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## PRISONERS OF CONGRESS: THE CONSTITUTIONAL AND POLITICAL CLASH OVER DETAINEES AND THE CLOSURE OF GUANTANAMO

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# PRISONERS OF CONGRESS: THE CONSTITUTIONAL AND POLITICAL CLASH OVER DETAINEES AND THE CLOSURE OF GUANTANAMO

David J.R. Frakt

## Table of Contents

Prologue .....	181
I. Introduction .....	183
A. A Brief Constitutional History of Guantanamo.....	183
1. The Bush Years (January 2002 to January 2009) .....	183
2. The Obama Years (January 2009 to the Present).....	192
a. 2009 .....	192
b. 2010 to the Present.....	199
II. Legislative Restrictions and Their Impact .....	205
A. Restrictions on Transfer and/or Release to Third Countries .....	206
1. Court-Ordered Transfers.....	207
2. Voluntary/Discretionary Transfers .....	212
B. Restrictions on Countries to Which Detainees Could Be Transferred .....	214
C. Restrictions on Release in the U.S. ....	218
1. Prosecution in Federal Courts.....	219
2. Law of War Detention .....	222
3. Release into the U.S.....	223
D. Restrictions on Detainees Facing Trial by Military Commission .....	225
E. Restrictions on Periodic Review Boards .....	229

III. Constitutionality of Restrictions .....	230
A. Two Views of the Commander in Chief Power .....	231
B. Specific Restrictions.....	238
1. Restrictions on Transfer to Third Countries .....	238
a. Court-Ordered Transfers .....	238
b. Voluntary/Discretionary Transfers.....	240
C. Restrictions on Countries to Which Detainees Could Be Transferred .....	242
D. Restrictions on Transfer to the U.S. for Trial.....	244
IV. Conclusion .....	252
Author's Postscript.....	260

## Prologue

On July 24, 2009, the Department of Justice did something very unusual, it informed the United States District Court for the District of Columbia that my client Mohammed Jawad, a Guantanamo detainee, was no longer considered “detainable” (i.e., there was no lawful basis to detain him).<sup>1</sup> The Department of Justice attorneys requested that the court fashion “appropriately tailored relief” and grant Jawad’s petition for a writ of habeas corpus.<sup>2</sup> A few days later, the Department submitted a proposed order to the district court judge granting the writ and ordering Jawad’s release to “the receiving country” (Jawad’s home country of Afghanistan).<sup>3</sup>

But, there was a slight catch. Even though the United States had determined that Jawad was “no longer detainable,” they proposed that he continue to be held at Guantanamo for another twenty-two days.<sup>4</sup> Over counsel for the petitioner’s objection to the delay,<sup>5</sup> the district court adopted the proposed order.<sup>6</sup> The reason for the delay was a section of a supplemental appropriations bill,<sup>7</sup> passed just five weeks earlier, which required that Congress be provided written notice, including a risk assessment, fifteen days prior to the use of any defense funds for the release or transfer of any Guantanamo detainee.<sup>8</sup> The Department of Justice lawyers claimed

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<sup>1</sup> Notice That Respondents Will No Longer Treat Petitioner As Detainable Under the AUMF and Request for Appropriately Tailored Relief, *Halmandy v. Obama*, No. 05-cv-2385-ESH (D.D.C. July 24, 2009), ECF No. 311 [hereinafter Respondents’ Notice].

<sup>2</sup> *Id.*

<sup>3</sup> Proposed Order and Judgment, *Halmandy v. Obama*, No. 05-cv-2385-ESH (D.D.C. July 29, 2009), ECF No. 319 [hereinafter Proposed Order].

<sup>4</sup> *Id.* This twenty-two-day delay was a significant reduction from what the government initially proposed in its July 24 notice. Respondents’ Notice, *supra* note 1, at 3–4 (asserting that “in order to give effect to any order to transfer the Government will require a period of several weeks to prepare Mr. Jawad’s records.”)

<sup>5</sup> Petitioner’s Response to Respondents’ Notice That Respondents Will No Longer Treat Petitioner As Detainable Under the AUMF and Request for Appropriately Tailored Relief, *Halmandy v. Obama*, No. 05-cv-2385-ESH (D.D.C. July 28, 2009), ECF No. 314 (asserting that Jawad could, and should, be transferred immediately to the Government of Afghanistan or a neutral party such as the ICRC to effectuate transfer without expenditure of appropriated funds). I was co-counsel, along with the ACLU, on the habeas corpus case.

<sup>6</sup> Order, *Bacha v. Obama*, No. 05-cv-2385-ESH (D.D.C. July 30, 2009), ECF No. 323.

<sup>7</sup> Supplemental Appropriations Act, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920–21. This bill was enacted on June 24, 2009. *Id.*

<sup>8</sup> *Id.* The full text of § 14103 (e):

they needed seven days to prepare the classified notice. As counsel for petitioner, we suggested that no funds would be expended in order to effectuate the release of Mr. Jawad, as the government of Afghanistan had expressed a willingness to send a plane to Guantanamo to return him home. This suggestion was derided by the United States attorneys, who asserted that even opening the door to Jawad's cell involved an expenditure of federal funds. The judge noted that, in any event, she had no power to order the military to allow a plane from Afghanistan to land at the Guantanamo naval base, and granted the writ subject to the government's requested timeline. Even though both the executive and judicial branches concurred that there was no lawful basis to detain Jawad, he remained confined at Guantanamo for another twenty-two days as a direct result of an act of Congress. Thus, with the signing of his order of release,<sup>9</sup> Jawad became the first<sup>10</sup> detainee to be held at Guantanamo as a "Prisoner of Congress." He was not to be the last. Indeed, dozens of detainees at Guantanamo have become Prisoners of Congress, their releases or transfers delayed or barred by spending restrictions imposed by the legislative branch.

In this article, I will discuss the series of increasingly stringent legislative restrictions placed on the transfer or release of Guantanamo detainees from 2009 to

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None of the funds made available in this or any prior Act may be used to transfer or release an individual detained at Naval Station, Guantanamo Bay, Cuba, as of the date of enactment of this Act, to the country of such individual's nationality or last habitual residence or to any other country other than the United States, unless the President submits to the Congress, in classified form 15 days prior to such transfer, the following information:

(1) The name of any individual to be transferred or released and the country to which such individual is to be transferred or released.

(2) An assessment of any risk to the national security of the United States or its citizens, including members of the Armed Services of the United States, that is posed by such transfer or release and the actions taken to mitigate such risk.

(3) The terms of any agreement with another country for acceptance of such individual, including the amount of any financial assistance related to such agreement.

*Id.* at 123 Stat. 1921.

<sup>9</sup> Order, *Halmandy v. Obama*, No. 05-cv-2385-ESH (D.D.C. July 30, 2009), ECF No. 323 [hereinafter Order], available at [http://www.aclu.org/files/pdfs/safefree/sakibachavobama\\_order.pdf](http://www.aclu.org/files/pdfs/safefree/sakibachavobama_order.pdf).

<sup>10</sup> Jawad was the first detainee to be transferred out of Guantanamo after the June 24, 2009 legislation. Several other detainees whose habeas corpus petitions were granted prior to Jawad were transferred out of Guantanamo after him, but he was the first to have his stay extended at Guantanamo solely for the purpose of providing notice to Congress of his impending transfer. *See infra* Part II.A.

the present, the politics behind the restrictions, the effect of such restrictions individually and cumulatively on the detainees, and the constitutionality of such restrictions. In conclusion, the article will analyze the extent to which Congress can be held responsible for the failure of President Obama's declared intention to close the detention facilities at Guantanamo.

To better understand the situation of Jawad and his fellow detainees and the Obama-era detainee legislation, it is useful to have an understanding of the historical and constitutional context of the determinations that resulted in the detention at Guantanamo of individuals initially identified as our adversaries in the "war on terror," and the implementation of legal procedures for their disposition. Of particular concern are issues relating to the transfer, release and prosecution of detainees.

## I. INTRODUCTION

### A. *A Brief Constitutional History of Guantanamo*

#### 1. The Bush Years (January 2002 to January 2009)

For over a decade, since their arrival at Guantanamo Bay on January 11, 2002, the detainees have been at the center of ongoing constitutional and political clashes among the three branches of American government.<sup>11</sup> During the Bush administration, these issues were primarily resolved in the federal courts, as detainees sought to establish the limits of Executive power to hold them at Guantanamo, to determine the conditions to which they could be subjected, and the constitutional protections, if any, to which they were entitled.<sup>12</sup> To the limited extent that the legislative body was involved in detention policy,<sup>13</sup> Congress

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<sup>11</sup> See generally Judith Resnik, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010); Aziz Z. Huq, *The Political Path of Detention Policy*, 48 AM. CRIM. L. REV. 1531 (2011); Jennifer L. Milko, *Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance*, 50 DUQ. L. REV. 173 (2012); Alberto R. Gonzales, *Waging War Within the Constitution*, 42 TEX. TECH. L. REV. 843 (2010).

<sup>12</sup> See generally Mark A. Drumbl, *Guantanamo, Rasul, and the Twilight of Law*, 53 DRAKE L. REV. 897 (2005); Jay Alan Bauer, *Detainees Under Review: Striking the Right Constitutional Balance Between the Executive's War Powers and Judicial Review*, 57 ALA. L. REV. 1081 (2006); Baher Azmy, *Rasul v. Bush and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369 (2007); Colin C. Pogge, *A Dissentious "Debate": Shaping Habeas Procedures Post-Boumediene*, 88 TEX. L. REV. 1073 (2010).

<sup>13</sup> Many legal scholars bemoaned the lack of congressional oversight over the war on terror, including detention issues. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689,

cooperated with the administration in the effort to limit the rights of detainees to an absolute minimum, to give the president maximum flexibility and discretion to deal with detainees as he saw fit, and to limit the scope of judicial review of executive branch actions to the narrowest extent possible.<sup>14</sup>

In four landmark decisions from 2004–2008, the Supreme Court of the United States rejected the most extravagant claims of executive branch power and swept aside the repeated efforts of Congress to eliminate judicial supervisory powers over detention.<sup>15</sup> Each Supreme Court decision had a direct effect on the detainees at Guantanamo, including Jawad. The final Supreme Court decision led directly to Jawad's release.<sup>16</sup>

Mohammed Jawad was approximately fifteen years old when he was arrested by Afghan police on suspicion of involvement in a hand grenade attack in Kabul that injured two United States soldiers on December 17, 2002.<sup>17</sup> Later that day, he was turned over to American custody.<sup>18</sup> After a brief stint at Bagram prison, he was flown to Guantanamo Bay, Cuba in February 2003.<sup>19</sup> At the time Jawad arrived in Guantanamo, the island prison complex was, in essence, a legal black hole. The

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693–721 (2008) (discussing “congressional abdication” during the war on terror); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2352 (2006) (“[T]he most glaring institutional fact about the war on terror so far is how little Congress has participated in it. The President has resolved most of the novel policy and institutional challenges terrorism poses with virtually no input or oversight from the legislative branch.”).

<sup>14</sup> Jonathan Hafetz, *The Guantanamo Effect and Some Troubling Implications of Limiting Habeas Rights Domestically*, 10 N.Y. CITY L. REV. 351, 355–56 (2007) (explaining how the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 limited the rights of detainees and their access to the courts).

<sup>15</sup> See Linda Greenhouse, *Goodbye to Gitmo*, NYTIMES.COM (May 16, 2012), <http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/?hp> (“It was primarily a separation-of-powers concern that fueled the inter-branch drama of 2004 to 2008, during which a shrinking majority, over increasingly sharp dissents, pushed back against the Bush administration and Congress to assert the court’s own institutional authority.”).

<sup>16</sup> The Center for Constitutional Rights had filed a habeas corpus petition on Jawad’s behalf in 2005. No action was taken on his petition until after *Boumediene v. Bush* was decided in the summer of 2008, which clearly established the right of detainees to petition for habeas corpus. Jawad’s petition was granted the following year.

<sup>17</sup> See David J.R. Frakt, *Mohammed Jawad and the Military Commissions of Guantanamo*, 60 DUKE L.J. 1367, 1367 (2011).

<sup>18</sup> *Id.* at 1368.

<sup>19</sup> *Id.* at 1368–69.

Bush administration claimed that detainees were entitled to no legal rights whatsoever.<sup>20</sup> The executive position was that detainees were not prisoners of war, and were not entitled to even the minimum protections of Geneva Convention Common Article 3, which would guarantee humane treatment.<sup>21</sup> According to the administration, detainees could be held indefinitely, without charge, until the end of the Global War on Terror.<sup>22</sup> They were not entitled to know, much less challenge, the basis for their detention.<sup>23</sup> They had no access to lawyers or to courts.<sup>24</sup> Indeed, the Guantanamo naval base was chosen as the location for the detention and interrogation center precisely because it was believed to be beyond the reach of United States courts.<sup>25</sup> The detainees the Bush administration deemed “terrorists” or “war criminals” were to be tried in military tribunals, created by Executive order, with minimal due process: there was no judge, only one rule of evidence (relevance),<sup>26</sup> and the only appeal was directly to the Commander in Chief. For the initial thirty months of detention operations at Guantanamo, before Combatant Status Review Tribunals (CSRT) were initiated, there was no formalized process for the release of detainees; nevertheless, a significant number of detainees were

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<sup>20</sup> Memorandum from George W. Bush on the Humane Treatment of Taliban and al Qaeda Detainees to the Vice President et al. (Feb. 7, 2002), [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf) [hereinafter Memorandum for the Vice President].

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Richard J. Wilson, *United States Detainees at Guantanamo Bay: The Inter-American Commission on Human Rights Responds to a “Legal Black Hole,”* 10 No. 3 HUM. RTS. BRIEF 2 (2003) (summarizing the U.S. response to the IACHR, including that detainees “enjoy no legal protections,” “do not enjoy the protection of basic human rights” and cannot “claim the protections of humanitarian law.”).

<sup>24</sup> *Id.*

<sup>25</sup> Barron & Lederman, *supra* note 13, at 709. *See, e.g.*, JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 108 (2007) (explaining that “the Pentagon considered other facilities besides GTMO, including military bases inside the United States and on the Island of Guam” but rejected them, in part, because “detentions there were more likely to be subject to legal challenges since they were on U.S. soil.” “GTMO by contrast . . . seemed like a good bet to minimize judicial scrutiny.”).

<sup>26</sup> All evidence of “probative value to a reasonable person” was admissible. Military Comm’n Order No. 1 § 6(D)(1) (Mar. 21, 2002). The same formulation was adopted under the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. *See* MILITARY COMM’N R. EVID. R. 401. This evidentiary rule was criticized by Justice Stevens in *Hamdan v. Rumsfeld*, 548 U.S. 557, 614–15 (2006).

transferred to other countries: five in 2002, sixty-eight in 2003, and sixty-nine by the end of July 2004.<sup>27</sup>

While the detainees themselves had no ability to challenge these extraordinary claims of Executive power, this did not deter some enterprising lawyers in the United States from seeking redress on their behalf. Within weeks after the detention facility opened, lawyers from the Center for Constitutional Rights filed a habeas corpus petition on behalf of several Guantanamo detainees in the United States District Court for the District of Columbia.<sup>28</sup> The Government's response was that federal courts had no jurisdiction to hear cases by foreign nationals held at Guantanamo Bay, Cuba, outside the United States.<sup>29</sup> The court agreed, and on appeal was affirmed by the United States Court of Appeals for the District of Columbia Circuit.<sup>30</sup> The case was appealed to the Supreme Court in September 2003, and oral arguments took place in April 2004.<sup>31</sup> On June 28, 2004, the Supreme Court ruled in favor of the detainees, holding that United States federal courts had jurisdiction to hear their habeas corpus petitions.<sup>32</sup> In a companion case, decided the same day, the Supreme Court also held that persons detained as enemy combatants were entitled to basic due process protections, including the right to an administrative hearing to determine their status and whether they were being lawfully held.<sup>33</sup> In response, the Department of Defense created CSRTs. These tribunals, like the military commissions then getting underway, were to function with neither a judge nor formal rules of evidence, and directed to afford a "presumption of accuracy" to government evidence. Unfortunately for the

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<sup>27</sup> See *The Guantánamo Docket*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline> (last visited Nov. 13, 2012).

<sup>28</sup> The first detainees arrived at Guantanamo on January 11, 2002. The suit was filed February 19, 2002. See *Rasul v. Bush*, 215 F. Supp. 2d 55, 57 (D.D.C. 2002), *rev'd*, *Al Odah v. United States*, 103 Fed. Appx. 676 (D.C. Cir. 2004).

<sup>29</sup> *Id.* at 56.

<sup>30</sup> See *id.* at 72–73; *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

<sup>31</sup> See *Petition for a Writ of Certiorari, Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2003 WL 22428935.

<sup>32</sup> *Rasul v. Bush*, 542 U.S. 466 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005), *as recognized in Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008). The Court did not rule on the merits of the detainees' habeas corpus petition. *Id.* at 485.

<sup>33</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006), *as recognized in Ghoregi v. Obama*, 609 F. Supp. 2d 43 (D.C. Cir. 2009).

detainees, the CSRTs also functioned without counsel to represent them, despite the fact that the critical determination of their status was being resolved. Perhaps not surprisingly, when Mohammed Jawad appeared before a CSRT in 2005, he was found to be an enemy combatant and ordered detained indefinitely.

Just days after the *Rasul* and *Hamdi* decisions, in July 2004, charges were brought in the military commissions against another Guantanamo detainee, Salim Hamdan. Hamdan, a driver for Osama Bin Laden, was charged with conspiracy.<sup>34</sup> Hamdan's appointed military counsel, Navy Lieutenant Commander Charles Swift, filed a habeas corpus petition challenging the authority of the administration to hold military commissions which offered such limited due process.<sup>35</sup> The petition sought to block the military commission trial.<sup>36</sup> The suit effectively stopped all military commissions while the case was appealed to the United States Supreme Court. The Court heard oral arguments in March 2006, and issued its opinion on June 29, 2006.<sup>37</sup> The Court held that the President had exceeded his authority in unilaterally creating military commissions that deviated substantially and without justification from the Uniform Code of Military Justice (UCMJ).<sup>38</sup> The Justices determined that the rules for the military commissions did not comply with the laws of war, including Geneva Convention Common Article 3, which the Court held did apply to Guantanamo detainees,<sup>39</sup> contrary to the declaration of President Bush.<sup>40</sup> In a concurring opinion, Justice Breyer suggested that the President could create military commissions with fewer protections than the UCMJ offered, with proper congressional authorization.<sup>41</sup>

During the Bush administration, Congress was highly cooperative with the executive branch on matters that could be characterized as "national security." On

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<sup>34</sup> Charge, *United States v. Hamdan*, 801 F. Supp. 2d 1247 (July 14, 2004), available at <http://www.defense.gov/news/Jul2004/d20040714hcc.pdf>.

