geneva Conventions, but Urges More Interaction for Some Detainees," *The Washington Post*, February 21, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/02/20/AR2009022002191.html (accessed September 8, 2015).

The President argues that it is imperative to close Guantanamo Bay because it has weakened national security and set back the moral authority of the United States.[22] Human rights organizations claim similarly that Guantanamo Bay "is a grave threat to both human rights and U.S. national security"[23] and is "emblematic of the gross human rights abuses perpetrated by the U.S. government."[24] And Matthew Waxman, the first Deputy Assistant Secretary of Defense for Detainee Affairs during the Bush Administration, has opined in *The Washington Post* that Guantanamo Bay has "hampered cooperation with our friends on such critical counterterrorism tasks as information sharing, joint military operations and law enforcement."[25]

Some, including President Obama, have claimed that the existence of Guantanamo Bay has acted as a recruiting tool for more terrorists.[26] However, a recent study of jihadist propaganda concluded that Guantanamo Bay has "grown far less salient over the last few years...and has never played a big role in any terrorist groups' propaganda compared to issues that really animate those groups."[27] The study concluded that "it is hardly clear that Guantanamo's *closure* would matter much, so far as concerns the contents of jihadist propaganda."[28]

That said, it is no coincidence that ISIS henchmen have exploited the image of orange jumpsuits—worn by the first Guantanamo Bay arrivals—by dressing their victims in the same orange garb and brutally executing them.

Big Promises, Big Mistakes, and Blown Capital

The year 2009 was arguably the most opportune time for the Administration to close Guantanamo. The Democrats held a 59–41 majority in the United States Senate when counting Independents who caucused with them.[29] Similarly, in the House of Representatives, the Democrats enjoyed a 257–178 advantage.[30] If the President needed any legislation to close Guantanamo—a debatable point—or simply the political backing of the majorities in both houses of Congress, the stars were aligned for him to do so.

In his first week in office, on January 22, 2009, President Obama signed Executive Order 13492 requiring that the joint detention facility at Guantanamo be closed within a year.[31] The order stated that any individuals still in detention after the one-year mark "shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States."[32]

22. See President Barack Obama, "Remarks by the President on National Security," address delivered at the National Archives, Washington, D.C., May 21, 2009, https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09 (accessed August 6, 2015).
23. Human Rights First, "Guantanamo," http://www.humanrightsfirst.org/topics/guantanamo (accessed August 5, 2015).
24. Amnesty International, "Guantanamo, Bagram and Illegal U.S. Detentions," http://www.amnestyusa.org/our-work/issues/security-and-human-rights/guantanamo (accessed August 6, 2015).
25. Matthew Waxman, "The Smart Way to Shut Gitmo Down," *The Washington Post*, October 28, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/10/26/AR2007102601761.html (accessed August 6, 2015).
26. See, for example, transcript, "News Conference by the President," The White House, April 30, 2013, https://www.whitehouse.gov/the-press-office/2013/04/30/news-conference-president (accessed August 6, 2015).
27. Cody M. Poplin and Sebastian Brady, "Is Guantanamo Really a Major Recruiting Tool for Jihadists?" Lawfare, June 3, 2015, http://www.lawfareblog.com/guantanamo-really-major-recruiting-tool-jihadists (accessed September 8, 2015). See also rebuttal at Adam Jacobson, "Closing Guantánamo Will Help Combat Terrorist Propaganda," Just Security, June 12, 2015, https://www.justsecurity.org/23749/closing-guantanamo-combat-terrorism/ (accessed September 10, 2015).
28. Poplin and Brady, "Is Guantanamo Really a Major Recruiting Tool for Jihadists?" (emphasis added).
29. In addition, one Independent and one Independent Democrat caucused with the Democrats. U.S. Senate, Senate History, "Party Division in the Senate, 1789–Present," http://www.senate.gov/history/partydiv.htm (accessed September 13, 2015).
30. U.S. House of Representatives, History, Art & Archives, "Party Divisions of the House of Representatives, 1789–Present," http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (accessed September 13, 2015).
31. Executive Order 13492, January 22, 2009, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," in *Federal Register*, Vol. 74, No. 16 (January 27, 2009), pp. 4897–4900, http://www.gpo.gov/fdsys/pkg/FR-2009-01-27/pdf/E9-1893.pdf (accessed September 11, 2015).
32. Ibid., Sec. 3. Note that the executive order included bringing some number of detainees into the United States for continued detention, which in January 2009 was not prohibited by law.

Yet 2009 ultimately proved to be a pivotal year in the detainee saga not because of any substantial steps toward shuttering Guantanamo, but because, with regard to the question of closure, a series of missteps turned Congress against the Administration. These mistakes soured the mood in Congress regarding the Administration's judgment with respect to how to deal with some detainees and resulted in the Democrat-controlled House and Senate passing legislation to prevent the Administration from importing detainees into the United States—a key part of the original executive order and all closure plans.