<sup>35</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, as stated in *Boumediene v. Bush*, 476 F.3d 981 (2007).

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 653.

<sup>39</sup> *Id.* at 571.

<sup>40</sup> Memorandum for the Vice President, *supra* note 20.

<sup>41</sup> *Hamdan*, 548 U.S. at 636.

issues relating to detainees, Congress was quick to give the President whatever authority he asked for, exercising only the most modest oversight. For example, in 2005, Congress passed the Detainee Treatment Act (DTA).<sup>42</sup> While this Act, passed in the wake of the Abu Ghraib scandal and other reports of detainee maltreatment, ostensibly focused on prohibiting inhumane treatment of detainees, it actually did nothing more than require the United States to follow the United Nations Convention Against Torture, a treaty which the U.S. had ratified and was already bound to follow.<sup>43</sup> The DTA also attempted to restrict detainees from pursuing habeas corpus petitions in federal court, directing that only CSRT determinations that a detainee was an enemy combatant could be reviewed.<sup>44</sup> The Act limited the scope of the review to whether the CSRT had been conducted in accordance with Department of Defense regulations.<sup>45</sup>

Shortly after the decision in *Hamdan v. Rumsfeld*, the Bush administration took up the suggestion of Justice Breyer and forwarded proposed legislation to Congress to authorize the President to establish military commissions deviating from the UCMJ. This legislation, the Military Commissions Act (MCA), was rapidly enacted into law in October 2006.<sup>46</sup> In addition to outlining rules and procedures for a list of crimes triable in military commissions, the MCA also stripped the rights of detainees to file habeas corpus petitions.<sup>47</sup> The Department of

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<sup>42</sup> 28 U.S.C. § 2241 (2006).

<sup>43</sup> U.N. General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, available at <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> (ratified by U.S. Oct. 21, 1994). The DTA did limit the interrogation methods available to Department of Defense (DoD) personnel in DoD facilities to those listed in the Army Field Manual on Intelligence Interrogation. However, this provision did not limit the techniques CIA personnel could use in secret ghost prisons. Nevertheless, the Bush administration was unhappy with even this very modest check on its power over detainees, issuing a presidential signing statement indicating that the administration would interpret the prohibition on cruel and inhumane interrogations “in a manner consistent with the President’s constitutional authority.” President’s Statement on H.R. 2863, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005). This was later explained by a senior administration official to mean that the President could simply ignore the ban. See Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1.

<sup>44</sup> 28 U.S.C. § 2241(e).

<sup>45</sup> *Id.*

<sup>46</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

<sup>47</sup> 28 U.S.C. § 2241(e).

Defense resumed prosecuting detainees in these revamped military commissions in 2007. In October 2007, Mohammed Jawad was the fourth detainee to be charged under the 2006 MCA.<sup>48</sup> His case was referred to trial in the winter of 2008, and he was arraigned in the spring.<sup>49</sup> Not long after pretrial litigation had begun in his case<sup>50</sup> in the summer of 2008, the Supreme Court decided the last of its landmark detainee cases, *Boumediene v. Bush*.<sup>51</sup> *Boumediene* held that detainees were entitled to seek habeas corpus relief in federal court, the habeas-stripping provisions in prior legislation were an unlawful suspension of the writ, and that CSRTs and their review under the DTA were an inadequate substitute for habeas corpus.<sup>52</sup>

Shortly after *Boumediene*, the military commission of Salim Hamdan, the first contested trial in a military commission, was held.<sup>53</sup> Hamdan sought to stay the trial by seeking habeas relief in federal court, but was rebuffed.<sup>54</sup> Hamdan was convicted of providing material support to terrorism, but acquitted of more serious terrorism and conspiracy charges.<sup>55</sup> He was sentenced to an additional five months of confinement, then released home to Yemen in December 2008.<sup>56</sup> The district

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<sup>48</sup> The MCA required that Guantanamo detainees charged under the MCA be assigned military defense counsel. This is how I, a Judge Advocate in the U.S. Air Force JAG Corps Reserve, came to represent Jawad. While serving with the Office of Military Commissions-Defense from April 2008 to August 2009, I was detailed as Jawad's lead defense counsel.

<sup>49</sup> He was initially arraigned March 12, 2008, then re-arraigned, after a substitution of defense counsel (I was the replacement), on May 7, 2008. See David J.R. Frakt, *The Difficulty of Defending Detainees*, 48 WASHBURN L.J. 381, 387–88 (2009).

<sup>50</sup> The first pretrial motion hearing was held June 19, 2008. See David J.R. Frakt, *Closing Argument at Guantanamo: The Torture of Mohammed Jawad*, 22 HARV. HUM. RTS. J. 1 (2009).

<sup>51</sup> *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>52</sup> *Id.* at 2275.

<sup>53</sup> Jim Loney, *Bin Laden Driver Faces First Guantanamo Trial*, REUTERS, July 20, 2008.

<sup>54</sup> Memorandum Order, Denial of Motion for Preliminary Injunction, *Hamdan v. Gates*, No. 04-1519, (D.D.C. July 18, 2008) (seeking injunction to stop military commission).

<sup>55</sup> William Glaberson, *Bin Laden's Former Driver Is Convicted in Split Verdict*, N.Y. TIMES, Aug. 6, 2008, <http://www.nytimes.com/2008/08/06/washington/07gitmo.html?pagewanted=all>. Over four years later, Hamdan's conviction was reversed by the D.C. Circuit Court of Appeals. John H. Cushman, Jr., *Appeals Court Overturns Terrorism Conviction of Bin Laden's Driver*, N.Y. TIMES, Oct. 16, 2012, <http://www.nytimes.com/2012/10/17/us/politics/appeals-court-overturns-terrorism-conviction-of-salim-ahmed-hamdan-bin-ladens-driver.html>.

<sup>56</sup> William Glaberson, *Bin Laden Driver Sentenced to a Short Term*, N.Y. TIMES, Aug. 7, 2008, <http://www.nytimes.com/2008/08/08/washington/08gitmo.html?pagewanted=all>.

court started reviewing habeas corpus petitions in the summer of 2008, eventually granting relief to over three dozen detainees beginning in October 2008, when seventeen Chinese Muslim Uighurs were granted habeas corpus.<sup>57</sup> This set up the last constitutional battle of the Bush administration, when the district court ordered the Uighurs released in the United States after the Government acknowledged that there was no other country to which they could currently be released.<sup>58</sup> The judge reasoned that for every right there must be a remedy, and that if the Supreme Court said that detainees had the right to habeas corpus, then the court must be able to enforce the right by ordering release.<sup>59</sup> On appeal, the Government argued that only the executive could make decisions relating to immigration.<sup>60</sup> The matter was still pending when President Bush completed his term of office. Six detainees won their habeas corpus petitions in the lame-duck session between President Obama's election and his inauguration, including three individuals released during President Bush's tenure, joining nearly 529 detainees voluntarily transferred from Guantanamo by the Bush administration.<sup>61</sup> In late October 2008, the second military commission trial, that of Ali Hamza al Bahlul, commenced.<sup>62</sup> He was convicted of all charges (no defense was offered) and sentenced to life

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<sup>57</sup> *Guantanamo Habeas Scorecard*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf> (last updated Feb. 9, 2011).

<sup>58</sup> Memorandum Opinion, *In re Guantanamo Bay Detainee Litigation*, No. 05-cv-1509-UNA (D.D.C. Oct. 8, 2008), ECF No. 184.

<sup>59</sup> *Id.*

<sup>60</sup> Brief for Appellants, *Kiyemba v. Bush*, Nos. 08-5424, 08-5425, 08-5426, 08-5427, 08-5428, 08-5429 (D.C. Cir. Oct. 24, 2008), available at <http://ccrjustice.org/files/2008-10-24%20Kiyemba%20%20Gov't%20Appeal%20Brief.pdf> [hereinafter Brief for Appellants]. The case was decided several months later, in the government's favor. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

<sup>61</sup> On November 20, 2008, five Bosnians-Algerians, Mustafa Ait Idir, Hadj Boudella, Mohamed Nechla, Lakhdar Boumediene and Saber Lahmar, were granted the writ. See Memorandum Order at 13, *Boumediene v. Bush*, No. 04-1166 (RJL) (D.D.C. Nov. 20, 2008), available at <http://www.scotusblog.com/wp-content/uploads/2008/11/leon-boumediene-order-11-20-2008.pdf>. Mr. Idir, Mr. Boudella and Mr. Nechla were transferred to Bosnia and Herzegovina on December 16, 2008. See Jaclyn Belczyk, *US Transfers Three Algerian Guantanamo Detainees to Bosnia*, JURIST.ORG (Dec. 1, 2008, 4:47 PM), <http://jurist.org/paperchase/2008/12/us-transfers-three-algerian-guantanamo.php>. Mr. Boumediene and Mr. Lahmar were transferred to France in May and November of 2009, respectively. *The Guantánamo Docket*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline> (last visited Nov. 13, 2012). The last detainee to win his habeas case during the Bush presidency was Mohammed el Gharani, of Chad, on January 14, 2009. *Id.* Mr. Gharani was not released until June 2009. *Id.*

<sup>62</sup> I was also Mr. al Bahlul's detailed military defense counsel.

imprisonment on November 3, 2008.<sup>63</sup> The following day, President Obama was elected. To many observers, myself included, it appeared likely that al Bahlul would be the last detainee to be tried at Guantanamo. We were wrong.

Shortly after the decision in *Boumediene v. Bush*, Mohammed Jawad authorized me to file a habeas corpus petition on his behalf. I enlisted the help of the ACLU National Security Project to do so. While preparing the petition, we learned that lawyers from the Center for Constitutional Rights had, without Jawad's knowledge, filed a habeas corpus petition on his behalf through a "next friend."<sup>64</sup> However, due to the habeas corpus restrictions in the DTA and in the MCA of 2006, his petition, along with many other similar petitions filed by detainees, languished. We filed a revised petition based on the many factual and legal developments since 2005.<sup>65</sup> Initially, Jawad's renewed petition also languished. The Government's position, supported by the federal district court in the *Hamdan* and *Khadr* cases,<sup>66</sup> was that the courts should not entertain a habeas corpus petition of a detainee who had a military commission pending. As the Bush presidency came to a close in January 2009, pretrial litigation in the military commission case against Jawad continued. I, in fact, argued against an interlocutory appeal filed by the Government in the case at the Court of Military Commission Review on January 13, 2009.<sup>67</sup> At this point, Mr. Jawad still faced three charges of attempted

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<sup>63</sup> Carol Rosenberg, *Bin Laden Propagandist Convicted of War Crimes*, MCCLATCHY.COM (Nov. 3, 2008), <http://www.mcclatchydc.com/2008/11/03/55221/bin-laden-propagandist-convicted.html>.

<sup>64</sup> Amended Petition for Writ of Habeas Corpus on Behalf of Mohammed Jawad (Also Known as Saki Bacha) at 10–11, *Halmandy v. Bush*, No. 05-cv-2385-RMU (D.C. Cir. Jan. 13, 2009), available at [http://www.aclu.org/pdfs/natsec/amended\\_jawad\\_20090113.pdf](http://www.aclu.org/pdfs/natsec/amended_jawad_20090113.pdf). The original petition was filed under the name Saki Bacha, a name that the Department of Defense asserted was an alias of Mr. Jawad. The petition was authorized by one of Jawad's uncles.

<sup>65</sup> *Id.*

<sup>66</sup> Memorandum Order, Denial of Motion for Preliminary Injunction, *Hamdan v. Gates*, No. 04-1519 (D.D.C. July 18, 2008) (seeking injunction to stop military commission); Memorandum Opinion, *Khadr v. Bush*, No. 04-1136 (JDB), (D.D.C. Nov. 24, 2008), available at <http://www.scotusblog.com/wp-content/uploads/2008/11/khadr-ruling-bates-11-24-08.pdf> (denying request to enjoin military commission proceedings and holding habeas corpus petition in abeyance until conclusion of military commission proceedings).

<sup>67</sup> The Court of Military Commission Review (CMCR) is a statutorily created court established by the MCA to serve as the court of first appeal to the military commissions. The government was appealing an adverse ruling in a suppression motion. See *United States v. Jawad*, 1 M.C. 349 (Military Comm'n Guantánamo Bay, Cuba Nov. 19, 2008) (ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused Made While in U.S. Custody (D-021)). See also Frakt, *supra* note 17, at 1373.

murder in violation of the law of war, and his habeas petition was stalled. Along with 239 other detainees at Guantanamo, his fate was very much uncertain.

## 2. The Obama Years (January 2009 to the Present)

### a. 2009

On January 22, 2009, the second full day in office, President Obama signed an Executive order directing the closure of Guantanamo Bay prison within one year<sup>68</sup> and a review of those currently detained at Guantanamo by an interagency group (the Guantanamo Review Task Force) to determine their appropriate disposition. He also suspended the military commissions.<sup>69</sup> Although the decision to close Guantanamo was greeted warmly by the international community and domestic civil libertarians, it was immediately criticized by congressional Republicans.<sup>70</sup> In fact, within a day of the order, “[a] group of House Republicans quickly filed a bill that would prohibit federal courts from ordering the transfer or release of Guantanamo detainees into the U.S.”<sup>71</sup> This criticism intensified throughout the winter and spring of 2009, capitalizing on the plan’s lack of specific details to close Guantanamo to stoke wildly unrealistic fears of terrorists and mass murderers being set free in the U.S.<sup>72</sup> Senate Minority Leader Mitch McConnell’s comments were typical:

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<sup>68</sup> Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009). It required the immediate review of all 241 Guantanamo Bay detainees by an interagency review team led by the U.S. Attorney General. *Id.* The Executive Order also established a one-year timeline for closing the detention facilities at Guantanamo Bay and suspended the use of military commissions. *Id.* at 4898.

<sup>69</sup> William Glaberson, *Obama Orders Halt to Prosecutions at Guantánamo*, N.Y. TIMES, Jan. 21, 2009, [http://www.nytimes.com/2009/01/22/washington/22gitmo.html?\\_r=0](http://www.nytimes.com/2009/01/22/washington/22gitmo.html?_r=0).

<sup>70</sup> See, e.g., Peter Wallsten, *Republicans step up criticism of Obama*, L.A. TIMES, Jan. 26, 2009, at A9 (discussing Senator McCain’s criticism of the decision to close Guantanamo).

<sup>71</sup> Huma Khan, *GOP Pushback Mounts on Gitmo*, ABC NEWS POLITICS BLOG (Jan. 22, 2009, 11:02 AM), <http://abcnews.go.com/blogs/politics/2009/01/gop-pushback-mo>.

<sup>72</sup> David M. Herszenhorn, *Senate G.O.P. Leader Warns Against Closing Gitmo*, N.Y. TIMES: THE CAUCUS BLOG (Apr. 21, 2009, 11:16 AM), <http://thecaucus.blogs.nytimes.com/2009/04/21/senate-gop-leader-warns-against-closing-gitmo>. See James R. Carroll, *McConnell Leads Charge Against Decision to Close Guantanamo*, LOUISVILLE COURIER-JOURNAL (May 17, 2009, 12:01 AM), <http://www.courier-journal.com/article/20090517/NEWS01/905170388/McConnell-leads-charge-against-decision-close-Guantanamo> (“Fourteen times since April 20, Senate Minority Leader Mitch McConnell has stood up to speak on the Senate floor about the same topic: President Barack Obama’s plans to close the detention facility for suspected terrorists at Guantanamo Bay, Cuba. In each speech, McConnell has criticized the Obama administration for its decision.”).

The administration says Guantanamo will close, will be closed by next January. What they haven't told us is what they plan to do with these killers once it closes. Well, Americans want some assurances that closing Guantanamo won't make them less safe. . . .

...

Guantanamo currently houses some of the most dangerous men alive. These are men who are proud of the innocent lives they've taken and who want to return to terrorism.<sup>73</sup>

Other Republican legislators resorted to even more cynical fear mongering. House Minority Leader John Boehner commented:

I think the first thing we have to remember is that we're talking about terrorists here. Do we bring them into our borders? Do we release them back into the battlefield, like some 61 detainees that have been released we know are back on the battlefield? And do we release them to get back and rejoin this fight?<sup>74</sup>

House Minority Whip Eric Cantor went even further stating, "Actively moving terrorists inside our borders weakens our security, raises far more questions than it answers and is the wrong track for our nation. Most families neither want nor need hundreds of terrorists seeking to kill Americans in their communities."<sup>75</sup> Congressmen Peter Hoekstra, the ranking Republican member on the House Intelligence Committee, also criticized the Executive order stating, "we are talking about trained terrorists and people who have committed acts of mass murder . . ."<sup>76</sup> The Republicans failed to note that President Bush had transferred or released 532 former Guantanamo detainees, without any limitations imposed by Congress.

Another successful Republican tactic, unwittingly aided by the *New York Times*, was the heavy emphasis, and occasional exaggeration of the "recidivism" rate of Guantanamo detainees. On May 21, 2009, the *Times* published a front-page

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<sup>73</sup> Herszenhorn, *supra* note 72.