In May 2009, President Obama gave an in-depth speech on national security and Guantanamo detainee policy at the National Archives.[33] He acknowledged that "there are no neat or easy answers" with respect to Guantanamo but said that he refused "to allow this problem to fester." In fact, he admitted that "it is my responsibility to solve the problem." To this end, Obama proposed five distinct categories through which detainees would be disposed:

- Federal court trials,
- Reformed military commissions trials,
- Releasing those ordered released by federal courts,
- Transferring those his Administration deems worthy of transfer, and
- Continued military detention of those who cannot be tried but still pose a national security risk to the United States.

President Obama acknowledged that the last category is "the toughest single issue we will face" and further promised that he was not going to "release individuals who endanger the American people." He also promised to "work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution."

The President, however, failed to deliver on these promises, and a month later, on June 9, 2009, the Administration transferred Ahmed Ghailani from Guantanamo to the United States for trial in a federal district court in New York. The charges against Ghailani were based on his role in the 1998 U.S. embassy bombings in Kenya and Tanzania. The move was controversial not only because Congress was not given prior notice of the transfer, but also because it was thought that Ghailani was a prime candidate for a reformed military commission trial.[34] Officials in New York were upset because they believed his trial would inspire new terrorist attacks against the city and impose additional security costs for law enforcement.

Congress reacted swiftly to the Ghailani transfer by adding transfer restrictions to the Supplemental Appropriations Act of 2009, approved on June 24, 2009.[35] The act included language that prohibited the use of funds to transfer any detainee into the United States unless certain criteria were met. If the Administration wanted to bring a Guantanamo detainee into the United States for prosecution, the act required that the Administration submit a classified plan that included a risk analysis, costs, legal rationale, mitigation plan, and a certification by the Attorney General that the transfer posed "little to no security risk to the United States."[36] Furthermore, no funds could be spent to effect a transfer to the United States until at least 45 days after the plan was submitted to Congress.

Throughout the summer of 2009, Congress held hearings on reforms needed to improve the Military Commissions Act of 2006. On October 28, 2009, Congress passed the NDAA for Fiscal Year 2010. Those meaningful reforms of military commissions became the Military Commissions Act of 2009.[37]

33. Amnesty International, "Guantanamo, Bagram and Illegal U.S. Detentions."
34. Ghailani was convicted in 2010 of one count of conspiracy and acquitted of 280 other counts. In January 2011, he was sentenced to life in prison, and his case is on appeal.
35. Supplemental Appropriations Act, 2009, Public Law 11-32, 111th Cong., June 24, 2009, http://www.gpo.gov:80/fdsys/pkg/PLAW-111publ32/html/PLAW-111publ32.htm (accessed September 13, 2015).
36. Ibid.
37. National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84, 111th Cong., October 28, 2009, http://www.gpo.gov/fdsys/pkg/PLAW-111publ84/pdf/PLAW-111publ84.pdf (accessed September 13, 2015).

Sixteen days later, on November 13, 2009, then-Attorney General Eric Holder announced that the five Guantanamo terrorists responsible for the 9/11 attacks would be brought to New York to face a criminal trial in federal district court.[38] Politicians from both parties objected vigorously, including Democratic Senator Chuck Schumer and Republican Representative Peter King, both from New York.[39]

As if those moves did not poison the relationship between the Obama Administration and Congress enough with respect to Guantanamo, on December 15, 2009, President Obama issued a Presidential Memorandum to the Attorney General and Secretary of Defense to purchase the state-run Thomson Correctional Facility in Thomson, Illinois, for the express purpose of housing Guantanamo detainees.[40] The controversial move produced another political backlash against the Administration. Even Obama's die-hard supporter from Illinois, Democratic Senator Dick Durbin, who at first supported the move,[41] withdrew his support when it became "politically impossible."[42]

As a result of these moves, Congress began to include a provision in annual appropriations or defense authorization enactments that barred the use of funds to construct or modify a facility in the United States to house detainees who remain under the custody or control of the Department of Defense.[43]

The closure of the Guantanamo Bay detention center did not have to unfold in such a contentious fashion. The Obama Administration could have worked with Congress to close Guantanamo in a responsible manner. Although closing the facility within the self-imposed one-year deadline was ambitious, it could have been accomplished by sharing the work and the credit with Congress. By provoking Congress and unilaterally pursuing ill-conceived policies, the Administration was no longer just making big promises it could not fulfill; it began to make big mistakes that haunt it to this day.

Four Big Challenges to Closing Guantanamo Bay

Logistical Challenges. The logistical challenges posed by the closing of Guantanamo Bay are perhaps the simplest to solve. The military, if ordered, could have planned for and executed the transfer of all 115 detainees from Guantanamo Bay within short order. However, that order was never given. Instead of a mass exodus of detainees from Guantanamo Bay, the Obama Administration, like its predecessor, has culled the population detainee-by-detainee through negotiated transfers.

Given the pace of transfers to date and the increasing difficulty of negotiating transfer agreements for each remaining detainee, it is therefore likely that unless some drastic change occurs, the facility will contain some detainees at the end of the Obama presidency.

Legal Challenges. There are several categories of legal challenges associated with detainees at Guantanamo Bay, each of which must be considered and evaluated before attempting to close the facility.

Over its 103-year history as an American naval base, Guantanamo Bay has not been a stranger to litigation. Well before the Naval Station at Guantanamo Bay was first used as a terrorist detention facility, it was used by the United States government as a detention facility for refugees picked up on the high seas—a use that resulted in litigation ultimately decided by the U.S. Supreme Court.[44]

38. News release, "Attorney General Announces Forum Decisions for Guantanamo Detainees," U.S. Department of Justice, November 13, 2009, http://www.justice.gov/opa/speech/attorney-general-announces-forum-decisions-guantanamo-detainees (accessed September 13, 2015).
39. Peter Finn and Anne E. Kornblut, "Opposition to U.S. Trial Likely to Keep Mastermind of 9/11 Attacks in Detention," *The Washington Post*, November 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111207508.html (accessed September 8, 2015).
40. President Barack Obama, "Presidential Memorandum—Closure of Detention Facilities at the Guantanamo Bay Naval Base," December 15, 2009, https://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-dentention-facilities-guantanamo-bay-naval-base (accessed September 13, 2015).
41. News release, "Durbin, Quinn Praise Administration Decision to Purchase Thomson Correctional Center," Office of Senator Dick Durbin, December 15, 2009, http://www.durbin.senate.gov/newsroom/press-releases/durbin-quinn-praise-administration-decision-to-purchase-thomson-correctional-center (accessed September 13, 2015).
42. News release, "Durbin: Obama Administration Will Not Transfer Prisoners from Guantanamo Bay to Thomson," Office of Senator Dick Durbin, April 4, 2011, http://www.durbin.senate.gov/newsroom/press-releases/durbin-obama-administration-will-not-transfer-prisoners-from-guantanamo-bay-to-thomson (accessed September 13, 2015).
43. Garcia et al., "Closing the Guantanamo Detention Center: Legal Issues," p. 5.
44. *Haitian Centers Council, Inc. v. Sale*, 509 U.S. 155 (1993).

Weeks after the first terrorist detainees arrived in January 2002, they filed lawsuits against the United States government to protest their detention. Despite these legal challenges to military detention and commissions, the courts have reaffirmed that the detainees may be detained under the law of war for the duration of the hostilities. Those hostilities continue as a matter of law, and the President therefore may continue to hold any unprivileged enemy belligerent he chooses to detain at Guantanamo Bay.

As a legal matter, President Obama could have released any or all of the detainees at Guantanamo Bay at any time. Doing so, of course, would have been dangerous and arguably irresponsible, not to mention fraught with political peril. The point, however, is that a President has the inherent legal authority to order the release of detained enemy fighters, even during an ongoing armed conflict.

In 2009, there were no federal statutes prohibiting President Obama from bringing Guantanamo Bay detainees to the United States for continued detention. Nor was there any statute that prohibited the Administration from spending money to acquire or upgrade an existing detention facility in the United States to house Guantanamo Bay detainees.

That all changed in 2010 when, as noted, the Democratic-controlled Senate and House of Representatives included a provision in the annual appropriations or defense authorization acts that barred the use of funds (1) to construct or modify a facility in the United States to house Guantanamo Bay detainees and (2) to transfer or release detainees into the United States.[45] Each subsequent NDAA has contained similar provisions.[46]

Additionally, Executive Order 13492 called for a prompt and comprehensive interagency review of the status of all Guantanamo Bay detainees. Thus, the Guantanamo Review Task Force (GRTF) was created. The GRTF issued its final report on January 22, 2010.[47] Of the 240 detainees subject to review, the task force recommended:

- Transfer of 126 detainees,
- Prosecution of 44 detainees either in federal court or by a military commission,
- Holding 30 Yemeni detainees for "conditional detention" based on the fragile security environment in Yemen, and
- The continued holding of 48 detainees determined "to be too dangerous to transfer but not feasible for prosecution."[48]

Critics of military detention have nicknamed the 48 detainees the "forever detainees." That phrase is meaningless because, as a matter of law, no one has asserted that the United States may detain Guantanamo Bay detainees under the law of armed conflict after the armed conflict has ended. Moreover, ever since the publication of the GRTF's final report, the Obama Administration has maintained that any closure plan necessarily requires bringing some of those 48 detainees into the United States for continued military detention—despite the fact that public opinion favors the continued existence of Guantanamo Bay as a detention facility but rejects bringing detainees into the United States.[49]

45. Garcia et al., "Closing the Guantanamo Detention Center: Legal Issues." The National Defense Authorization Act for Fiscal Year 2011, Public Law 111-383, 111th Cong., January 7, 2011, § 1034(a)-(b), applied only to DOD funds for FY 2011. Later versions of the prohibition found in continuing appropriations legislation have extended it to all funds made available under any act. See Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10, 112th Cong., April 15, 2011, § 1114; Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112-55, 112th Cong., November 18, 2011, § 533; Consolidated Appropriations Act, 2012, Public Law 112-74, 112th Cong., December 23, 2011, Div. A, § 8121, and Div. H, § 511; Consolidated and Further Continuing Appropriations Act, 2013, Public Law 113-6, 113th Cong., March 26, 2013, Div. B, § 531, and Div. C, § 8111.
46. The Administration's repeated claims that the Republican Congress has blocked the President's efforts to close Guantanamo by enacting legislative restrictions ignores the fact that those restrictions were first put into place by the Democratic-controlled Senate and House.
47. Guantanamo Review Task Force, *Final Report*, January 22, 2010, http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf (accessed September 13, 2015).
48. Ibid., p. ii.
49. Justin McCarthy, "Americans Continue to Oppose Closing Guantanamo Bay," Gallup, June 13, 2014, http://www.gallup.com/poll/171653/americans-continue-oppose-closing-guantanamo-bay.aspx (accessed September 8, 2015).