<sup>74</sup> Khan, *supra* note 71.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

story, entitled, *1 In 7 Detainees Rejoined Jihad, Pentagon Finds*.<sup>77</sup> The story, purportedly based on a leaked Pentagon study, significantly misstated the number and percentage of released detainees confirmed to have engaged in jihadist activity after release stating, “74 prisoners released from Guantánamo have returned to terrorism, making for a recidivism rate of nearly 14 percent.”<sup>78</sup> The *New York Times* later modified the headline and apologized for the misleading nature of the story calling it “seriously flawed and greatly overplayed,”<sup>79</sup> but leading opponents of closing Guantanamo, including former Vice President Cheney, had already maximized the propaganda value of the deceptive article. In a speech at the American Enterprise Institute, given the same day as President Obama’s major national security speech at the National Archives on May 21, 2009, Mr. Cheney stated:

Keep in mind that these are hardened terrorists picked up overseas since 9/11. The ones that were considered low-risk were released a long time ago. And among these, we learned yesterday, many were treated too leniently, because 1 in 7 cut a straight path back to their prior line of work and have conducted murderous attacks in the Middle East. I think the President will find, upon reflection, that to bring the worst of the worst terrorists inside the United States would be cause for great danger and regret in the years to come.<sup>80</sup>

The Republican scare tactics were so politically successful that many Democrats jumped on the bandwagon, refusing to support the President’s plan to close Guantanamo, especially if it entailed transferring detainees to the United States. On May 19, 2009, the Senate unanimously adopted a Sense of the Senate resolution, stating that “detainees housed at Guantanamo should not be released into American society, nor should they be transferred stateside into facilities in

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<sup>77</sup> Elisabeth Bumiller, *1 In 7 Detainees Rejoined Jihad, Pentagon Finds*, N.Y. TIMES, May 21, 2009, at A1.

<sup>78</sup> *Id.*

<sup>79</sup> Clark Hoyt, Op-Ed., *What Happened to Skepticism?*, N.Y. TIMES, June 7, 2009, at WK8. See also Greg Mitchell, *UPDATED: New York Times Finally Corrects Botched Front-Page on Gitmo Prisoners ‘Returning to Jihad,’* HUFFINGTON POST (June 5, 2009, 2:49 PM), [http://www.huffingtonpost.com/greg-mitchell/nyt-finally-corrects-botc\\_b\\_211938.html](http://www.huffingtonpost.com/greg-mitchell/nyt-finally-corrects-botc_b_211938.html).

<sup>80</sup> Richard B. Cheney, *Remarks by Richard Cheney*, AM. ENTER. INST. (May 21, 2009), <http://www.aei.org/article/foreign-and-defense-policy/regional/india-pakistan-afghanistan/remarks-by-richard-b-cheney>.

American communities and neighborhoods.”<sup>81</sup> According to a *New York Times* report “Guantánamo has become a difficult issue for some Democrats on Capitol Hill because constituents have expressed anxiety about potentially freeing a small number of detainees or moving those that the Bush administration called ‘the worst of the worst’ to prisons in the United States.”<sup>82</sup> The article also noted, “[s]ome administration insiders say top officials have appeared surprised by the ferocity of the largely Republican opposition to Mr. Obama’s effort to close Guantánamo.”<sup>83</sup> This fierce opposition seemed to have an effect on public opinion. A poll taken in late May 2009 found that twice as many Americans opposed closing Guantanamo as favored the plan.<sup>84</sup> Given the tide of public opinion, it was perhaps not surprising that efforts to slow the closure gained wide support in Congress. In one of the rare displays of Congressional bipartisanship during President Obama’s term in office, the first legislative restrictions related to the transfer or release of detainees, proposed in late June 2009 as part of a supplemental defense appropriations bill, were passed overwhelmingly by the Democratically controlled Congress.<sup>85</sup> However, language in the legislation suggested that Congress still contemplated that Guantanamo would be closed.<sup>86</sup>

Until these first restrictions were passed for the remainder of fiscal year 2009, then renewed in a series of continuing budget resolutions and final budget bills, for fiscal year 2010, President Obama enjoyed a brief period of complete legal, if not political, flexibility on the disposition of detainees. He used this time to coordinate with several countries, particularly our European allies, who were willing to assist him in his plan to close Guantanamo by accepting detainees for resettlement.<sup>87</sup>

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<sup>81</sup> 155 CONG. REC. S5602 (daily ed. May 19, 2009) (quoting the text of S. amend. 1140 from the 2007 resolution).

<sup>82</sup> William Glaberson, *Obama to Keep Tribunals; Stance Angers Some Backers*, N.Y. TIMES, May 15, 2009, <http://www.nytimes.com/2009/05/16/us/politics/16gitmo.html>.

<sup>83</sup> *Id.*

<sup>84</sup> Jeffrey M. Jones, *Americans Oppose Closing Gitmo and Moving Prisoners to U.S.*, GALLUP (June 3, 2009), <http://www.gallup.com/poll/119393/americans-oppose-closing-gitmo-moving-prisoners.aspx> (“By a better than 2-to-1 margin, Americans are opposed to closing the Guantanamo Bay prison that houses terror suspects and moving some of those prisoners to the United States.”).

<sup>85</sup> Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, § 14103(f), 123 Stat. 1859, 1921.

<sup>86</sup> *See id.* (“Prior to the termination of detention operations at Naval Station, Guantanamo Bay, Cuba, the President shall submit to the Congress a report in classified form describing the disposition or legal status of each individual detained at the facility as of the date of enactment of this Act.”).

<sup>87</sup> Jon Manel, *US Envoy Confident on Guantanamo Closure*, BBC NEWS, Sept. 16, 2009, <http://news.bbc.co.uk/2/hi/americas/8260081.stm> (summarizing interview with Ambassador Daniel Fried, US

Portugal, Ireland, Belgium, Hungary, France, Italy, Palau, and Bermuda all accepted detainees for resettlement in 2009, while Iraq, Saudi Arabia, Chad, Kuwait, Yemen, Afghanistan, and Somalia accepted their citizens for repatriation.<sup>88</sup>

The administration also used the first few months of Obama's term to reevaluate the use of military commissions. Two detainees previously charged with crimes in the military commissions were transferred out of Guantanamo: Binyam Mohamed was unconditionally released to Great Britain in February,<sup>89</sup> and Ahmed Ghailani was transferred to federal custody to face charges in federal court in New York in June.<sup>90</sup> But while President Obama repeatedly stated that he preferred to try detainees in federal court,<sup>91</sup> he was persuaded not to abandon military commissions altogether. Rather the administration sought to improve them through regulatory and legislative fixes, keeping them available as an option to try some detainees.

On May 15, 2009, the President formally announced that, following further reforms he planned to continue to utilize military commissions.<sup>92</sup> He reiterated and explained his support for using military commissions in a major national security speech at the National Archives on May 21, 2009:

[D]etainees who violate the laws of war . . . are . . . best tried through military commissions. Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war . . . .

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Special Envoy for the Closure of Guantanamo Bay Detention Facilities regarding his efforts to find countries willing to resettle detainees).

<sup>88</sup> *The Guantánamo Docket: 2009*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline/2009> (last visited Nov. 13, 2012) (listing the countries to which detainees were released in 2009).

<sup>89</sup> *The Guantánamo Docket: Binyam Mohamed*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/detainees/1458-binyam-mohamed> (last visited Nov. 30, 2012).

<sup>90</sup> Press Release, U.S. Dep't of Justice, Ahmed Ghailani Transferred from Guantanamo Bay to New York for Prosecution on Terror Charges, No. 09-563 (June 9, 2009), <http://www.justice.gov/opa/pr/2009/June/09-ag-563.html>.

<sup>91</sup> See, e.g., Press Release, The White House, Remarks by the President on National Security (May 21, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09) [hereinafter President's Remarks] ("First, whenever feasible, we will try those who have violated American criminal laws in federal courts—courts provided for by the United States Constitution.").

<sup>92</sup> *Text: Obama's Remarks on Military Commissions*, N.Y. TIMES, May 15, 2009, <http://www.nytimes.com/2009/05/15/us/politics/15obama.text.html?ref=politics>.

Instead of using the flawed commissions of the last seven years, my administration is bringing our commissions in line with the rule of law. We will no longer permit the use of evidence—as evidence statements that have been obtained using cruel, inhuman, or degrading interrogation methods. We will no longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay. And we will give detainees greater latitude in selecting their own counsel, and more protections if they refuse to testify. These reforms, among others, will make our military commissions a more credible and effective means of administering justice, and I will work with Congress and members of both parties, as well as legal authorities across the political spectrum, on legislation to ensure that these commissions are fair, legitimate, and effective.<sup>93</sup>

While President Obama may well have believed what he said, the decision to continue military commissions was widely seen as politically motivated. According to the *New York Times*, “[t]he decision [to utilize military commissions] benefits the administration politically because it burnishes Mr. Obama’s credentials as a leader who takes a hard line toward terrorism suspects.”<sup>94</sup> Military commissions remained suspended for several months while the administration worked with Congress on reforms to the MCA,<sup>95</sup> resulting in the Military Commissions Act of 2009, which became law in October of that year. In November 2009, the administration announced that it would resume trying detainees in the revised commissions.<sup>96</sup> At the same time, perhaps hoping to soften the blow to his liberal

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<sup>93</sup> President’s Remarks, *supra* note 91.

<sup>94</sup> Glaberson, *supra* note 82.

<sup>95</sup> On July 30, 2009, I testified before a House Subcommittee considering proposals to reform the military commissions. Also testifying at the hearing were two senior Administration officials, DoD General Counsel Jeh C. Johnson and Assistant Attorney General David Kris, head of the DOJ’s National Security Division. See *Proposals for Reform of the Military Comm’ns Sys: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009), [http://judiciary.house.gov/hearings/printers/111th/111-26\\_51347.pdf](http://judiciary.house.gov/hearings/printers/111th/111-26_51347.pdf). There were at least two other hearings on reforming the military commissions in which the administration also participated. See *Reforming the Military Comm’ns Act of 2006 and Detainee Policy: Hearing Before the H. Comm. on Armed Servs.*, 111th Cong. (2009); *Legal Issues Regarding Military Comm’ns and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. (2009).

<sup>96</sup> Press Release, U.S. Dep’t of Justice, Departments of Justice and Defense Announce Forum Decisions for Ten Guantanamo Bay Detainees (Nov. 13, 2009), <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html> (“The Attorney General has also determined, in consultation with the Secretary of Defense, that the prosecutions of five other Guantanamo Bay detainees who were charged in military commissions may be resumed in that forum.”).

supporters, the administration announced that 9/11 defendants would be tried in federal court.<sup>97</sup> As with many of the President's actions, the announcement satisfied neither the left, nor the right. If President Obama thought that adopting military commissions, which were highly popular with key Republican legislators like Senator Lindsay Graham and Senator John McCain, would make it easier to win support from Republicans for other aspects of his plan to close Guantanamo, he was mistaken. In fact, endorsing reformed military commissions played right into the hands of those who wished to keep Guantanamo open.

While the military commissions were suspended in the spring of 2009, the district court required the Government to answer Mohammed Jawad's habeas corpus petition on its merits.<sup>98</sup> After determining that most of the evidence they intended to use to prove Jawad was an enemy combatant was obtained through torture,<sup>99</sup> the Department of Justice decided not to contest the petition.<sup>100</sup> The suppression of the evidence led to the order to release Mr. Jawad on July 30, 2009.<sup>101</sup>

Jawad was one of forty-three detainees transferred to other countries by the Obama administration in 2009, including sixteen awarded release through habeas corpus petitions.<sup>102</sup> Although the President acknowledged on November 18, 2009 that the one year deadline to close Guantanamo would not be met, he maintained his expectation that it would be closed sometime in 2010: "We are on a path and a process where I would anticipate that Guantanamo will be closed next year. I'm not going to set an exact date because a lot of this is also going to depend on cooperation from Congress."<sup>103</sup> The cooperation was not forthcoming.

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<sup>97</sup> *Id.*

<sup>98</sup> *Halmandy v. Obama*, 612 F. Supp. 2d 45, 46–48 (D.D.C. 2009) (order amending the Case Management Order).

<sup>99</sup> *Bacha v. Obama*, No. 05-2385-ESH, 2009 WL 2149949, at \*1 (D.D.C. July 17, 2009) (order granting Jawad's motion to suppress after Government conceded incriminating statements by Jawad were the product of torture).

<sup>100</sup> Respondents' Notice, *supra* note 1.

<sup>101</sup> Order, *supra* note 9.

<sup>102</sup> *The Guantánamo Docket: 2009*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline/2009> (last visited Nov. 13, 2012) (listing the countries to which detainees were released in 2009).

<sup>103</sup> Anne E. Kornblut, *Obama Admits Guantanamo Won't Close by Jan. Deadline*, WASHINGTONPOST.COM (Nov. 18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/18/AR2009111800571.html>.

One other event that no one could have anticipated further complicated the President's efforts to close Guantanamo. On Christmas Day, 2009, Umar Farouk Abdulmutallab, a Nigerian Islamist, attempted to blow up an American airliner bound for Detroit using explosives concealed in his underwear.<sup>104</sup> Mr. Abdulmutallab received training from al Qaeda in Yemen, and they provided the explosive device.<sup>105</sup> This attempted terrorist attack reignited domestic fears of terrorism and brought back unpleasant memories of 9/11. Although Abdulmutallab freely confessed his role and provided significant cooperation to the FBI, Republicans were incensed that he was read *Miranda* rights, even though the warning did not come until after he had been in custody for nine hours.<sup>106</sup> Several of the administration's critics misled the public, including Senators Lindsey Graham and Mitch McConnell, asserting that Abdulmutallab received a rights advisement after fifty minutes of questioning, a story that was widely circulated, including on *Fox News*<sup>107</sup> and the *Wall Street Journal*<sup>108</sup> after his arrest.

b. 2010 to the Present

The Christmas Day bomber had an immediate impact on the effort to empty Guantanamo, especially with regard to the many Yemenis at Guantanamo already cleared for release. In response to the failed attack, on January 5, 2010, President Obama ordered a temporary halt to the transfer of scores of Yemeni detainees at Guantanamo awaiting repatriation.<sup>109</sup> This moratorium continues to this day. Only one detainee, ordered released through habeas corpus, has been released to Yemen in the last three years, although Yemenis make up by far the largest national group at Guantanamo.<sup>110</sup>

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<sup>104</sup> Walter Pincus, *Christmas Day Bomb Suspect Was Read Miranda Rights Nine Hours After Arrest*, WASH. POST, Feb. 15, 2010, at A6.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Storm Brews Over Decision to Reveal Abdulmutallab's Cooperation*, FOX NEWS (Feb. 5, 2010), <http://www.foxnews.com/politics/2010/02/04/bomb-scolds-administration-revealing-abdulmutallabs-cooperation/#ixzz1tZNhZMtc>.

<sup>108</sup> *Abdulmutallab in 50 Minutes*, WALL ST. J., Jan. 25, 2010, at A16.

<sup>109</sup> Michael A. Fletcher, *Obama Administration Suspends Transfers of Terrorist Suspects to Yemen*, WASHINGTONPOST.COM, (Jan. 5, 2010, 3:11 PM ET), <http://voices.washingtonpost.com/44/2010/01/obama-administration-suspends.html>.

<sup>110</sup> Simon Rogers, *Guantanamo Bay Detainees—The Full List*, THE GUARDIAN, Apr. 25, 2011, <http://www.guardian.co.uk/world/datablog/2011/apr/25/guantanamo-bay-detainees-full-list> (identifying 89 of the then 178 remaining detainees. The country with the next largest contingent was Afghanistan,

Although the administration failed to complete the closure of Guantanamo, it was able to achieve one milestone by the one-year anniversary of the Executive order. On January 22, 2010, the Guantanamo Review Task Force issued its final report.<sup>111</sup> The report divided the 240 remaining detainees into four groups: those cleared for release (126, the majority), those approved for prosecution (36), a group of Yemenis designated for “conditional detention” (30), and detainees deemed too dangerous to release but not feasible for prosecution (48).<sup>112</sup> With the announcement of this fourth category, the Obama administration appeared to be embracing a policy of indefinite detention. The Task Force Report indicated that in addition to habeas corpus review, detainees in this category would be eligible for “periodic [e]xecutive [b]ranch review,”<sup>113</sup> but few details were provided.

By March 2010, public opinion had shifted markedly on the closure of Guantanamo. According to one poll:

Support for closing the facility has dropped 12 points over the past 14 months,

....

....

Shortly before Obama’s inauguration, 51 percent of Americans said they thought the facility in Cuba should be closed. Now that number is down to 39 percent, and six in ten believe the United States should continue to operate Guantanamo.<sup>114</sup>

Also in March 2010, the *Washington Post* reported that President Obama’s advisors were counseling him to overrule Attorney General Eric Holder’s previous decision to try the alleged 9/11 co-conspirators in federal court, and instead return

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with 19.). The last Yemeni released was Mohammed Odaini, on July 13, 2010. *The Guantánamo Docket: Mohammed Odaini*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/detainees/681-mohammed-odaini> (last visited Nov. 13, 2012).

<sup>111</sup> See GUANTANAMO REVIEW TASK FORCE, FINAL REPORT (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf> [hereinafter FINAL REPORT].

<sup>112</sup> *Id.* at ii.

<sup>113</sup> *Id.* at 25.

<sup>114</sup> CNN Poll: *Big Shift on Closing of Guantanamo Bay Facility*, CNN.COM (Mar. 29, 2010), <http://politicalticker.blogs.cnn.com/2010/03/29/cnn-poll-big-shift-on-closing-of-guantanamo-bay-facility/>.

the case to the military commissions.<sup>115</sup> The story suggested that “[i]f Obama accepts the likely recommendation of his advisers, the White House may be able to secure from Congress the funding and legal authority it needs to close the U.S. military prison at Guantanamo Bay, Cuba, and replace it with a facility within the United States.”<sup>116</sup> Although the administration did ultimately abandon its plan to try the 9/11 case in federal court, and sent it back to the military commissions, it did not do so until April 2011,<sup>117</sup> and the decision did nothing to help the administration close the military prison.

There were few significant events in the spring and summer of 2010, as the administration worked behind the scenes to gain support for its closure plan. In May 2010, another botched bombing plot in Times Square by Pakistani-born U.S. citizen Faisal Shahzad<sup>118</sup> further hardened the mood against releasing or transferring former suspected terrorists. The resumption of the military commissions also provided support for those opposed to allowing detainees in federal court. Two detainees, Ibrahim al Qosi, a Sudanese cook for al Qaeda, and Omar Khadr, a Canadian teenager, pled guilty before military commissions in July and October, the first convictions under the 2009 MCA.<sup>119</sup>

Any hope that President Obama had to complete the closure of Guantanamo by the end of his first term evaporated with the 2010 mid-term Congressional elections, when Republicans won a comfortable majority in the house (242-193) and reduced the Democratic majority in the Senate to 53-47, effectively giving Congressional control to the Republicans.<sup>120</sup> As the elections approached in the fall

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<sup>115</sup> Peter Finn & Anne E. Kornblut, *Obama advisers set to recommend military tribunals for alleged 9/11 plotters*, WASH. POST, Mar. 5, 2010, at A1.

<sup>116</sup> *Id.*

<sup>117</sup> Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

<sup>118</sup> Mark Mazzetti, Sabrina Tavernise & Jack Healy, *Suspect, Charged, Said to Admit Role in Plot*, NYTIMES.COM (May 4, 2010), <http://www.nytimes.com/2010/05/05/nyregion/05bomb.html?pagewanted=all>.

<sup>119</sup> Lisa Daniel, *Bin Laden Aide Pleads Guilty in Military Commission*, U.S. DEP'T. OF DEF. (July 7, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=59936> (describing guilty plea of Mr. al Qosi as “the first case prosecuted under the Obama administration and the Military Commissions Act of 2009”); Jane Sutton, *Canadian Khadr Pleads Guilty in Guantanamo Trial*, REUTERS (Oct. 25, 2010), <http://www.reuters.com/article/2010/10/25/us-guantanamo-khadr-preview-idUSTRE69N0WL20101025> (“He is the second man to plead guilty in the tribunal during the administration of U.S. President Barack Obama.”).

<sup>120</sup> See *Election 2010: House Map*, NYTIMES.COM, <http://elections.nytimes.com/2010/results/house> (showing that Republicans gained 63 seats and control of the House of Representatives); *Election 2010:*

of 2010, Republicans, sensing a possible change in the composition of Congress, ensured that no major fiscal year 2011 budget bills were passed prior to the midterm elections, leaving it to the newly elected Republican majority to work out a defense budget with the administration.<sup>121</sup>

Throughout 2010, as the prospects for closing Guantanamo dimmed, it became harder to find countries willing to accept detainees. In fact, during 2010, only twenty-four detainees were released.<sup>122</sup> Four were repatriated (three to Algeria, one to Yemen) and twenty were resettled in Germany, Spain, Latvia, Cape Verde, Latvia, Bulgaria, Georgia, Switzerland, Albania and Slovakia.<sup>123</sup>

Perhaps the penultimate nail in the coffin of the plan to close Guantanamo was a report issued, at the direction of Congress, by the Office of the Director of National Intelligence in December 2010.<sup>124</sup> The report stated that of the 598 detainees transferred out of Guantanamo, the “Intelligence Community assesses that 81 (13.5%) are confirmed and 69 (11.5%) are suspected of reengaging in terrorist or insurgent activities after transfer.”<sup>125</sup> The fact that Obama-era released detainees engaged in “terrorist or insurgent activities” at a far lower rate (3% confirmed and 4.5% suspected) than those released by President Bush did not seem to matter.<sup>126</sup> This report gave congressional Republicans all the ammunition they

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*Senate Map*, NYTIMES.COM, <http://elections.nytimes.com/2010/results/house> (showing that Democrats lost 6 seats in the Senate). Because of the significant majority held by Republicans in the House and because of U.S. Senate procedural rules requiring a 60 vote supermajority to bring any legislation up for a vote, no legislation could be passed without significant Republican cooperation.

<sup>121</sup> Congress passed a continuing budget resolution on September 30, 2010 (Pub. L. No. 111-242, 124 Stat. 2607 (2010)) funding the federal government from October 1, 2010 to December 3, 2010. *Status of Appropriations Legislation for Fiscal Year 2011*, THOMAS (Mar. 23, 2012), <http://thomas.loc.gov/home/approp/app11.html>. The final budget did not pass until April 15, 2011. *Id.*

<sup>122</sup> *The Guantánamo Docket: 2011*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline/2011> (last visited Nov. 13, 2012) (listing the detainees released in 2011 and their destination countries).

<sup>123</sup> *Id.*

<sup>124</sup> OFFICE OF THE DIRECTOR OF NAT'L INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA (2010), available at [www.dni.gov/files/documents/Newsroom/Reports\\_and\\_Pubs/120710\\_Summary\\_of\\_the\\_Reengagement\\_of\\_Detainees\\_Formerly\\_Held\\_at\\_Guantanamo\\_Bay\\_Cuba.pdf](http://www.dni.gov/files/documents/Newsroom/Reports_and_Pubs/120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (“Of those 66 individuals transferred since January 2009, 2 are confirmed and 3 are suspected of reengaging in terrorist or insurgent activities.”).

needed (if indeed they needed any) to place even greater restrictions on President Obama's plans to transfer detainees out of Guantanamo.

In early January 2011, the final nail in the coffin was hammered home by Congress in the 2011 National Defense Authorization Act (NDAA).<sup>127</sup> This appropriations bill had the most stringent restrictions on transferring detainees out of Guantanamo enacted to date. These restrictions have been replicated in the 2012 NDAA and other spending bills.<sup>128</sup>

Strikingly, only one detainee was transferred in all of 2011.<sup>129</sup> However, in March 2011, President Obama did reveal the contours of the Executive periodic review process, first mentioned in the Guantanamo Review Task Force in January 2010, when he issued an Executive order on the subject. Order 13,567 established that detainees would receive a full board hearing on a triennial basis with "file reviews" conducted every six months.<sup>130</sup> These boards can make a "determination of transfer" which obliges the administration to make every effort to secure a transfer to another country, but do not have the authority to "address the legality of any detainee's law of war detention" other than to refer issues of legality to the Secretary of Defense and Attorney General.<sup>131</sup> Executive order 13,567 directed the Secretary of Defense to develop implementing regulations for the periodic review boards, and required they begin by March 2012, one year from the date of the order.<sup>132</sup> The Order, much like the President's original Executive order to close Guantanamo within one year, was not followed. On April 9, 2012, Human Rights Watch sent a letter to Secretary of Defense Leon Panetta reminding him of this obligation and making several "recommendations for the implementation of the order in a manner that is as fair and transparent as possible."<sup>133</sup> Human Rights

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<sup>127</sup> See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. 111-383, 124 Stat. 4137 (2010).

<sup>128</sup> See National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 §§ 1026-1028, 125 Stat. 1298, 1566-69 (2011).

<sup>129</sup> Saïid Farhi transferred home to Algeria January 6, 2011. *The Guantanamo Docket: Saïid Farhi*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/detainees/311-saïid-farhi> (last visited Oct. 14, 2012).

<sup>130</sup> Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* See also Finn & Kornblut, *supra* note 115.

<sup>133</sup> Letter from Kenneth Roth, Exec. Director, Human Rights Watch, to Leon Panetta, Secretary of Defense Re: Periodic Review of Individuals Detained at Guantanamo Bay, Human Rights Watch

Watch urged the Secretary to focus on the “89 detainees already cleared for transfer.”<sup>134</sup> One month later, on May 9, 2012, the implementing guidelines were finally issued.<sup>135</sup> However, the first periodic review board could not meet until completing a sixty-day waiting period after notifying Congress of a change in procedures from the detainee review procedures during the Bush administration.<sup>136</sup> Curiously, the Secretary’s guidance indicated that it was effective only through November 5, 2012, the day before the presidential election.<sup>137</sup> Thus, unless renewed by Secretary Panetta or his successor, the periodic review boards will have less than four months to complete their initial review of the remaining detainees, and the follow-up reviews for those not determined to be released (a six-month file review and a three-year full review), may never occur. The timing suggests a clear recognition of the political nature of the effort to close Guantanamo.<sup>138</sup>

On April 19, 2012, following a fifteen month period in which no detainees were released, two Uighurs, who had initially been cleared for release by CSRTs and ordered released through habeas corpus in October 2008, were resettled to El Salvador, bringing the total number of detainees remaining at Guantanamo to 169, and the number cleared for transfer to 87.<sup>139</sup> These were the first detainees to be settled in Latin America, possibly heralding a new willingness in the region to accept detainees for resettlement.<sup>140</sup> On July 10, 2012, Ibrahim al Qosi was

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(Apr. 9, 2012), <http://www.hrw.org/news/2012/04/09/letter-secretary-defense-leon-panetta-repatriate-or-resettle-detainees-cleared-trans>.

<sup>134</sup> *Id.*

<sup>135</sup> Memorandum from the Deputy Sec’y of Def. on Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Exec. Order 13,567 to Sec’ys of the Military Dep’ts et al. (May 9, 2012), available at <http://www.emptywheel.net/wp-content/uploads/2012/05/120509-GTMO-PRB-Guidelines.pdf>.

<sup>136</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(c), 119 Stat. 2680, 2739–44 (codified as amended at 10 U.S.C. § 801 and 28 U.S.C. § 2241 (2006)).

<sup>137</sup> See Marcy Wheeler (aka “emptywheel”), *The 4 Month Detainee Review Election Season Special*, EMPTYWHEEL (May 11, 2012), <http://www.emptywheel.net/2012/05/11/the-4-month-detainee-review-election-season-special/>.

<sup>138</sup> *Id.*

<sup>139</sup> Charlie Savage, *Pair of Guantánamo Detainees Freed, the First in 15 Months*, N.Y. TIMES, Apr. 20, 2012, at A8.

<sup>140</sup> In another interesting regional development, on March 30, 2012, the InterAmerican Commission of Human Rights issued a decision in which the commission, for the first time, agreed that it had subject matter jurisdiction over a Guantanamo detainee, agreeing to take up the petition of an Algerian, Djamel Ameziane, held at Guantanamo for over a decade. See Press Release, Center for Constitutional Rights,

repatriated to Sudan, in accordance with a plea bargain, after pleading guilty in 2010 to charges before the military commissions, making him the first “detainee convicted under the Obama administration’s version of the military commissions system [to be] sent back to his home country.”<sup>141</sup> On September 8, 2012, Yemeni Adnan Farhan Abdul Latif died in his cell at Guantanamo, apparently of natural causes.<sup>142</sup> On September 29, 2012, Omar Khadr was repatriated to Canada pursuant to his military commission plea agreement, reducing the number of detainees remaining at Guantanamo to 166.<sup>143</sup> On September 21, 2012, the administration identified, for the first time, the fifty-five detainees currently at Guantanamo who have been approved for transfer.<sup>144</sup> However, none of these detainees have been identified by the administration as likely candidates for release in the near future.

## II. LEGISLATIVE RESTRICTIONS AND THEIR IMPACT

While Congress’ blanket refusal to fund the closure of Guantanamo and allow the purchase or retrofitting of an alternate facility has frustrated the President’s stated ultimate goal of completely shuttering the detention center, it is worth asking what effect other restrictions and complications have had on reducing the numbers of individuals incarcerated there through transfer or outright release. In terms of the volume of detainees released, the rate of decline in the Guantanamo population has decreased dramatically as Congressional restrictions were enacted and subsequently tightened. As previously noted, in 2009, forty-nine detainees were

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International Human Rights Body Admits First Guantánamo Case: Rights Groups Urge an End to the Indefinite Detention of Algerian (Mar. 30, 2012), <http://ccrjustice.org/newsroom/press-releases/international-human-rights-body-admits-first-guant%C3%A1namo-case%3A-rights-groups-urge-end-indefinite-dete>.

<sup>141</sup> Charlie Savage, *Guantanamo Prisoner Is Sent Back to Sudan*, N.Y. TIMES, July 12, 2012, at A9; see also Carol Rosenberg, *Convicted al-Qaida Operative Released from Guantanamo, Repatriated to Sudan*, MIAMI HERALD, July 11, 2012, <http://www.miamiherald.com/2012/07/10/v-print/2890308/convicted-al-qaida-operative-released.html>.

<sup>142</sup> Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, N.Y. TIMES, Sept. 12, 2012, at A20. Mr. Latif had been cleared for release by both the Bush and Obama administrations and had even won an order of habeas corpus, but the writ was reversed on appeal. Because he was a Yemeni, he was subject to the moratorium on repatriation to Yemen. See David Frakt, *Guantanamo Detainees: The ‘Other’ Victims of 9/11*, JURIST.ORG (Sept. 20, 2012), <http://jurist.org/forum/2012/09/david-frakt-guantanamo-detainees.php>.

<sup>143</sup> Ian Austen, *Canadian Held at Guantánamo Bay Is Repatriated*, N.Y. TIMES, Sept. 30, 2012, at A26.

<sup>144</sup> Josh Gerstein, *U.S. Names 55 Gitmo Prisoners Cleared To Go*, POLITICO (Sept. 21, 2012), <http://www.politico.com/blogs/under-the-radar/2012/09/us-names-gitmo-prisoners-cleared-to-go-136305.html>.

transferred to other countries.<sup>145</sup> The number dwindled to twenty-four in 2010, then came to almost a complete stop over the last two years, in which only four detainees found new homes.<sup>146</sup>

It clearly has become more difficult over the course of the Obama presidency to move detainees out of Guantanamo. But, not all of the slowing in the number of detainees released can be attributed directly to the congressional restrictions. The international community's initial eagerness to assist President Obama withered, particularly as it became clear that the U.S. would resettle no detainees within its borders. The willingness to assist faded further as it became apparent that the President's pledge to close Guantanamo would not likely be fulfilled in the near term. Another significant factor is that those detainees who were easiest to resettle, such as those with particularly strong claims of innocence, were quickly resettled, leaving those detainees with more ambiguous or troubled histories behind. Thus, it is not surprising that the pace of detainee transfers and releases has slowed. Nevertheless, a review of the impact of each of the specific legislative restrictions reveals that they have had a significant effect.

#### A. *Restrictions on Transfer and/or Release to Third Countries*

The first type of restriction to be enacted by Congress in June 2009 was the one which briefly ensnared Mohammed Jawad, a restriction on the use of appropriated funds to transfer a detainee without first meeting certain reporting requirements.<sup>147</sup> It required the executive to notify Congress fifteen days prior to a proposed transfer or release and to provide a classified report giving the name of the detainee and the country to which he will be transferred.<sup>148</sup> It also required an assessment of the risk to national security or United States citizens posed by the transfer or release, as well as the terms of any agreement with the country

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<sup>145</sup> *The Guantánamo Docket: Timeline*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline> (last visited Dec. 2, 2012). Six of the forty-nine, four Iraqis, one Afghan and one Algerian were transferred by the Bush administration to their home countries on January 17, 2009, the last of over 500 detainees transferred by the prior administration. *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> 2009 Supplemental Appropriations Act, Pub. L. No. 111-32, § 14103(e), 123 Stat. 1859, 1921.

<sup>148</sup> The FY 2010 Homeland Security Appropriations, Interior Appropriations, Consolidated Appropriations and Defense Appropriations acts all contained such provisions. Pub. L. No. 111-83, § 552(e), 123 Stat. 2142, 2178-79 (2009); Pub. L. No. 111-88, § 428(e), 123 Stat. 2904, 2963 (2009); Pub. L. No. 111-117, § 532(e), 123 Stat. 3034, 3157 (2009); Pub. L. No. 111-118, § 9011(e), 123 Stat. 3409, 3467-68 (2009).

accepting the detainee.<sup>149</sup> Similar restrictions were included in several fiscal year 2010 appropriations bills.<sup>150</sup>

### 1. Court-Ordered Transfers

In addition to Jawad, it appears that sixteen other detainees whose petitions for habeas corpus were granted in 2008, 2009 and 2010 had their releases delayed by this legislation, including eleven detainees who were ordered released before the restrictions existed.

Seventeen Uighurs were the first detainees to win habeas corpus petitions, on October 7, 2008.<sup>151</sup> Fearing they would suffer torture and political repression if returned to China, the United States was forced to try to find other countries willing to take them.<sup>152</sup> Although four were transferred to Bermuda before the notice and waiting period restriction took effect, several were affected by the requirement, including six released to Palau on October 31, 2009 and two sent to Switzerland in March 2010.<sup>153</sup>

The next two detainees to win habeas corpus petitions were Algerians Lakhdar Boumediene and Sabir Mahfouz Lahmar on November 25, 2008.<sup>154</sup> Although Boumediene was resettled in France in May 2009, Mr. Lahmar's resettlement in France was delayed for over a year until November 30, 2009, by which time the notice requirement was in effect.<sup>155</sup>

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<sup>149</sup> In the 2010 bills, "countries" was expanded to include the "freely associated states" of Palau, Micronesia and the Marshall Islands. The Republic of Palau had offered to resettle several Chinese Uighurs in 2009. Six Uighurs accepted the offer and were released to Palau on October 31, 2009. This likely explains the inclusion of Palau and the other island states by name in the FY10 acts. No detainees have been resettled in Micronesia or the Marshall Islands.

<sup>150</sup> See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R40754, GUANTANAMO DETENTION CENTER: LEGISLATIVE ACTIVITY IN THE 111TH CONGRESS 3-4 (Jan. 13, 2011) (listing all of the restrictions and providing the citations to all the acts).

<sup>151</sup> William Glaberson, *Judge Orders 17 Detainees at Guantanamo Freed*, N.Y. TIMES, Oct. 7, 2008, at A18.

<sup>152</sup> *Room For Debate: After Detention, Where Can the Uighurs Go?*, NYTIMES.COM (Mar. 31, 2009), <http://roomfordebate.blogs.nytimes.com/2009/03/31/after-detention-where-can-the-uighurs-go/?scp=9&sq=uighurs+bermuda&st=nyt>.

<sup>153</sup> *The Guantánamo Docket*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline> (last visited Nov. 13, 2012).

<sup>154</sup> *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008).

<sup>155</sup> Press Release, U.S. Dep't of Justice, U.S. Transfers a Guantanamo Bay Detainee to Fr., No. 09-1289 (Dec. 1, 2009), <http://www.justice.gov/opa/pr/2009/December/09-ag-1289.html>.