As detailed in a 2013 Congressional Research Service Report, myriad restrictions on detainee transfers have been imposed since 2010.[50] These restrictions include a requirement that Congress be notified 30 days before any transfer occurs and a prohibition on transfers to a country if there is a confirmed case that a former Guantanamo detainee has reengaged in combatant activity in that country. Starting in 2011, use of any appropriated funds to transfer detainees into the United States for any purpose has been prohibited.[51]

Thus, unless Congress is persuaded to change the law and allow some detainees to come to the United States for continued detention or trial, the President may not legally bring detainees to the United States as part of any closure plan.

Political Challenges. From the very beginning, political considerations have been the most important—and complicated—aspect of closing the detention facility. Had President George W. Bush sought and received congressional backing for the use of Guantanamo as a terrorist detention facility in 2001, the controversy over the facility might have been muted. The Bush Administration, however, did not request legislation to establish Guantanamo as the "official" terrorist detention facility post-9/11, and just as opening Guantanamo had political consequences, closing it down takes an act of political action and willpower.

As noted, the most politically opportune time for the Obama Administration to force the closure of Guantanamo was during the President's first two years in office, when his own political party was in the majority in both houses of Congress. Political power is evanescent: It must be spent quickly before it slips away. But instead of working behind the scenes with members of the President's own party to forge an acceptable closure plan, the Administration took unilateral action, which in turn soured its relationship with Congress.

The cumulative effect of the mistakes made by the Obama Administration in 2009, ongoing terrorist plots against the United States by radical Islamist extremists or those they inspire,[52] the fact that the Administration did not make closing Guantanamo an actionable priority, and other external factors all contributed to the current, complicated nature of the Guantanamo question. Whether the political landscape can change remains to be seen.

Diplomatic Challenges. On the diplomatic front, the Bush Administration spent an enormous amount of time working with other countries to ensure that they understood U.S. detention policies.[53] Prior to 2009, many countries worked with the United States through diplomatic channels on Guantanamo-related issues, and many, if not most, of them welcomed the prospect of Guantanamo Bay's eventual closure. The diplomatic stage was set for its closure.

Prior to the Obama Administration, many countries worked with the United States to effect the release and/or transfer of detainees from Guantanamo, either to their own country or to other countries. For example, 532 detainees were either released or transferred from Guantanamo before January 2009, and each of those cases involved delicate, confidential, and extensive diplomacy between the United States and other countries.

50. See Garcia et al., "Closing the Guantanamo Detention Center: Legal Issues."

51. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111-383, 111th Cong., January 7, 2011, § 1032; Department of Defense and Full-Year Continuing Appropriations Act, 2011, Public Law 112-10, 112th Cong., April 15, 2011, § 1012.

52. In 2009 alone, authorities thwarted the synagogue terrorism plot in New York City and arrested Najibullah Zazi for planning to blow up the New York City subway; Hosam Maher Husein Smadi for planning to bomb a Dallas skyscraper; Michael Finton for trying to blow up the federal courthouse in Springfield, Illinois; and Tarek Mehanna and Ahmad Abousamra for conspiracy to provide material support to a terrorist organization. The infamous attempted attack of 2009 involved Umar Farouk Abdulmutallab, a 23-year-old Nigerian student living in London who took a flight from Nigeria to Amsterdam and then on to Detroit. On the second leg of his trip, he attempted to detonate a bomb hidden in his underwear. Luckily, the device did not detonate, and passengers stopped him from trying again. The bomb, containing the explosives PETN and TATP, was similar to the bomb used by shoe bomber Richard Reid in 2001.

53. The issue of Guantanamo was emblematic of a broader discussion in legal and diplomatic circles relating to the United States decision to treat the attacks of 9/11 as an act of war, thus triggering the law of armed conflict. There were numerous discussions between American officials and international partners with respect to Guantanamo and U.S. detention policies. John Bellinger, the top lawyer in the State Department, gave a speech on October 31, 2006, at the London School of Economics on "Legal Issues in the War on Terrorism" that encapsulated the legal and diplomatic framework for America's detention operations and the tension between the American approach and the European approach. See John Bellinger, "Legal Issues in the War on Terrorism," speech at the London School of Economics, October 31, 2006, http://www.state.gov/s/l/2006/98861.htm (accessed September 13, 2015).

Over 121 detainees have been transferred during the Obama Administration to various countries, and each of those transfers has involved similar difficult diplomatic negotiations, but the 2014 transfer of the so-called Taliban Five detainees to Qatar in exchange for U.S. Army Sergeant Bowe Bergdahl complicated the legal and diplomatic landscape. Although it is difficult to know how this controversial decision—made in violation of the 30-day congressional notification requirement—has affected ongoing diplomatic transfer negotiations, it is easy to gauge congressional sentiment on the matter.

This year's House-passed NDAA includes a provision that essentially requires the Administration to disclose all correspondence between the United States and Qatar as it relates to the Taliban Five transfer. The Administration will be reluctant to do so, not only because the substance of the agreement may be politically indefensible, but also because doing so would violate the unspoken principle behind all previous transfer agreements during both the Bush and Obama Administrations: that negotiations between countries with respect to detainee transfers are the prerogative of the executive branches of the respective governments, not the legislative branches. By definition and custom, transfer agreements have been negotiated by executive branch officials—primarily the State Department—with no direct input from or oversight by the legislative branch. Complying with the House amendment, if it became law, could infringe on core separation of powers issues and set a bad precedent not only for future transfer agreements, but also for other matters outside the context of detention policy.

The House amendment could have a chilling effect on ongoing diplomatic negotiations with respect to other transfers. For example, countries that otherwise might be amenable to accepting a Guantanamo transferee might be hesitant to do so if they concluded that the written agreement would be shared with the United States Congress. On the other hand, the amendment might may have no impact; a slight impact on one country but not another; a slight impact on all negotiations; or—if passed and signed into law—a significant impact. It is too early to tell.

In any event, President Obama's Special Envoy to Close Guantanamo has been charged with a formidable task. Even assuming that the President succeeds in bringing some detainees to the United States for trial or military detention, the Administration will nevertheless need to transfer 50 or more detainees to other countries by January 2017.

A Legislative Path to Closure: Section 1032

Section 1032 of the Senate-passed NDAA has four substantive and interrelated constituent parts:

1. Transfers to the United States,
2. Immigration status of detainees brought to the United States,
3. Limitations on judicial review, and
4. A comprehensive plan for disposition of each detainee.

The first three parts depend on the Secretary of Defense submitting and Congress approving a comprehensive disposition plan.

Comprehensive Disposition Plan. Section 1032(g) requires the Secretary of Defense to submit an unclassified report to "appropriate committees in Congress" setting forth a comprehensive plan for each detainee. The report shall contain a "case-by-case" determination on all 115 detainees, regardless of whether the Administration intends to transfer detainees to a foreign country, to the United States for a civilian or military trial, or to the United States or another country for continued military detention under the law of armed conflict.[54]

This may prove to be the most difficult aspect of the amendment, as it requires the Administration to predict which detainees will be transferred to which country—even before diplomatic negotiations have been finalized. The Administration most likely will identify those detainees who are slated for third-country transfers without identifying the countries to which it hopes to transfer the detainees.

Section 1032(g)(2)(B) requires the Administration to identify the "specific facility or facilities that are intended to be used, or modified to be used" inside the United States for the purpose of trial or, if

54. Section 1032(g)(1)(2)(a).

convicted, to serve a sentence or for military detention under the law of armed conflict. The place of detention in the United States for hardened al-Qaeda terrorists has always been a political hot potato for Members of Congress from both parties. It is the ultimate NIMBY (not in my backyard) problem. For example:

- Senator Dick Durbin (D–IL) was in favor of using the Thomson Correctional Facility in his state before he was against importing Guantanamo terrorists to Thomson.

- Senator Chuck Schumer (D–NY) was for civilian trials for the 9/11 terrorists detained at Guantanamo but balked at the cost and security threat if those trials were held in New York City.

- Senator Lindsay Graham (R–SC) rejects bringing detainees to the Naval Consolidated Brig in Charleston, South Carolina.

- When news broke that the Pentagon is looking at the United States Disciplinary Barracks in Fort Leavenworth, Kansas, as a potential "Guantanamo North," Senator Pat Roberts (R–KS) said, "Not on my watch will any terrorist be placed in Kansas."[55]

Recent reports indicate that the executive branch is divided on the issue of where to move Guantanamo detainees inside the United States.[56] In an ironic twist, given the Administration's disastrous moves in 2009, the Justice Department cannot support using the Thomson Correctional Facility in Illinois for Guantanamo detainees because former Attorney General Eric Holder testified—under oath—to the Senate Judiciary Committee in 2012 that "We will not move people from Guantanamo, regardless of the state of the law, to Thomson. That is my pledge as attorney general."[57]

Next, Subsection (g)(2)(D) requires a "description of the legal implications associated with detention inside the United States...including but not limited to the right to challenge such detention as unlawful," and Subsection (g)(2)(F) calls for the Administration's ideas with respect to whether additional legal authorities are necessary to effect military detention inside the United States.

In anticipation of a possible push to move detainees into the United States, Congress passed Section 1039 of the NDAA for Fiscal Year 2014. Section 1039(b)(1) seeks an assessment of whether relocation of a detainee from Guantanamo to the United States could result in eligibility for relief from removal from the United States, including eligibility pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; any required release from immigration detention, including release pursuant to the decision by the Supreme Court in *Zadvydas v. Davis*;[58] asylum or withholding of removal; or any additional constitutional right.