Yasim Muhammed Basardah was granted habeas corpus on March 31, 2009, but this order was initially appealed by the Department of Justice (the appeal was later dismissed), resulting in an extended delay before he was ultimately released. He was transferred to Spain on May 4, 2010, after the requisite notice and waiting period.<sup>156</sup>

Alla Ali Bin Ali Ahmed, a Yemeni detained at Guantanamo since 2002 when he was still a teenager, was granted habeas corpus May 4, 2009.<sup>157</sup> This ruling was not appealed, but he was not repatriated to Yemen until September 26, 2009, 114 days later.<sup>158</sup> He presumably would have been released at least fifteen days earlier, and likely even more, if not for the notice requirement.

On June 22, 2009, two days before the notice requirement legislation was enacted, detainee Abd al Rahim Abdul Rassak Janko (sometimes called al Ginco) was granted the writ of habeas corpus.<sup>159</sup> Janko was transferred to Belgium on October 9, 2009, 110 days later.<sup>160</sup> Again, at least two weeks of this delay was attributable to the notice and waiting period requirement.<sup>161</sup>

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<sup>156</sup> Press Release, U.S. Dep't of Def., Detainee Transfers Announced, No. 358-10 (May 4, 2010), <http://www.defense.gov/releases/release.aspx?releaseid=13501>.

<sup>157</sup> *Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009).

<sup>158</sup> *The Guantánamo Docket: Ali Bin Ali Aleh*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/detainees/692-ali-bin-ali-aleh> (last visited Nov. 13, 2012).

<sup>159</sup> *Id.* See also Andy Worthington, "Respect My Anonymity," Says Guantanamo Prisoner Released in Belgium, ANDYWORTHINGTON (Oct. 19, 2009), <http://www.andyworthington.co.uk/2009/10/19/respect-my-anonymity-says-guantanamo-prisoner-released-in-belgium/> (explaining that a detainee released to Belgium was initially not identified out of respect for his privacy. The detainee was later identified as Mr. Janko.). Janko, a Syrian, was imprisoned and tortured by al-Qaeda into making a false confession that he was a U.S. spy, and also imprisoned by the Taliban, who accused him of being an Israeli spy. Although he was quite clearly neither a member of al-Qaeda nor the Taliban, he was sent to Guantanamo anyway in May 2002 and spent more than seven years there before ultimately proving his innocence in federal district court. Andy Worthington, *Why Did It Take So Long to Order the Release from Guantánamo of an Al-Qaeda Torture Victim?*, ANDYWORTHINGTON (June 24, 2009), <http://www.andyworthington.co.uk/2009/06/24/why-did-it-take-so-long-to-order-the-release-from-guantanamo-of-an-al-qaeda-torture-victim/>.

<sup>160</sup> *Id.*

<sup>161</sup> Press Release, U.S. Dep't of Justice, U.S. Transfers Two Guantanamo Bay Detainees to Kuwait and Belg., No. 09-1095 (Oct. 9, 2009), <http://www.justice.gov/opa/pr/2009/December/09-ag-1289.html> [hereinafter Kuwait Press Release] (noting that the Administration informed Congress of its intent to transfer Janko at least fifteen days in advance).

Khalid Abdullah Mishal Thamer Al Mutairi, whose habeas petition was granted on July 29, 2009,<sup>162</sup> one day prior to Jawad, was the first detainee whose habeas petition was granted after the legislative restrictions became law, more than seven years after he filed the petition on May 1, 2002. Unlike Jawad's case, the government contested the granting of the writ at the trial level. However, they did not appeal the ruling. The order granting the writ specifically referenced the recently enacted restrictions on transfer,<sup>163</sup> directing the government to comply with the restrictions, if applicable, "forthwith." Unlike the Jawad case, the judge did not give the government a certain date by which to provide notice to Congress, although she did issue a "lengthy written opinion, detailing and eviscerating the government's evidence."<sup>164</sup> It does not appear that the government acted with the same alacrity as in the Jawad case, as Mr. Al Mutairi was not repatriated to Kuwait until October 8, 2009, seventy-one days later.<sup>165</sup> Since the U.S. was required to have an agreement with Kuwait to repatriate him before it could notify Congress, the notice and waiting period requirement cost Mr. al Mutairi another fifteen days or more of his life as he remained detained at Guantanamo.<sup>166</sup>

Subsequent to Jawad's habeas corpus petition being granted on July 30, 2009, only three other detainees have been granted habeas and actually released from Guantanamo. The first of these was Fouad al Rabiah. Although at one point Mr. al Rabiah was actually charged as a war criminal in the military commissions, the government gradually came to the realization that the entire case was built on Mr. al Rabiah's confessions, which were the product of torture.<sup>167</sup> Following a

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<sup>162</sup> For more details, see Chisun Lee, *New Gitmo Decision Offers Unusual Insight Into Weakness of Government Evidence*, PROPUBLICA (Aug. 4, 2009, 7:29 PM), <http://www.propublica.org/article/new-gitmo-decision-offers-unusual-insight-into-weakness-of-govt-evidence-804>.

<sup>163</sup> "ORDERED that the Government is directed to comply with any reporting requirements mandated by the Supplemental Appropriations Act, Pub. L. No. 111-32, 123 Stat. 1859 (2009), if applicable, to facilitate the release of Petitioner Al Mutairi forthwith . . . ." Order, *Al Mutairi v. United States*, No. 02-828-CCK (D.D.C. July 29, 2009), available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2002cv0828-606](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0828-606).

<sup>164</sup> Lee, *supra* note 162.

<sup>165</sup> For details on his release, see Andy Worthington, *Two More Guantanamo Prisoners Released: To Kuwait and Belgium*, ANDYWORTHINGTON (Oct. 11, 2009), <http://www.andyworthington.co.uk/2009/10/11/two-more-guantanamo-prisoners-released-to-kuwait-and-belgium/>.

<sup>166</sup> Kuwait Press Release, *supra* note 161.

<sup>167</sup> Scott Horton, *The Case of Fouad al-Rabiah: Airline Manager or Terrorist?*, HARPER'S.ORG (Oct. 2, 2009 4:01 PM), <http://www.harpers.org/archive/2009/10/hbc-90005812>; Andy Worthington, *A Truly Shocking Guantanamo Story: Judge Confirms That an Innocent Man Was Tortured to Make False*

comprehensive review of his case the interagency Guantanamo Review Task Force approved him for transfer from Guantanamo Bay.<sup>168</sup> Independently, Mr. al Rabiah's writ of habeas corpus was granted on September 17, 2009, yet he was not repatriated to Kuwait until December 9, 2009, eighty days later.<sup>169</sup>

The next detainee to have his habeas corpus petition granted was Saaid Farhi (aka Farhi Saeed Bin Mohammed). Mr. Farhi's writ was granted on November 19, 2009.<sup>170</sup> He was held largely on the basis on information provided by Binyam Mohammed, which the reviewing court found was likely the product of torture.<sup>171</sup> He was also approved for transfer by the Guantanamo Review Task Force.<sup>172</sup>

The last detainee to win release through a writ of habeas corpus was Mohamed Hassan Odaini, imprisoned at Guantanamo as an eighteen-year-old student in June 2002. Odaini was actually approved for transfer as a result of an Administrative Review Board recommendation in June 2006,<sup>173</sup> but was held for an additional four years apparently due to reluctance on the part of both the Bush and Obama administrations to release detainees to Yemen. His habeas corpus petition

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*Confessions*, HUFFINGTON POST (Sept. 30, 2009 4:47 PM), [http://www.huffingtonpost.com/andy-worthington/a-truly-shocking-guantana\\_b\\_305227.html](http://www.huffingtonpost.com/andy-worthington/a-truly-shocking-guantana_b_305227.html).

<sup>168</sup> Press Release, U.S. Dep't of Justice, U.S. Transfers One Guantanamo Bay Detainee to Kuwait, No. 09-1323 (Dec. 9, 2009), <http://www.justice.gov/opa/pr/2009/December/09-ag-1323.html> (noting that "[i]n accordance with Congressionally-mandated reporting requirements, the Administration informed Congress of its intent to transfer the detainee at least 15 days before his transfer.").

<sup>169</sup> *Id.*

<sup>170</sup> Press Release, U.S. Dep't of Def., Detainee Transfers Announced, No. 015-11 (Jan. 6, 2011), <http://www.defense.gov/releases/release.aspx?releaseid=14183> [hereinafter Detainee Transfer Press Release].

<sup>171</sup> Larry Siems, *The Fruits of Torture*, TORTURE REPORT (Jan. 11, 2010 5:01 PM), <http://www.thetorturereport.org/diary/fruits-torture> (quoting from Judge Kessler's ruling in Farhi's habeas case).

<sup>172</sup> After winning the right to be released, Mr. Farhi fought a long court battle to prevent the United States from repatriating him to Algeria, where he feared he would be tortured or killed, a battle which he ultimately lost. Bill Mears, *Gitmo Detainee Transferred to Algeria Despite Torture Fears*, CNN.COM (Jan. 7, 2011), [http://articles.cnn.com/2011-01-07/us/scotus.algerian.detainee\\_1\\_detainees-algerian-security-forces-mohammed?s=PM:US](http://articles.cnn.com/2011-01-07/us/scotus.algerian.detainee_1_detainees-algerian-security-forces-mohammed?s=PM:US). Ignoring his concerns, the U.S. forcibly repatriated him to Algeria in January 2011. Detainee Transfer Press Release, *supra* note 170. While the lengthy delay in his release was largely the result of his legal struggle to avoid being sent to Algeria, the DoD News Release, indicated that the government did comply with Congressionally-mandated reporting requirements prior to release. *Id.*

<sup>173</sup> Tori Marlan, *Growing Old in Gitmo*, CHI. READER (Oct. 4, 2007), <http://www.webcitation.org/query?url=http%3A%2F%2Fwww.chicagoreader.com%2Fchicago%2Fgrowing-old-in-gitmo%2FContent%3Foid%3D926050&date=2009-08-23>.

was granted on May 26, 2010<sup>174</sup> in a scathing opinion by Judge Henry Kennedy, which concluded:

The evidence before the Court shows that holding Odaini in custody at such great cost to him has done nothing to make the United States more secure. There is no evidence that Odaini has any connection to Al Qaeda. Consequently, his detention is not authorized by the AUMF [Authorization for Use of Military Force Against Terrorists]. The Court therefore emphatically concludes that Odaini's motion must be granted.<sup>175</sup>

Odaini was repatriated to Yemen on July 13, 2010, forty-eight days later, his detention of greater than eight years extended by an additional fifteen days or more by Congress.<sup>176</sup>

In the 2011 National Defense Authorization Act (NDAA), Congress created an exception to the notice and waiting period requirements for court ordered releases.<sup>177</sup> This exception was renewed for fiscal year 2012. Thus, a detainee ordered released through habeas corpus today could presumably be transferred as soon as transportation could be arranged to a country willing to accept him. But while these restrictions were in force, seventeen innocent detainees were imprisoned at Guantanamo for at least fifteen days longer than necessary, plus the time it took the Justice Department to prepare the notices to Congress, likely a minimum of a week based on the Jawad case.<sup>178</sup> The first detainees to experience a

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<sup>174</sup> *Abdah v. Obama*, No. 04-1254-HHK (D.D.C. 2010) (mem.), available at [http://media.miamiherald.com/smedia/2010/06/10/15/hassen.source.prod\\_affiliate.56.pdf](http://media.miamiherald.com/smedia/2010/06/10/15/hassen.source.prod_affiliate.56.pdf).

<sup>175</sup> *Id.* at 36.

<sup>176</sup> Press Release, U.S. Dep't of Def., Detainee Transfers Announced, No. 611-10 (July 13, 2010), <http://www.defense.gov/releases/release.aspx?releaseid=13708> (noting that "[t]he suspension of Yemeni repatriations from Guantanamo remains in effect due to the security situation that exists there" and also that the administration informed Congress at least fifteen days before his transfer.).

<sup>177</sup> Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1033(a)(2), 124 Stat. 4137, 4351 (2011). Section 1033(a)(2) of this act provides: "Paragraph (1) [the notice and certification requirement] shall not apply to any action taken by the Secretary to transfer any individual detained at Guantanamo to effective an order affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having competent jurisdiction."

<sup>178</sup> At Jawad's final habeas hearing, we asked the judge to order the Department of Justice to complete the notice more quickly than the seven days suggested by the government. The DOJ representative argued that seven days was the fastest possible time they could complete the notice and persuaded the judge to grant them a full week.

“rapid release” were the two Uighurs resettled in El Salvador in April 2012 (*forty-two months* after their habeas petition was granted in October 2008).<sup>179</sup> Only three other habeas corpus grantees, also Uighurs, are currently awaiting transfer. Although seven other Guantanamo detainees were granted the writ of habeas corpus by the U.S. District Court for the District of Columbia in 2009 and 2010, the Obama administration appealed each of these rulings. None of the rulings have been upheld on appeal.<sup>180</sup>

## 2. Voluntary/Discretionary Transfers

In addition to the court-ordered releases, the Obama administration has continued the practice of voluntarily releasing or transferring detainees cleared for release by administrative processes. During the Bush years, 532 detainees, the vast majority of them cleared through Combatant Status Review Tribunals or Administrative Review Boards, were transferred or released without any congressional restrictions.<sup>181</sup> Detainees released included those determined to have been wrongfully held (those who were not enemy combatants at all), and those who were deemed to have been lawfully held initially but were believed to no longer present a threat and could now be safely released.<sup>182</sup> President Obama continued to release detainees who had been cleared by the prior administration, while ordering an interagency review to determine if additional detainees could be released.<sup>183</sup> Initially, his discretion to transfer detainees was unfettered.<sup>184</sup> The first person to be transferred, on February 23, 2009, was Binyam Mohammed, a British detainee who

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<sup>179</sup> Press Release, U.S. Dep’t of Def., Detainee Transfers Announced, No. 291-12 (Apr. 19, 2012), <http://www.defense.gov/releases/release.aspx?releaseid=15202>.

<sup>180</sup> *Guantanamo Habeas Scorecard*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf> (last updated Feb. 9, 2011).

<sup>181</sup> FINAL REPORT, *supra* note 111.

<sup>182</sup> Combatant Status Review Tribunal Summary, Dep’t of Def., *available at* <http://www.defense.gov/news/csrtsummary.pdf> (reporting that 39 detainees were found to be “no longer classified as enemy combatants” in CSRTs); U.S. DoD News Transcript “Annual Administrative Review Boards for Enemy Combatants Held at Guantanamo Attributable to Senior Defense Officials (Mar. 6, 2007), [www.defense.gov/transcripts/transcript.aspx?transcriptid=3902](http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3902) (explaining annual administrative review boards process under which enemy combatants no longer deemed to possess a threat could be released or transferred and providing statistical summaries of ARB decisions in 2005 and 2006).

<sup>183</sup> Exec. Order 13,492, Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897–4900 (Jan. 27, 2009).

<sup>184</sup> GARCIA, *supra* note 150, at 3–4 (indicating that the first legislative restrictions on transfer of detainees were passed in June 2009).

had been rendered to Morocco by the United States, where he was brutally tortured.<sup>185</sup> Based on false confessions extracted under torture, he was later charged with terrorism offenses in the Guantanamo military commissions.<sup>186</sup> The charges were withdrawn in the fall of 2008.<sup>187</sup> The next to be released, in May, was Lakhmar Boumediene, who had won the right of habeas corpus for his fellow Guantanamo detainees in *Boumediene v. Bush*, and had won his own habeas corpus case on November 20, 2008.<sup>188</sup> Boumediene was transferred to France.<sup>189</sup> On June 11, 2009, Mohammed El Gharani, who had been imprisoned at Guantanamo since the age of fifteen, and was accused of being part of an al Qaeda cell in London when he was eleven or twelve (although he had never been to England), was repatriated to Chad.<sup>190</sup> Gharani won his habeas corpus case on January 14, 2009.<sup>191</sup> Also in June, three detainees were repatriated to Saudi Arabia, and one was transferred home to Iraq.<sup>192</sup> Also, four Chinese Uighurs who won their habeas corpus cases in 2008, were resettled in Bermuda.<sup>193</sup>

Beginning on June 24, 2009, as with detainees ordered released through habeas corpus, those being voluntarily transferred from Guantanamo were also subject to required notification to Congress along with the risk assessment and fifteen day waiting period.<sup>194</sup> This waiting period extended the stays of numerous

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<sup>185</sup> Duncan Gardham, *MI5 Accused of Torture Cover Up in Binyam Mohamed Case*, TELEGRAPH, Aug. 1, 2009, <http://www.telegraph.co.uk/news/uknews/law-and-order/5951042/MI5-accused-of-torture-cover-up-in-Binyam-Mohamed-case.html>.

<sup>186</sup> Richard Norton-Taylor & David Leigh, *Guantánamo Bay Files: Binyam Mohamed Held on Torture 'Confessions'*, GUARDIAN, Apr. 24, 2011, <http://www.guardian.co.uk/world/2011/apr/25/guantanamo-files-binyam-mohamed-torture>.

<sup>187</sup> William Glaberson, *U.S. Drops Charges for 5 Guantánamo Detainees*, N.Y. TIMES, Oct. 22, 2008, at A1.

<sup>188</sup> *Guantanamo Habeas Scorecard*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf>. (last updated Feb. 9, 2011).

<sup>189</sup> Press Release, U.S. Dep't of Justice, U.S. Transfers Lakhdar Boumediene to France, No. 09-477 (May 15, 2009), [www.justice.gov/opa/pr/2009/May/09-ag-477.html](http://www.justice.gov/opa/pr/2009/May/09-ag-477.html).

<sup>190</sup> Andy Worthington, *Guantanamo's Youngest Prisoner Released to Chad*, ANDYWORTHINGTON (June 11, 2009), [www.andyworthington.co.uk/2009/06/11/guantanamos-youngest-prisoner-released-to-chad/](http://www.andyworthington.co.uk/2009/06/11/guantanamos-youngest-prisoner-released-to-chad/).

<sup>191</sup> *Gharani v. Bush*, 593 F. Supp. 2d 144 (D.D.C. 2009).

<sup>192</sup> *The Guantánamo Docket: Timeline: 2009*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline/2009> (last visited Nov. 13, 2012).