On May 14, 2014, Peter Kadzik, Principal Deputy Assistant Attorney General in the U.S. Department of Justice, sent a cover letter and nine-page legal memorandum stating the Administration's views on those thorny legal issues.[59] It is very likely that the Administration will consider that the May 14 submission substantially complied with both Subsection 1032(g)(2)(D) and Subsection 1032(g)(2)(F).

Subsection 1032(g)(2)(E) requires the Secretary of Defense, in consultation with the Secretary of State and the Director of National Intelligence, to provide a detailed description and assessment of all actions that would be taken by the United States and a foreign country that would receive a transferee that would "substantially mitigate the risk of such

55. Carole Rosenberg, "Pentagon Surveying Potential U.S. 'Guantanamo North' Lockups," *The Miami Herald*, August 15, 2015, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article31202144.html (accessed September 13, 2015).

56. Adam Goldman and Missy Ryan, "Issue of Where to Move Guantanamo Detainees Threatens Closure Plan," *The Washington Post*, August 10, 2015, https://www.washingtonpost.com/world/national-security/guantanamo-closure-plan-suffers-setback-over-us-site-for-detainees/2015/08/10/1540c2e0-3f68-11e5-9561-4b3dc93e3b9a_story.html (accessed September 8, 2015).

57. Ibid.

58. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

59. U.S. Department of Justice, *Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014*, May 14, 2014, http://www.scribd.com/doc/249658866/Report-Pursuant-to-Section-1039-of-the-National-Defense-Authorization-Act-for-Fiscal-Year-2014#scribd (accessed September 13, 2015).

individual engaging or reengaging in any terrorist or other hostile activity that threatens the United States or United States persons or interests." For the reasons discussed above, it is highly unlikely that the Administration will provide granular details with respect to each mitigation plan for each detainee. As a practical matter, it might be impossible because one cannot know, *a priori*, what accommodations a country will agree to for any particular detainee.

Furthermore, as evidenced by the terrorism recidivism rate detailed above, there have been very few risk-free transfers from Guantanamo. The remaining detainees pose the greatest threat and therefore will require the most stringent mitigation plans.

Finally, Subsection 1032(g)(2)(G) requires a detention and interrogation plan for any detainees captured after the date of the report. This requirement is not geared to future captures taken to Guantanamo. The current Administration has not brought one detainee to Guantanamo, arguing that doing so is inconsistent with its long-held desire to shutter the facility. The Administration claims to prefer capturing al-Qaeda terrorists because "capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots."[60] In reality, however, they have used targeted drone strikes to kill thousands of suspected terrorists while only capturing a handful.

Rather, Subsection 1032(g)(2)(G) will affect future captures who invariably would be brought to the United States for prosecution in federal court. Over the past seven years, some of those high-value captures have included Ahmed Warsame and Ahmed Abu Khattala, both of whom were captured abroad, transferred to, and interrogated aboard U.S. Navy warships before being transferred to a federal district court for prosecution.

Transfers to the United States. Assuming that Congress accepts the comprehensive plan, the Secretary of Defense may transfer a Guantanamo detainee to the United States for military detention pursuant to the 2001 AUMF. Alternatively, such a detainee could be tried in federal or military court and sentenced to a period of incarceration pursuant to a criminal conviction.[61]

Such a transfer may take place only if the Secretary of Defense determines that it is in the "national security interest of the United States" and that "appropriate actions have been taken" to address public safety and only after giving Congress at least 30 days' notice.[62] The 30-day notice must include the reason the Secretary believes such a transfer is in the national security interest of the United States and a description of the actions to be taken to address any public safety issues.[63]

Immigration Status While in the United States. Section 1032(d) forbids detainees brought from Guantanamo to the United States from applying for asylum under Section 208 of the Immigration and Nationality Act[64] or from being eligible for admission to the United States.[65] It also prohibits them from applying for or obtaining any "right, privilege, status, benefit, or eligibility for any benefit" under immigration law or "any other law or regulation."[66] Finally, it prohibits any detainee in the United States from changing his designation as an unprivileged enemy belligerent under the AUMF.[67]

The May 14, 2014, analysis submitted to Congress by the Department of Justice in accordance with Section 1039 considers in some detail the immigration consequences of bringing such a detainee to the United States. The report concludes that "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...."[68]

60. See statement of Administration policy in fact sheet, "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities," The White House, May 23, 2013, https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf (accessed September 13, 2015).
61. National Defense Authorization Act for Fiscal Year 2014, Public Law 113-66, December 26, 2013, § 1032(b).
62. Ibid., § 1032(b)(1-3).
63. Ibid., § 1032(c)(1-2).
64. 8 U.S.C. 1158.
65. National Defense Authorization Act for Fiscal Year 2014, § 1032(d)(1).
66. Ibid., § 1032(d)(3).
67. Ibid., § 1032(d)(4).
68. U.S. Department of Justice, *Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014*, p. 2.

The fact that this Justice Department is "not aware" of any cases, statutes, or constitutional provisions may not give Members of Congress much comfort. The Justice Department has been on the losing end of every Guantanamo detainee Supreme Court case since 9/11. Congress is certainly aware that the Supreme Court, rightly or wrongly, has rejected the Department of Justice's legal interpretation of the law, at least in part, as it pertained to Guantanamo detainees.