<sup>193</sup> *Id.*

<sup>194</sup> Pub. L. No. 111-32, § 14103(e), 123 Stat. 1859, 1921 (2009).

detainees, but did not appreciably slow the pace of releases. Over the next eighteen months, there were thirty-five voluntary transfers to fifteen different countries: Portugal, Ireland, Hungary, Italy, Somalia, Afghanistan, Yemen, Algeria, Slovakia, Switzerland, Albania, Spain, Cape Verde, Latvia, and Germany.<sup>195</sup> The 2011 NDAA brought voluntary releases to a grinding halt.

*B. Restrictions on Countries to Which Detainees Could Be Transferred*

For the first time, the 2011 NDAA placed significant restrictions on the ability of the administration to repatriate or resettle detainees. The spending bill specified that a:

[D]etainee may only be transferred to the custody or control of a foreign government or the recognized leadership of a foreign entity if, at least 30 days prior to the proposed transfer, the Secretary of Defense certifies to Congress that the foreign government or entity: (1) is not a designated state sponsor of terrorism or terrorist organization; (2) maintains effective control over each detention facility where a transferred detainee may be housed; (3) is not facing a threat likely to substantially affect its ability to control a transferred detainee; (4) has agreed to take effective steps to ensure that the transferred person does not pose a future threat to the United States, its citizens, or its allies; (5) has agreed to take such steps as the Secretary deems necessary to prevent the detainee from engaging in terrorism; and (6) has agreed to share relevant information with the United States related to the transferred detainee that may affect the security of the United States, its citizens, or its allies.<sup>196</sup>

The act also contains a one-year prohibition on the transfer of any detainee to the custody or control of a foreign government or entity if there is a confirmed case that a former Guantanamo detainee transferred to that government or entity subsequently engaged in terrorist activity.<sup>197</sup>

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<sup>195</sup> *The Guantánamo Docket: Timeline*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline> (last visited Nov. 13, 2012).

<sup>196</sup> Pub. L. No. 111-383, § 1033(a)–(b), 124 Stat. 4137, 4351–52 (2011). For a summary, see GARCIA, *supra* note 150. These restrictions continue to this day, as similar language was included in Section 1028 of the 2012 NDAA.

<sup>197</sup> *Id.*

Although the legislation provided for the possibility of the Secretary of Defense obtaining a waiver of this last prohibition “in the interest of national security,” the consensus among national security scholars and administration officials on the cumulative effect of these conditions is that Congress has made it nearly impossible to release detainees, at least to their home country.<sup>198</sup> Department of Defense General Counsel Jeh Johnson has described the provision as “onerous and near impossible to satisfy.”<sup>199</sup> So far, these criticisms have been proven valid. Since the passage of this provision, only five detainees have left Guantanamo, including three who were ordered released through habeas corpus petitions, and two pursuant to plea agreements in the military commissions.<sup>200</sup> A review of the countries of origin of the current detainee population reveals why there have been no voluntary transfers. Of the 166 detainees currently at Guantanamo, 91 are from Yemen, 21 are from Afghanistan, 14 are from Saudi Arabia, 6 are from Pakistan, and 1 to 3 are from each of the following countries or authorities: Somalia, Palestine, Mauritania, Libya, Kuwait, Syria, Algeria, Tajikistan, Sudan, Iraq, Russia, Uzbekistan, United Arab Emirates, China,<sup>201</sup> Morocco, Tunisia, Kenya,

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<sup>198</sup> See Robert Chesney, *Key Points from Today's Executive Order on GTMO Detention Review*, LAWFARE BLOG (Mar. 7, 2011, 4:02 PM), <http://tinyurl.com/3pwgmaj> (“Absent a habeas order compelling a release, current legislation makes it nearly impossible to effectuate a release from GTMO . . . the Secretary of Defense must make a series of rather difficulty [sic] certifications, arguably impossible to meet in most circumstances”); William M. Hains, Comment: *Challenging the Executive: The Constitutionality of Congressional Regulation of the President's Wartime Detention Policies*, BYU L. REV. 2283, 2289–90 (2011) (“these conditions make it almost impossible to transfer detainees who have not been ordered released through the habeas process”). See also Robert Chesney, *Transferring Taliban Detainees from GTMO to Qatar: A Primer on the NDAA's Transfer Constraints*, LAWFARE BLOG (Feb. 1, 2012), <http://www.lawfareblog.com/2012/02/transferring-taliban-detainees-from-gtmo-to-qatar-a-primer-on-the-ndaas-transfer-constraints/> (discussing possibility of transferring detainees to Qatar).

<sup>199</sup> Peter Finn, *Guantanamo Detainees Cleared for Release but Left in Limbo*, WASH. POST, Nov. 9, 2011, at A16.

<sup>200</sup> Saïid Farhi was transferred to Algeria in 2011. Abdul Razak and Ahmed Mohamed were transferred to El Salvador in 2012. All three had been ordered released through habeas corpus petitions. Omar Khadr and Ibrahim al Qosi were transferred to Canada, and Sudan, respectively, in 2012 pursuant to plea agreements.

<sup>201</sup> The three remaining detainees from China are all Muslim Uighurs, who could not be returned to China in any event. See Carol Williams, *Names of Guantanamo Detainees Set for Transfer Are Revealed*, L.A. TIMES, Nov. 21, 2012, <http://www.latimes.com/news/nation/nationnow/la-na-nn-gitmo-detainees-named-20120921,0,846190.story>.

Malaysia, and one dual citizen of Bosnia-Herzegovina and Egypt.<sup>202</sup> It is highly doubtful that any of these countries could meet the criteria.

The result of this restriction (coupled with the restriction blocking transfers to the United States discussed below) has been to block the release of scores of detainees cleared for release by the Bush administration, the Obama administration, or both. The Obama administration's Guantanamo Review Task Force cleared 126 detainees for release.<sup>203</sup> At the time the Task Force issued its report, in January 2010, forty-four of those detainees had been transferred to other countries. The Task Force Report provided additional details about those cleared detainees who remained:

Of the 82 detainees who remain at Guantanamo and who have been approved for transfer, 16 may be repatriated to their home countries (other than Yemen) consistent with U.S. policies concerning humane treatment, 38 cannot be repatriated due to humane treatment or related concerns in their home countries (other than Yemen) and thus need to be resettled in a third country, and 29 are from Yemen. Half of all detainees approved for transfer—63 of the 126—also had been approved for transfer during the prior administration, ordered released by a federal court, or both.<sup>204</sup>

The review also created a new category of “conditional detention” for Yemenis (this is in addition to the 29 Yemenis cleared for release). As explained in the report:

30 detainees from Yemen were designated for “conditional” detention based on the current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or

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<sup>202</sup> *The Detainees*, THE GUANTANAMO DOCKET OVERVIEW, <http://projects.nytimes.com/guantanamo/detainees> (last visited Nov. 13, 2012).

<sup>203</sup> FINAL REPORT, *supra* note 111.

<sup>204</sup> *Id.* at 16. According to the report, as of January 20, 2009, “59 had been approved for transfer by the prior administration and were awaiting implementation of their transfers.” *Id.* at 2.

repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.<sup>205</sup>

Subsequent to the release of this report on January 22, 2010, an additional twenty-five of the eighty-two detainees on the cleared list have been transferred, twenty-two of them by September 16, 2010. In 2011, more detainees died in captivity (two) as were released (one).<sup>206</sup> On September 8, 2012, a Yemeni detainee from the cleared list, Adnan Latif, also died in detention.<sup>207</sup> With these deaths the total number of cleared detainees remaining is fifty-five.<sup>208</sup>

Can these fifty-five men be considered Prisoners of Congress? Put another way, might they have been released by now were it not for the conditions imposed by Congress? One interesting conclusion of the Task Force was that only sixteen of the eighty-two could be repatriated to their home countries “consistent with U.S. policies on humane treatment.”<sup>209</sup> Of the remaining sixty-six, twenty-nine were from Yemen and were prohibited from returning there,<sup>210</sup> and thirty-seven were from other countries where they “cannot be repatriated at this time due to humane treatment or related concerns associated with their home countries.”<sup>211</sup> Thus, the Department of State was seeking other countries willing to resettle them. Of the twenty-five releases since then, twenty-two detainees have been resettled in new countries, while three have returned home (one to Yemen, two to Algeria).<sup>212</sup> Thus,

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<sup>205</sup> *Id.* at 2. President Obama imposed a moratorium on repatriating Yemenis in response to the attempted airplane bombing by Umar Farouk Abdulmutallub, who was recruited and trained by al-Qaeda operatives in Yemen. *Times Topics: Umar Farouk Abdulmutallub*, NYTIMES.COM (Feb. 16, 2012), [http://topics.nytimes.com/top/reference/timestopics/people/a/umar\\_farouk\\_abdulmutallab/index.html](http://topics.nytimes.com/top/reference/timestopics/people/a/umar_farouk_abdulmutallab/index.html). Prior to this rule, several Yemeni detainees were repatriated, including 7 on December 19, 2009. *The Guantánamo Docket: Timeline*, NYTIMES.COM, <http://projects.nytimes.com/guantanamo/timeline> (last visited Nov. 13, 2012).

<sup>206</sup> Awal Gul, an Afghani, died February 2, 2011. Inayatullah, another Afghani citizen, died May 19, 2011. THE GUANTANAMO DOCKET OVERVIEW, *supra* note 202.

<sup>207</sup> *Adnan Farhan Abdul Latif*, THE GUANTANAMO DOCKET OVERVIEW, <http://projects.nytimes.com/guantanamo/detainees/156-adnan-farhan-abdul-latif> (last visited Nov. 13, 2012).

<sup>208</sup> Current Guantanamo Bay Detainee-Petitioners Approved for Transfer (Sept. 21, 2012), Document 314-2, Case No. 1:04-cv-01166-RJL, <http://images.politico.com/global/2012/09/gitmolist55.pdf>.

<sup>209</sup> FINAL REPORT, *supra* note 111, at 10.

<sup>210</sup> *Id.* at 11.

<sup>211</sup> *Id.*

<sup>212</sup> *Timeline*, THE GUANTANAMO DOCKET, <http://projects.nytimes.com/guantanamo/timeline> (last visited Nov. 24, 2012).

it would appear that there are fourteen detainees (sixteen less the two from Algeria) who the Obama administration believed in January 2010 could be repatriated to their home countries, but who remain in detention. It is reasonable to conclude that at least some, if not all, of these men would have been returned home over the last two-and-a-half years if Congressional restrictions did not preclude their release. These men are true Prisoners of Congress. It would also appear that there are forty-one detainees who are cleared for release to third countries. It is the Department of State's responsibility to find these detainees a home. While the list of potential countries who might be eligible to accept detainees has clearly been reduced by the "onerous" criteria imposed by Congress, there are doubtless many countries remaining who could meet the criteria, but either have not been approached, or have rebuffed the Department of State's efforts. Either way, Congress cannot be held solely responsible for the administration's failure to find homes for these detainees.

As to the thirty "conditionally detained" Yemenis, it is clear that Yemen could not meet the criteria imposed by Congress. Yet the Obama administration voluntarily imposed a moratorium on transfers to Yemen before Congress enacted the 2011 NDAA, and has never lifted the ban, so Congress cannot be blamed for their continued detention either (although it could be argued that the administration sees no point in removing the moratorium, since Yemenis would still be barred from transfer by the Congressional restrictions).<sup>213</sup> What Congress fairly can be blamed for is tying the President's hands by foreclosing several domestic options.

### *C. Restrictions on Release in the U.S.*

At the time President Obama assumed office, he had unfettered discretion to transfer detainees to the U.S. for three distinct purposes: continued law of war detention for enemy combatants (much as we held German and Italian Prisoners of Wars in the United States during World War II), prosecution in federal court for suspected terrorists, and, for detainees deemed not to be enemy combatants or criminals, resettlement in the U.S. as legal immigrants. President Obama intended to use all three of these methods to meet his goal of closing Guantanamo, but Congress has gradually foreclosed all of these options.

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<sup>213</sup> See *supra* note 198.

## 1. Prosecution in Federal Courts

During his campaign for President, President Obama indicated that he would stop military commissions and try suspected terrorists in federal court.<sup>214</sup> Shortly after assuming office, he began to execute this plan, suspending all pending military commissions by Order.<sup>215</sup> On June 9, 2009, the administration transferred detainee Ahmed Khalfan Gailani, who previously had been charged in the military commissions, to federal custody in the Southern District of New York, where he had been indicted on December 16, 1998 for suspected involvement in the U.S. Embassy bombings in Kenya and Tanzania.<sup>216</sup>

Shortly thereafter, on June 24, 2009, Congress passed the first legislation restricting transfers of detainees to the United States to face trial.<sup>217</sup> While still

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<sup>214</sup> See Julian E. Barnes, *Obama to Continue Military Tribunals*, L.A. TIMES, May 15, 2009, <http://articles.latimes.com/2009/may/15/nation/na-military-tribunal15> (“The Obama administration will announce plans today to revive the Bush-era military commission system for prosecuting terrorism suspects, current and former officials said, reversing a campaign pledge to rely instead on federal courts and the traditional military justice system.”).

<sup>215</sup> Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

<sup>216</sup> Press Release, Dep’t of Justice, Ahmed Ghailani Transferred from Guantanamo Bay to New York for Prosecution on Terror Charges (June 9, 2009), <http://www.justice.gov/opa/pr/2009/June/09-ag-563.html>.

<sup>217</sup> Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920–21:

(b) None of the funds made available in this or any prior Act may be used to transfer an individual who is detained as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, for the purpose of detention in the continental United States, Alaska, Hawaii, or the District of Columbia, except as provided in subsection (c).

(c) None of the funds made available in this or any prior Act may be used to transfer an individual who is detained, as of the date of enactment of this Act, at Naval Station, Guantanamo Bay, Cuba, into the continental United States, Alaska, Hawaii, or the District of Columbia, for the purposes of prosecuting such individual, or detaining such individual during legal proceedings, until 45 days after the plan detailed in subsection (d) is received.

(d) The President shall submit to the Congress, in classified form, a plan regarding the proposed disposition of any individual covered by subsection (c) who is detained as of the date of enactment of this Act. Such plan shall include, at a minimum, each of the following for each such individual:

(1) The findings of an analysis regarding any risk to the national security of the United States that is posed by the transfer of the individual.

(2) The costs associated with transferring the individual in question.

permitting such transfers, Congress required that the administration provide a detailed plan, forty-five days in advance of a proposed transfer for prosecution.<sup>218</sup> Despite this requirement, the Obama administration still planned to proceed with federal prosecutions of some detainees. On November 13, 2009, Attorney General Holder announced that Khalid Sheikh Mohammed and four co-conspirators would be tried in the Southern District of New York.<sup>219</sup>

The Guantanamo Review Task Force determined that there were a total of thirty-six viable candidates for prosecution either in federal court or in a military commission.<sup>220</sup> Of these, six (Ghailani and the five 9/11 co-conspirators) were initially selected for prosecution in federal court and six were initially approved for prosecution in military commissions (Abd al-Rahim al-Nashiri, Ahmed al-Darbi, Noor Uthman, Omar Khadr, Ibrahim al-Qosi and Obaidullah).<sup>221</sup> This left twenty-four individuals subject to prosecution in one or the other forum. The Department of Defense and Department of Justice agreed on a joint protocol to determine which forum would be utilized.<sup>222</sup> This protocol established a “presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution.”<sup>223</sup> Based on this presumption in favor of federal prosecution, it is fair to assume that a substantial number of the

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(3) The legal rationale and associated court demands for transfer.

(4) A plan for mitigation of any risk described in paragraph (1).

(5) A copy of a notification to the Governor of the State to which the individual will be transferred or to the Mayor of the District of Columbia if the individual will be transferred to the District of Columbia with a certification by the Attorney General of the United States in classified form at least 14 days prior to such transfer (together with supporting documentation and justification) that the individual poses little or no security risk to the United States.

<sup>218</sup> *Id.* at § (c)–(d).

<sup>219</sup> Peter Finn & Carrie Johnson, *Alleged Sept. 11 Planner Will Be Tried in New York*, WASH. POST, Nov. 14, 2009, at A01.

<sup>220</sup> FINAL REPORT, *supra* note 111, at 21.

<sup>221</sup> *Id.*

<sup>222</sup> DEPT. OF JUSTICE & DEP’T OF DEFENSE, DETERMINATION OF GUANTANAMO CASES REFERRED FOR PROSECUTION (July 20, 2009), available at <http://www.justice.gov/opa/documents/tafa-prel-rpt-dptf-072009.pdf> [hereinafter GUANTANAMO CASES REFERRED FOR PROSECUTION].

<sup>223</sup> *Id.* at 1.

remaining twenty-four candidates for federal prosecution would have been tried in federal court, if the Obama administration had its way. It was not to be.

Ghailani was found guilty of one count of conspiracy in November 17, 2010.<sup>224</sup> Although this might have been seen as a vindication of the President's plan to prosecute detainees in federal court, it had the opposite effect in Congress, where many members viewed Ghailani's "near acquittal" (he was acquitted on 284 of 285 counts) as a narrowly averted disaster and evidence of the unreliability of a federal jury trial.<sup>225</sup> He was scheduled to be sentenced on January 25, 2011.<sup>226</sup> Before this occurred, Congress slammed the door on any further federal prosecutions. On January 7, 2011, Congress passed the 2011 NDAA, which barred the Department of Defense from spending appropriated funds to transfer any detainee to the United States for any purpose, including prosecution.<sup>227</sup> The statute singled out Khalid Sheikh Mohammed by name, making it absolutely clear that Congress was rejecting the administration's plan to try the 9/11 co-conspirators in the United States.<sup>228</sup> It was suggested by at least one civil rights advocacy organization that this statute did not preclude transferring the 9/11 defendants to the U.S. for trial; noting that the code section only prohibited the use of Department of Defense funds, the ACLU opined in a letter to the President that he could use Department of Justice or Department of Homeland Security funds to effectuate the

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<sup>224</sup> Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 26, 2011, at A18.