Furthermore, the Department of Justice's May 14, 2014, Section 1039 review states, "This report focuses on the specific information sought by the reporting requirements in section 1039 and does not purport to address all the issues presented by, or that may arise from, the relocation of detainees from Guantanamo to the United States."[69] By its own admission, in other words, the Department of Justice cannot anticipate all legal issues that most likely will arise if detainees are brought to the United States. That legal uncertainty alone might give Congress reason enough to reject the closure plan.

This contention is further supported by a Congressional Research Service report on the legal issues surrounding closing Guantanamo, which states that "[t]he nature and scope of constitutional protections owed to detainees within the United States may be different from those available to persons held at Guantanamo or elsewhere."[70] The authors also state that "the transfer of detainees to the United States may have additional consequences, as some detainees might qualify for asylum or other protections under immigration law."[71]

The issue of what immigration or other rights will accrue to detainees if brought to the United States predates the Obama Administration, but any closure plan that includes bringing some detainees to the United States must answer the following questions:

- If the armed conflict ends, thus eliminating the ability to hold detainees under the 2001 AUMF and the law of armed conflict, then what?
- Assuming that detainees are not candidates for a trial in federal or military court, what are the Administration's arguments to justify further law of war detention?
- What areas of litigation most likely will be brought on behalf of detainees once they arrive in the United States, and what is the probability of success?
- What is the Administration's plan with respect to the detainees if or when the armed conflict—as a matter of law—ends?

Limitation on Judicial Review. Section 1032(e) purports to limit judicial review of any detainee brought to the United States from Guantanamo. It states that "no court, justice, or judge shall have jurisdiction to hear or consider any action against the United States…relating to any aspect of the detention, transfer, treatment, or conditions of confinement of a detainee."[72]

The purpose of this provision is clear: to foreclose an avalanche of lawsuits on behalf of detainees once they arrive in the United States. This is understandable, given the volume of lawsuits surrounding all aspects of Guantanamo detention policy and operations. The subsection also serves a political purpose: to convince lawmakers from both parties that bringing detainees to the United States will not spark further litigation—a key first step on any road to bipartisan consensus.

Congress does not have a good track record with respect to "court stripping" measures for Guantanamo detainees. In 2005, Congress passed the Detainee Treatment Act, Section 1005 of which provided that "no court, justice, or judge shall have jurisdiction to hear or consider (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."[73] The Congress tried to cabin judicial review of the one-time administrative Combatant Status Review Tribunals (CSRT) to the single issue of whether those proceedings were conducted in a valid manner.

69. Ibid., p. 1.
70. Garcia et al., "Closing the Guantanamo Detention Center: Legal Issues," p. 8.
71. Ibid.
72. National Defense Authorization Act for Fiscal Year 2014, § 1032(e)(1).
73. 28 U.S.C. 2241, § 1005(1).

In response to the Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*, which struck down the original military commissions order, Congress passed the Military Commissions Act of 2006, which amended Section 2241 by further stripping the courts' jurisdiction over detainee cases. Detainees challenged the Detainee Treatment Act and the Military Commissions Act of 2006, and in *Boumediene v. Bush*, the Court held that the procedures under the Detainee Treatment Act were not an adequate substitute for habeas corpus review and that Section 7 of the Military Commissions Act of 2006 operated as an unconstitutional suspension of the writ of habeas corpus.

There is every reason to believe that if detainees are brought to the United States, litigation will ensue despite Congress's latest efforts to the contrary. Moreover, based on the government's track record at the Supreme Court—they have lost every time—it is not hard to imagine future legal challenges succeeding, perhaps even before the High Court.

Finally, Section 1032(e)(3) also attempts to foreclose the possibility of a cause of action by a Guantanamo detainee if he is not transferred to the United States. This provision is aimed at those detainees who have been cleared for transfer but have yet to be moved from the island to their home country or a third country that is willing to accept them.

House and Senate Procedures Once a Comprehensive Plan Is Submitted. Section 1032 of the Senate NDAA also sets out a special procedure for congressional consideration of the Secretary of Defense's detainee transfer plan. Once Congress receives the various mandated reports and certifications from the Secretary, any Member can introduce a joint resolution approving the plan. In order to ensure that both chambers pass the same language, Section 1032 provides a word-by-word template for the joint resolution. This provision ensures that there are no inter-house differences necessitating a conference committee or other reconciliation mechanisms.

After introduction, the measure will be referred to the committees of jurisdiction in each house: the House and Senate Armed Services Committees. These committees will then have 20 days to consider the resolution before it is automatically discharged from the committee and placed on the calendars that govern the order and timing of floor consideration in the respective chambers. Once the resolution is on a calendar, any Member may move for the full body to consider it. As it moves to the floor, various procedures already in place will limit debate and prevent amendments or dilatory motions. Of course, any joint resolution enacted pursuant to these procedures would still require the President's approval in order to become law.

Conclusion

The United States is still engaged in an ongoing armed conflict. Under the international law of armed conflict, or law of war, and as recognized by the Supreme Court, the U.S. has the authority to detain enemies who have engaged in combatant actions, including acts of belligerence, until the end of such hostilities. The fact that when these hostilities will end is uncertain does not alter the legality of law of war detention, including for those detainees at Guantanamo Bay, Cuba.