<sup>225</sup> Some Republican Congressmen also expressed dismay that the federal judge had suppressed some evidence obtained through coercive interrogation. See, e.g., Lawrence Friedman & Victor Hansen, *The Ghailani Trial: Justice Served*, JURIST.ORG (Oct. 4, 2012, 11:52 PM), <http://jurist.org/forum/2010/11/the-ghailani-trial-justice-served.php>.

<sup>226</sup> Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombings*, N.Y. TIMES, Nov. 18, 2010, at A1.

<sup>227</sup> Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2011) ("None of the funds authorized to be appropriated by this Act for fiscal year 2011 may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee who (1) is not a United States citizen or a member of the Armed Forces of the United States; and (2) is or was held on or after January 20, 2009, at United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense." Exception 1 reserved a power to President Obama exercised by his predecessor. President Bush actually transferred one "enemy combatant," Yaser Esam Hamdi, from Guantanamo to a U.S. military brig, for continued law of war detention after it was discovered that Hamdi was an American citizen.)

<sup>228</sup> *Id.*

transfer.<sup>229</sup> Whether or not the President agreed with the ACLU's analysis, he did not take them up on their suggestion. And if there was a loophole allowing the expenditure of funds from other departments, Congress closed it, starting with the 2012 Minibus appropriations bill.<sup>230</sup>

Although Ghailani was sentenced to life in prison just eighteen days after the 2011 NDAA,<sup>231</sup> this did not apparently change the minds of many congressmen about the efficacy of federal terrorism prosecutions. The bar on transfers for federal prosecution was renewed in the 2012 NDAA. According to the Congressional Research Service, "the 2012 Minibus, 2012 CAA, and the 2012 NDAA appear to have effectively made military commissions the only viable forum for the criminal prosecution of Guantanamo detainees, at least until the end of fiscal year 2012."<sup>232</sup>

## 2. Law of War Detention

On December 15, 2009, President Obama announced a plan to purchase the Thomson Correctional Center, an unused maximum-security state prison in Illinois, and convert it for use for law of war detention.<sup>233</sup> Although funding restrictions in place at the time only permitted transfer of detainees to detention in the United States "during legal proceedings," many members of Congress had indicated that they would be willing to lift or meliorate the restrictions if President Obama devised a viable long-term plan for the confinement of detainees.<sup>234</sup> Congress quickly made it clear that they did not support the President's plan, refusing to

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<sup>229</sup> See Letter from ACLU to President Barack Obama, Re: Guantanamo Transfer Provisions in H.R.652 (Jan. 5, 2011), [http://www.aclu.org/files/assets/2011-1-5\\_-\\_ACLU\\_Letter\\_to\\_Obama\\_RE\\_Guantanamo\\_Transfer\\_Provisions\\_in\\_the\\_NDAA.pdf](http://www.aclu.org/files/assets/2011-1-5_-_ACLU_Letter_to_Obama_RE_Guantanamo_Transfer_Provisions_in_the_NDAA.pdf).

<sup>230</sup> Consolidated and Further Continuing Appropriations Act, Pub. L. No. 112-55, § 532, 125 Stat. 552, 637-38 (2011) ("None of the funds appropriated or otherwise made available in this *or any other Act* may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions Khalid Sheikh Mohammed or any other detainee.") (emphasis added). See also Consolidated Appropriations Act, Pub. L. No. 112-74, § 511, 125 Stat. 786, 1163-64 (2011) (similar restriction).

<sup>231</sup> Weiser, *supra* note 224.

<sup>232</sup> JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FY2012: DETAINEE MATTERS 28 (Apr. 10, 2012).

<sup>233</sup> See Memorandum on Closure of [Detention] Facilities at the Guantanamo Bay Naval Base, 74 Fed. Reg. 67047, 67047-48 (Dec. 15, 2009).

<sup>234</sup> Charlie Savage, *House Panel Rejects a Plan to Shift Detainees to Illinois*, N.Y. TIMES, May 21, 2010, at A18.

include a measure authorizing funds in the 2010 NDAA.<sup>235</sup> Although the Obama administration reportedly hoped to insert a funding measure in the 2011 NDAA,<sup>236</sup> Congress not only refused to include funds to purchase Thomson, but “enacted legislation barring military funds for the 2011 fiscal year from being used 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.”<sup>237</sup>

### 3. Release into the U.S.

It is within the discretion of the executive branch to enforce the immigration laws of the United States.<sup>238</sup> Accordingly, the executive branch could grant legal immigration status to Guantanamo detainees. Initially, the Obama administration planned to do exactly that with several Chinese Uighurs. Seventeen Uighurs won a habeas corpus petition in 2008.<sup>239</sup> The district court judge ordered that the Uighurs be released into the United States because there was no reasonable prospect of resettling them in any other country at that time.<sup>240</sup> The Bush administration appealed this aspect of the ruling (not the grant of habeas corpus itself), contending that the federal court did not have the power to order admission into the United States, and that it was for the executive branch to decide on how detainees could properly apply for admission.<sup>241</sup> Later the Obama administration decided to continue to support the appeal.<sup>242</sup> On February 18, 2009, the court of appeals

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<sup>235</sup> Charlie Savage, *Plan to Move Guantanamo Detainees Faces New Delay*, N.Y. TIMES, Dec. 23, 2009, at A1.

<sup>236</sup> *Id.*

<sup>237</sup> MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., R42143, CLOSING THE GUANTANAMO DETENTION CENTER: LEGAL ISSUES 5 (July 6, 2011) (citing Ike Skelton National Defense Authorization Act for FY2011, Pub. L. No. 111-383, § 1034 (a)-(b), 124 Stat. 4137, 4353 (2011)). In late September 2012, the Department of Justice quietly bought the Thomson Correctional Facility from Illinois for \$165 million using money remaining in their 2012 fiscal year budget. Congressional approval was not sought. The Attorney General said the facility would be used to house U.S. inmates, but Republican congressmen still criticized the purchase, as a backdoor plan to import “dangerous terrorists” into the U.S. See Dave McKinney, *Done Deal: Feds to Buy Thomson Prison from State for \$165 Million*, CHI. SUN-TIMES, Oct. 3, 2012 (News), at 6.

<sup>238</sup> *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

<sup>239</sup> *Guantanamo Habeas Scorecard*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf> (last updated Feb. 9, 2011).

<sup>240</sup> *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

<sup>241</sup> Brief for Appellants, *supra* note 60.

<sup>242</sup> Terry Frieden, *Justice Dept. Asks Supreme Court to Reject Uighurs' Appeal*, CNNPOLITICS.COM (May 30, 2009), <http://edition.cnn.com/2009/POLITICS/05/30/scotus.uighurs/index.html>.

reversed, agreeing with the administration that the lower court did not have the authority to order the release of detainees into the United States.<sup>243</sup> At the time, the Obama administration was aggressively pressuring our allies to accept cleared Guantanamo detainees. One sticking point with many countries was the apparent unwillingness of the United States to resettle any detainees on our own soil.<sup>244</sup> The administration decided that resettling some Uighurs in the United States, as the district court had originally ordered, was not such a bad idea after all. By late April 2009, the administration reportedly had developed plans to admit up to seven Uighurs into the United States.<sup>245</sup> The plan immediately ran into strong resistance from Republicans in Congress.<sup>246</sup> By early June, the administration had reportedly given up on the plan to resettle the Uighurs, but one anonymous administration official asserted that they were still considering “a few” cleared detainees for settlement in the United States.<sup>247</sup> Congress quickly moved to ensure that this would never happen, enacting a bar on the use of funds to effect the release of detainees into the U.S. in the 2009 Supplemental Appropriations Bill on June 24, 2009.<sup>248</sup> A similar bar has been passed in several subsequent spending bills, blocking the release of detainees into the United States at least through the end of fiscal year 2012.<sup>249</sup>

It is difficult to gauge the direct effect of these spending restrictions on the detainee population because there is no way of knowing which, if any, detainees might have been selected for resettlement in the United States had Congress not made it impossible to do so. It appears that the administration had already abandoned the plan to resettle the seven Uighurs, but perhaps this plan might have been resurrected at a later point. It is worth noting that two Uighurs were resettled

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<sup>243</sup> *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

<sup>244</sup> Manel, *supra* note 87 (quoting from Ambassador Daniel Fried, US Special Envoy for the Closure of Guantanamo Bay Detention Facilities: “It is fair to say, as just an objective statement, that the US [sic] could resettle more detainees [worldwide], had we been willing to take in some.”)

<sup>245</sup> Julian Barnes, *U.S. May Accept Muslim Detainees*, L.A. TIMES, Apr. 24, 2009, at A1.

<sup>246</sup> David Weigel, *Republicans Seize on Uighurs for Anti-Gitmo Closure Campaign*, WASH. INDEP. (May 22, 2009), <http://washingtonindependent.com/44130/republicans-seize-on-uighurs-for-anti-gitmo-closure-campaign>.

<sup>247</sup> Peter Finn & Sandhya Somashekhar, *Obama Bows on Settling Detainees*, WASH. POST, June 12, 2009, at A01.

<sup>248</sup> 2009 Supplemental Appropriations Bill, Pub. L. No. 111-32, § 319, 123 Stat. 1859, 1874–75.

<sup>249</sup> ELSEA & GARCIA, *supra* note 232, at 28.

in El Salvador in April 2012, and that three Uighurs remain at Guantanamo to this day.<sup>250</sup> If these five were among those being considered for resettlement in the United States, then their detention at Guantanamo has been extended quite dramatically by this legislation. Perhaps even more significant than the direct impact on detainees who might have been allowed to resettle in the United States is the indirect effect this legislation has had on the administration's ability to resettle detainees in other countries. The willingness of many countries to accept detainees would have been greatly enhanced if the United States had accepted its fair share (or any share) of Guantanamo detainees for resettlement. Congress' refusal to even allow the administration to consider this option undoubtedly has contributed to the inability of the Department of State to find countries willing to accept detainees,<sup>251</sup> leaving some fifty-five detainees currently cleared for release condemned to continued indefinite detention at Guantanamo.<sup>252</sup> Thus, one could make the case that all of the cleared detainees trapped at Guantanamo should be considered Prisoners of Congress.

#### *D. Restrictions on Detainees Facing Trial by Military Commission*

Although Congress has essentially forced the Obama administration to utilize military commissions as the only viable forum for prosecuting detainees, the legislative branch has also recently made it more difficult for the government to carry out these prosecutions. Since 2007, the only way for a detainee to guarantee a one-way ticket out of Guantanamo was to enter into a pretrial agreement (the military's term for a plea bargain) with the Convening Authority of the military commissions.<sup>253</sup> The Convening Authority had the power to approve the transfer of a detainee who had been convicted by voluntary plea at the completion of his sentence or to permit the detainee to serve some or his entire sentence in his home

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<sup>250</sup> Savage, *supra* note 139.

<sup>251</sup> See Manel, *supra* note 87 ("It is fair to say, as just an objective statement, that the US [sic] could resettle more detainees [worldwide], had we been willing to take in some.").

<sup>252</sup> *U.S. Names 55 Set for Transfer from Guantánamo*, N.Y. TIMES, Sept. 21, 2012, <http://www.nytimes.com/2012/09/22/world/americas/united-states-clears-55-detainees-to-leave-guantanamo-bay.html>.

<sup>253</sup> The original regulatory authority for the Convening Authority to enter into pretrial agreements under the Military Commissions Act of 2006 is found in Rule for Military Commissions 705 in the MANUAL FOR MILITARY COMMISSIONS, UNITED STATES (2007). The Rule did not specify that the Convening Authority has the power to authorize release or transfer to a third country, but the Convening Authority has nevertheless exercised this right, both under the 2007 version of the Manual and the identical provision in the 2010 Manual for Military Commissions under the Military Commissions Act of 2009.

country, which would then have the discretion to release him unconditionally or grant him parole.<sup>254</sup> This provided the only real incentive for a detainee to enter into a plea agreement, because the government made clear that otherwise there could be no certainty of release. The Bush administration determined that law of war detention was a separate matter than incarceration as a result of criminal prosecution, utilizing different standards.<sup>255</sup> Thus, a detainee convicted in a military commission who received a short sentence, as occurred in the case of Salim Hamdan, could serve the sentence and then immediately be placed back into law of war detention. Although Mr. Hamdan was released to Yemen after serving the brief five month sentence imposed by his military commission, the Bush administration took the position that his release was discretionary and that they had the legal right to continue to hold him.<sup>256</sup> Even a detainee acquitted in a military commission, it has been said, could still be detained as an enemy combatant. A detainee who pled guilty, on the other hand, could guarantee a fixed date-certain for release from Guantanamo.

Only a small handful of detainees have been able to make use of this exit strategy. The first person to take advantage of this option was an Australian, David Hicks, who pled guilty to material support to terrorism in exchange for a nine-month sentence to be served in Australia, after which he was released.<sup>257</sup> Three other detainees entered into pretrial agreements under the Obama administration which included post-sentence release or mid-sentence transfer: Ibrahim al Qosi, who pled guilty in August 2010 to material support to terrorism by serving as a cook for Osama bin Laden and other members of al Qaeda;<sup>258</sup> Omar Khadr, who

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<sup>254</sup> See generally MANUAL FOR MILITARY COMMISSIONS, UNITED STATES R. 705 (2010).

<sup>255</sup> William Glaberson, *War Crimes System is Still on Trial*, N.Y. TIMES, Aug. 10, 2008, at A27 (“The Bush administration has long asserted that detainees at Guantanamo, even those who complete war crimes sentences or are acquitted, are enemy combatants who can be held indefinitely.”).

<sup>256</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 616–17 (2006) (government arguing that release of detainee is discretionary).

<sup>257</sup> Rory Callinan, *Aussie Taliban Goes Free*, TIME, Dec. 29, 2007, <http://www.time.com/time/world/article/0,8599,1698999,00.html>.

<sup>258</sup> Carol Rosenberg, *War Crimes Panel Gives al Qaeda Cook 14-Year Sentence*, MIAMI HERALD, Aug. 11, 2010, <http://www.miamiherald.com/2010/08/11/1771545/war-court-jury-chosen-to-sentence.html#ixzz12djH29tT>. Al Qosi’s plea has officially been kept secret, but was reportedly for two years. Peter Finn, *Guantanamo Detainee Ibrahim al-Qosi’s Plea Agreement Is Kept Secret*, WASH. POST (Aug. 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/09/AR2010080906065.html>. The report was apparently accurate. On July 10, 2012, Mr. al Qosi was transferred to Sudan, and released. Carol Rosenberg, *Convicted al-Qaida Operative Released From*

pled guilty to several crimes in exchange for a relatively light sentence and a transfer home to Canada where he would be eligible for parole;<sup>259</sup> and Noor Uthman Mohammed, who pled guilty to material support to terrorism and conspiring to provide material support to terrorism and agreed to cooperate in other cases in exchange for a 34-month sentence in February 2011.<sup>260</sup> Although the prospect of certain release undoubtedly was critical in inducing these guilty pleas, it is not clear if this escape route will continue to be available. During the Bush administration, and for the first three years of the Obama administration, it was never questioned that this power resided in the executive branch. Recently however, it has become apparent that the Obama administration no longer has this power, due to the language in recent spending bills placing stringent restrictions on transfers to other countries. While both the 2011 and 2012 NDAs contained an exception to these restrictions in the case of detainees transferred pursuant to a pretrial agreement in a military commission case, this exception, unlike the parallel exception for detainees transferred pursuant to a court order, is limited to pretrial agreements entered into prior to enactment of these statutes.<sup>261</sup> Because this provision is only retrospective and not prospective, military commissions prosecutors attempting to negotiate plea agreements today cannot guarantee that a detainee will be released at the end of his agreed upon sentence, nor can they offer a transfer to serve all or part of a sentence in another country, as happened previously with Khadr and Hicks. This limitation was highlighted in the case of Majid Khan. In February 2012, Khan pled guilty to conspiracy, spying, material support to terrorism, murder in violation of the law of war, and attempted murder in violation of the law of war and agreed to cooperate with the prosecution in other military commission cases in exchange for the possibility of a nineteen-year sentence.<sup>262</sup> Before accepting the plea deal, the military commission Judge, Army

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*Guantanamo, Repatriated to Sudan*, BOSTONHERALD.COM, July 11, 2012, <http://bostonherald.com/news/international/general/view.bg?articleid=1061144916>.

<sup>259</sup> Khadr was facing a maximum sentence of life, but pled guilty in exchange for an eight-year sentence, which was to be served in Canada after one more year in Guantánamo. See Paul Koring, *Verdict's in: Khadr is Ottawa's Problem Now*, GLOBE & MAIL, Oct. 31, 2010, <http://www.theglobeandmail.com/news/politics/verdicts-in-khadr-is-ottawas-problem-now/article1779878/>.

<sup>260</sup> Tyler Cabot, *Noor Uthman Muhammed's Day of Decision*, ESQUIRE.COM (Feb. 18, 2011, 8:01 PM), <http://www.esquire.com/blogs/politics/guantanamo-sentence-5257920>.

<sup>261</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028, 125 Stat. 1298, 1567–69 (2011).

<sup>262</sup> Majid Shoukat Khan Pretrial Agreement, United States v. Majid Shoukat Khan, ISN 10020 (Feb. 29, 2012), AE012, available at <http://www.mc.mil/cases/militarycommissions.aspx>; Appendix A to Offer for Pretrial Agreement, United States v. Majid Shoukat Khan, ISN 10020 (Feb. 29, 2012), AE013,

Colonel James Pohl, made certain that Khan understood that the agreement did not guarantee that he would be released at the end of his period of confinement, as revealed in this excerpt from his plea hearing:

MJ [COL POHL]: When that sentence runs, whether it's 19 years, 25 years, whatever it is, you will no longer be serving a post-conviction sentence. Do you understand that?

ACC [MR. KHAN]: Yes.

MJ [COL POHL]: Your sentence will be done.

ACC [MR. KHAN]: Yes, sir.

MJ [COL POHL]: But you still may be a detainee. Do you understand that?

ACC [MR. KHAN]: Yes, sir.

...

ACC [MR. KHAN]: What I understood basically you are saying . . . is, even though I do my time, the government can still consider me enemy combatant and they can keep me for the rest of my life. There is no guarantee it will happen. I can always go to habeas, you know how habeas corpus helped me so far. Basically I do my time. There is no guarantee. This agreement does not guarantee me I will ever get free even though I do my time.