The main arguments for closing Guantanamo are as follows:

- It was created, in part, to house detainees in a law-free zone;
- Detainees were mistreated there;
- It is a recruiting tool for jihadists;
- The legacy costs of Guantanamo have made counterterrorism and intelligence cooperation with our allies more difficult;
- It is too expensive to maintain;
- The mere existence of Guantanamo is "not who we are" as put forth by, among other people, President Obama; and
- The cumulative baggage of Guantanamo is simply too great a burden for our country.[74]

Upon closer inspection, however, most of those arguments have little merit in 2015. Guantanamo

74. For an interesting exchange between Brookings Institution Senior Fellow Benjamin Wittes and Washington College of Law Professor Steve Vladeck on the arguments for or against closing Guantanamo, see Steve Vladeck, "What It Really Means to 'Close Guantánamo,'" Just Security, January 26, 2015, https://www.justsecurity.org/19378/means-close-guantanamo/ (accessed September 13, 2015).

detainees do not live in a law-free zone in southeastern Cuba, as evidenced by the rulings of the Supreme Court. Rather, they enjoy the constitutional writ of habeas corpus to challenge their detention—the first time any wartime prisoner in United States history has enjoyed such a right.

A handful of detainees were mistreated at Guantanamo early in its existence, but policies and practices have improved since 2004, and for the past 10 years, the facility has been a "model prison"[75] and in compliance with Common Article 3 of the Geneva Conventions.

Whether the facility is a recruiting tool for jihadists is at best debatable. If detainees were moved from Guantanamo Bay to a secure facility in the United States, those same jihadists would use the new location as a proxy for their contempt and hatred toward the United States and Western values.

With the rise of ISIS and ISIS-inspired terrorist organizations and a smaller but still lethal al-Qaeda, the United States and its allies have an increased need to cooperate on counterterrorism and intelligence sharing. There is little evidence that the existence of Guantanamo, which houses only 115 detainees, hampers crucial relationships between America's intelligence professionals and those of its allies. The topic of Guantanamo is still raised in diplomatic dialogues, but parties on different sides of the matter have agreed to disagree.

The fiscal argument that Guantanamo is too expensive to maintain might be a good political talking point, but it rings hollow—especially coming from an Administration that has almost doubled the national debt in seven years[76] and has failed to reform Medicaid, Medicare, and Social Security. As one scholar has stated, the marginal cost of Guantanamo "is a rounding error on a rounding error."[77]

Those who favor closing Guantanamo assert, in essence, that if the U.S. just changes the ZIP code of detention from Cuba to some facility in the United States, the "un-American-ness" of Guantanamo will vanish. But for America's enemies, Guantanamo is only the latest proxy for their ire against the United States: If you change the ZIP code, they change the proxy.

Those who support Guantanamo's role in detaining the enemy during wartime focus, in essence, on the ZIP code. They assert that because it is an exceptionally well-run facility and is far from U.S. shores, there is no chance that there will be any escapes, and the courts—at least to date—have intervened only to grant detainees the writ of habeas corpus. Moreover, as these detainees are not in the United States, there have been no immigration consequences.

Regrettably, however, rather than debating and passing a sustainable long-term detention framework—a topic Heritage Foundation scholars have written about since 2009[78]—Congress and the Administration remain fixated on *where* the enemy should be kept rather than on *how* best to incapacitate non-state actors lawfully for the long war against terrorism.

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75. See comment by Alain Grignard, deputy head of the Organization for Security and Cooperation in Europe's federal police anti-terrorism unit, after his visit to Guantanamo in March 2006: "At the level of the detention facilities, it is a model prison, where people are better treated than in Belgian prisons." Reuters, "Guantanamo Better than Belgian Prisons: OSCE Expert," *Sydney Morning Herald*, March 7, 2006, http://www.smh.com.au/news/world/guantanamo-better-than-belgian-prisons-osce-expert/2006/03/07/1141493645389.html (accessed September 13, 2015).
76. As of publication of this paper, the U.S. national debt was over $18.3 trillion. When President Obama took office, the national debt was $10.6 trillion. See Philip Bump, "The Story Behind Obama and the National Debt in 7 Charts," *The Washington Post*, January 7, 2015, http://www.washingtonpost.com/news/the-fix/wp/2015/01/07/the-story-behind-obama-and-the-national-debt-in-7-charts/ (accessed September 13, 2015).
77. Benjamin Wittes, "The Arguments About Guantanamo Are Nearly All Wrong, Disingenuous, Irrelevant, or Just Plain Dumb," Lawfare, January 21, 2015, https://www.lawfareblog.com/arguments-about-guantanamo-are-nearly-all-wrong-disingenuous-irrelevant-or-just-plain-dumb (accessed September 13, 2015).
78. Charles D. Stimson, "Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War," Heritage Foundation *Legal Memorandum* No. 35, January 23, 2009, http://www.heritage.org/research/reports/2009/01/holding-terrorists-accountable-a-lawful-detainment-framework-for-the-long-war.