MJ [COL POHL]: Exactly.

ACC [MR. KHAN]: I understand, sir.

MJ [COL POHL]: This has nothing to do with your status as a detainee, just your status as a post-conviction sentence detainee.

ACC [MR. KHAN]: I'm making a leap of faith here, sir.

MJ [COL POHL]: I got it.

ACC [MR. KHAN]: That is all I can do.<sup>263</sup>

It remains to be seen whether other detainees facing charges in the military commissions will be willing to make a similar leap of faith. What is obvious is that Congress has placed another hurdle in the path of both the administration's efforts to reduce the Guantanamo population and the detainee's desire to leave Guantanamo.

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*available at* <http://www.mc.mil/cases/militarycommissions.aspx>. Mr. Khan's actual sentencing was deferred for four years to determine his level of cooperation.

<sup>263</sup> Unofficial/Unauthenticated Transcript of the Khan Hearing at 80–82, *United States v. Majid Shoukat Khan* (Feb. 29, 2012), *available at* <http://www.mc.mil/cases/militarycommissions.aspx>.

### *E. Restrictions on Periodic Review Boards*

In Section 1023 of the 2012 NDAA, enacted December 31, 2011, Congress directed the Secretary of Defense to provide a report to Congress by June 28, 2012 (180 days after enactment) to the congressional defense and intelligence committees “setting forth procedures to be employed by review panels established pursuant to Executive order 13,567.”<sup>264</sup> This Executive order directed the Secretary of Defense to issue “implementing guidelines” regulations for periodic review boards by March 7, 2012.<sup>265</sup>

The provision requires that these new review procedures clarify that the purpose of the periodic review is not to review the legality of any particular detention, but to determine whether a detainee poses a continuing threat to U.S. security; clarify that the Secretary of Defense, after considering the results and recommendations of a reviewing panel, is responsible for any final decision to release or transfer a detainee and is not bound by the recommendations; and ensure that appropriate consideration is given to a list of factors, including the likelihood the detainee will resume terrorist activity or rejoin a group engaged in hostilities against the United States; the likelihood of family, tribal, or government rehabilitation or support for the detainee; the likelihood the detainee may be subject to trial by military commission; and any law enforcement interest in the detainee.<sup>266</sup>

It is not clear why Congress believed that the first issue required “clarification.” The Executive order was quite clear that the periodic review process would “not address the legality of any detainee’s law of war detention.”<sup>267</sup> The Executive order was also clear that the boards were to determine whether a detainee posed a “significant threat to the security of the United States.”<sup>268</sup> The other provisions of section 1023 were more detailed than the broad requirements in the Executive order. In a signing statement accompanying the 2012 NDAA,

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<sup>264</sup> ELSEA & GARCIA, *supra* note 232, at 24.

<sup>265</sup> Exec. Order No. 13,567, 76 Fed. Reg. 13,277, § 3 (Mar. 7, 2011).

<sup>266</sup> ELSEA & GARCIA, *supra* note 232, at 24–25.

<sup>267</sup> Exec. Order No. 13,567 at § 8 (“Sec. 8. Legality of Detention. The process established under this order does not address the legality of any detainee’s law of war detention.”).

<sup>268</sup> *Id.* at § 2.

President Obama characterized section 1023 as “needlessly interfere[ing] with the [e]xecutive [b]ranch’s processes for reviewing the status of detainees.”<sup>269</sup>

By making the Secretary of Defense personally responsible for any decision to transfer a detainee, and giving him the authority to override the recommendations of the periodic review boards, Congress increased the potential for political pressure to be exerted on a process that was intended to be as apolitical as possible. This micromanaging of an executive branch initiative that had not yet even begun reflects the struggle between the executive branch and Congress to assert their control over all aspects related to the potential release of detainees. This struggle has played out in a series of presidential signing statements and other statements by senior administration officials raising objections to congressional efforts to tie the hands of the executive branch as it seeks to effectuate appropriate dispositions for detainees.

### III. CONSTITUTIONALITY OF RESTRICTIONS

While much could be said about the wisdom of the policies reflected in these congressional restrictions and of the motivations behind them, perhaps the more salient question is the legality, or more accurately, the constitutionality of the various restrictions placed by Congress on the executive branch. Has Congress exceeded its constitutional authority by frustrating the plans and purposes of the President, particularly on a national security matter during a period of ongoing armed conflict? While there has been considerable debate on the policy issues surrounding Guantanamo, there has been relatively little scholarship devoted to the constitutional issues. As of this writing, only one published law review article, a comment in the *Brigham Young University Law Journal*, has focused on the constitutionality of these restrictions.<sup>270</sup> There have also been discussions of the constitutionality of various restrictions in op-eds, blogs, advocacy pieces by civil rights organizations, and news articles.<sup>271</sup> In this section, I first compare the broader constitutional approach of the Bush administration with that of the Obama administration to this question, before delving into specific constitutional issues raised by individual restrictions.

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<sup>269</sup> Press Release, White House, Office of the Press Secretary, Statement by the President on H.R. 1540 (Dec. 31, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>. [hereinafter Statement on H.R. 1540].

<sup>270</sup> Hains, *supra* note 198, at 2289–90.

<sup>271</sup> See, e.g., *infra* notes 321, 324, 332, 334 and 337.

### A. *Two Views of the Commander in Chief Power*

Generally speaking, what does the Constitution have to say about which branch has the power to regulate wartime detainees? Perhaps the obvious starting point in the Constitution is the Commander in Chief power granted to the President.<sup>272</sup> During the Bush administration, this was essentially where the analysis ended as well. Indeed, had comparable restrictions been levied on the prior administration by Congress, it is likely that they would have been challenged as unconstitutional, if not simply ignored.<sup>273</sup> The view of the White House, particularly within the Office of the Legal Counsel (OLC) in the Bush Department of Justice was that the Executive had virtually unlimited powers during wartime. Their position was that congressional restrictions on the President's ability to determine the appropriate disposition of detainees, and where and under what conditions they will be detained and tried, were almost categorically unconstitutional. After all, detainees are held under the law of war, and the President is the Commander in Chief. Under this view of the Constitution, the Executive order to close Guantanamo, on the basis of vital strategic national security interests, could be considered a valid "battlefield" military order, particularly given the fact that the detention facilities are under the command of Joint Task Force Guantanamo, a military organization under SOUTHCOM, a regional combatant command. The prevailing view in the Bush administration, expressed in several OLC opinions, was that the Commander in Chief must have unfettered discretion to manage detention operations as he sees fit. For example, one of the infamous "Torture Memos" issued by the OLC stated:

Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek

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<sup>272</sup> U.S. CONST. art. II, § 2.

<sup>273</sup> See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1095 (2008) [hereinafter Barron & Lederman, *A Constitutional History*] ("[T]he [Bush] [a]dministration has gone beyond merely asserting the preclusive power in signing statements, veto messages, or memoranda to Congress. It appears to have relied upon such claims to engage in outright defiance of statutory restrictions in exercising coercive governmental authority."). The authors cite numerous examples of this defiance. *Id.* at 1094–97.

to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.<sup>274</sup>

While this quote refers to the President's power to hold and interrogate detainees, the same logic was applied by the OLC to decisions relating to transfer of detainees to other countries. In a memorandum to the Department of Defense general counsel on the subject of "[t]he President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations," the OLC wrote:

We conclude that the President has full discretion to transfer al Qaeda and Taliban prisoners captured overseas and detained outside the territorial jurisdiction of the United States to third countries.

...

As a matter of constitutional text and structure, the location of the Commander-in-Chief power in Article II of the Constitution makes clear that this function, historically held by military commanders-in-chief, lies within the discretion of the Executive Branch. Our constitutional history and practice confirms this: the President has since the Founding era exercised exclusive and virtually unfettered control over the disposition of enemy soldiers and agents captured in time of war.<sup>275</sup>

Indeed, John Yoo, an attorney in the OLC during the Bush administration, and a leading proponent of the unitary executive theory and advocate for robust presidential powers, reiterated this view in a 2004 law review article.<sup>276</sup> Yoo

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<sup>274</sup> A very similar quote appeared in another document from the OLC. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.").

<sup>275</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes, II, Dep't of Def., Gen. Counsel, Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations (Mar. 13, 2002), <http://www.justice.gov/opa/documents/memorandumpresidentpower03132002.pdf>.

<sup>276</sup> John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1184 (2004). In fact, Professor Yoo seems to have borrowed from the OLC memo, without attribution, writing:

As a matter of constitutional text and structure, the authority to determine the handling of military detainees is conferred on the President by the

asserted, “the power to dispose of the liberty of individuals captured and brought under the control of U.S. armed forces during military operations remains in the hands of the President alone unless the Constitution specifically commits the power to Congress.”<sup>277</sup> Yoo left no doubt that he did not believe the Constitution committed any such power to Congress:

The treatment of captured enemy soldiers is but one of the many facets of the conduct of war, entrusted by the Constitution in plenary fashion to the President by virtue of the Commander in Chief Clause. Moreover, it is an area in which the President enjoys exclusive authority, as the power to handle captured enemy soldiers is not reserved by the Constitution in whole or in part to any other branch of the government.<sup>278</sup>

A desire to refute such extreme claims by Bush administration lawyers, perhaps coupled with a desire that Congress exercise greater oversight over the conduct of the war on terrorism, including detention operations, motivated some leading Constitutional scholars to explore the somewhat neglected issue of congressional constitutional powers during wartime, particularly the balance of power between Congress and the President.<sup>279</sup> The first major article on the subject, by University of Pittsburgh law professor Jules Lobel, “challenged the Administration’s initial premise—that the Constitution gives the President as Commander-in-Chief unbridled power over battlefield tactical decisions in the conduct of war.”<sup>280</sup> According to Professor Lobel:

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Commander in Chief Clause, which is located in Article II of the Constitution. Our constitutional history and practice confirm this. Since the Founding era, the President has exercised exclusive and virtually unfettered control over the disposition of enemy soldiers and agents captured in time of war.

*Id.*

<sup>277</sup> *Id.* at 1201.

<sup>278</sup> *Id.* Professor Yoo has been curiously silent regarding the many restrictions imposed by Congress on President Obama, perhaps because he appreciates the fact that these restrictions have forced the Obama administration to maintain the detention regime that he worked so hard to help put in place.

<sup>279</sup> See Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 299 (2009) (“Absent from war-powers scholarship is an account of when war and military powers separate and when they overlap.”).

<sup>280</sup> Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 393 (2008).

The critical flaw in the basic premise supporting exclusive presidential powers in war is that it ignores Congress's own panoply of war powers. Arrayed against the President's sole war power as Commander in Chief, the Constitution vests Congress with powers to declare war, issue letters of marque and reprisal, to raise armies and navies, to make rules concerning captures on land and water, and to make rules for the regulation of the army and navy. Furthermore, congressional authority to define offenses against the law of nations, its power to appropriate funds, and its power to make all laws which shall be necessary and proper for carrying into execution its powers are also important wartime powers. Congressional power over warfare also seems logically limitless, and the Constitution seems to provide Congress with substantial power to check virtually all the President's Commander in Chief powers. Indeed, Chief Justice Marshall once observed that the "whole powers of war" are vested in Congress.<sup>281</sup>

Professor Lobel concluded:

The Framers of the Constitution intended that Congress have substantial power to control the conduct of warfare it has authorized. The consistent history of congressional restrictions confirms that the Constitution grants Congress concurrent power to decide not only whether to initiate warfare, but how and in what manner those authorized wars should be fought. Accordingly, the Constitution sensibly accords the President considerable flexibility and discretion to prosecute a war, but permits Congress to maintain the ultimate authority to decide whether the President's policies and strategies are those the nation should follow.<sup>282</sup>

While Professor Lobel, as a leading proponent of closing Guantanamo,<sup>283</sup> undoubtedly disapproves of congressional efforts to obstruct the transfer of

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<sup>281</sup> *Id.* at 395 (internal citations omitted).

<sup>282</sup> *Id.* at 466–67. For a similar argument, see Prakash, *supra* note 279, at 304 (“[T]he Commander in Chief lacks any exclusive war or military powers. Instead, military authorities not granted exclusively to Congress are vested concurrently with the President and Congress, meaning that either can exercise such authorities. When congressional statutes conflict with presidential orders within this area of overlap, the former always trumps the latter. All told, the Constitution creates a powerful Commander in Chief who is authorized to direct military operations, but who is nevertheless subject to congressional direction in all war and military matters.”).

<sup>283</sup> Mr. Lobel is now also the President of the Center for Constitutional Rights, a leading advocacy group for Guantanamo detainees. See Jules Lobel, *Preventive Detention and Preventive Warfare: U.S.*

detainees and block Guantanamo's closure, his article strongly supports Congress' power under the Constitution to impose such restrictions.<sup>284</sup>

Professor Lobel's article was followed in short order by a definitive two-part article in the *Harvard Law Review* by Professors David Barron and Martin Lederman.<sup>285</sup> Barron and Lederman meticulously rebutted the premise that the President's Executive war powers, other than the power of "superintendency" were "preclusive," providing extensive historical and textual support for the premise that Congress has robust powers to regulate war.<sup>286</sup> In particular, Barron and Lederman persuasively argued that Congress, through the power of the purse, can exert considerable control over the nation's war policies, including those related to detention.<sup>287</sup> As the authors noted:

Congress has no fewer than three relevant spending powers, and collectively these are authorities the Court has recently dubbed "broad and sweeping." Pursuant to them, Congress has the power to determine not only how money shall be spent on military functions, but also how appropriated funds shall *not* be spent.<sup>288</sup>

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*National Security Policies Obama Should Abandon*, 3 J. NAT'L. SEC. L. & POL'Y. 341 (2010). See generally *Illegal Detentions and Guantanamo*, Center for Constitutional Rights, CENTER FOR CONST. RTS, <http://ccrjustice.org/illegal-detentions-and-guantanamo> (last visited Nov. 13, 2012).

<sup>284</sup> Lobel, *supra* note 283.

<sup>285</sup> See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 691 (2008) [hereinafter *Framing the Problem, Doctrine, and Original Understanding*] (the first of a two-part article addressing the "fundamental question of whether and when the President may exercise Article II war powers in contravention of congressional limitations," with the second part finding that "[e]vidence from the Founding era does not reveal an original understanding that the Commander in Chief enjoyed preclusive authority over matters pertaining to warmaking." Barron & Lederman, *A Constitutional History*, *supra* note 273, at 944 (the second of this two-part article, surveying the history of the application and interpretation of presidential and congressional war powers and finding "surprisingly little historical evidence supporting the notion that the conduct of military campaigns is beyond legislative control." Barron & Lederman, *Framing the Problem, Doctrine, and Original Understanding*, *supra*, at 691–92)).

<sup>286</sup> See *id.*

<sup>287</sup> The authors discuss detention powers in several places, including in Barron & Lederman, *A Constitutional History*, *supra* note 273, at 981, 1008, and 1104.

<sup>288</sup> Barron & Lederman, *Framing the Problem, Doctrine, and Original Understanding*, *supra* note 285, at 733–34 (emphasis added) (internal citations omitted).

Barron and Lederman make it clear that Congress has extensive power to regulate the detention of wartime prisoners, and provided a Constitutional road map to do so through the use of appropriations bills.<sup>289</sup> Although they did not squarely address the right of Congress to limit the scope of the President's discretion to release detainees, it is implicit in their discussion that Congress does have this power.<sup>290</sup> Applying the Barron-Lederman and Lobel "concurrent constitutional authority over wartime detention" approach to the legislative restrictions imposed by Congress on the transfer and release of detainees in the 2011 NDAA, one commentator concluded that all of the restrictions are constitutional.<sup>291</sup> It is a striking irony that the strategy mapped out by Barron and Lederman to encourage Congress to curb the war policies of the prior President have been expertly utilized to hamstring the policies of the President whom they advised.

The Barron-Lederman approach to the balance of powers during wartime is so persuasive that even John Yoo concedes the constitutionality of the legislative restrictions. In fact, in yet another ironic and arguably hypocritical turn, Professor Yoo now openly advocates use of the spending power to block President Obama's Guantanamo strategy.<sup>292</sup> As he stated in a March 2011 op-ed:

Congress dragged the administration kicking and screaming to this destination [formally endorsing indefinite detention at Guantanamo and the use of military commissions] by cutting off funds for the transfer of any detainees from Gitmo to the U.S. This effectively used Congress's sole power of the purse to prevent Obama from making a grievous national security mistake. The new Congress should continue to keep the ban in its Defense spending bills . . . .<sup>293</sup>

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<sup>289</sup> *Id.* at 739–40

<sup>290</sup> See Barron & Lederman, *A Constitutional History*, *supra* note 273, parts VI–VII.

<sup>291</sup> William M. Hains, *supra* note 198, at 2319 (2011).

<sup>292</sup> John Yoo, *Obama's Guantanamo Turnabout*, RICOCHET (Mar. 7, 2011, 6:03 PM), <http://ricochet.com/main-feed/Obama-s-Guantanamo-Turnabout> [hereinafter *Obama's Guantanamo Turnabout*]; see also John C. Yoo & Robert J. Delahunty, *The Collapse of the Guantanamo Myth*, WALL ST. J., Dec. 11, 2010, [http://online.wsj.com/article/SB10001424052748704457604576011390769140846.html?mod=WSJ\\_Opinion\\_LEADTop](http://online.wsj.com/article/SB10001424052748704457604576011390769140846.html?mod=WSJ_Opinion_LEADTop) (noting with approval that Congress "this week voted overwhelmingly to defund any effort to shut down the Gitmo prison"); John Yoo, *The Death of the Guantanamo Myth*, RICOCHET (Dec. 12, 2010, 9:23 AM), <http://ricochet.com/main-feed/The-Death-of-the-Guantanamo-Myth> (noting approvingly that "Congress cut off the funding for any efforts to shut down the detention facility at Guantanamo or to transfer any al Qaeda prisoners there to American territory.").

<sup>293</sup> *Obama's Guantanamo Turnabout*, *supra* note 292.

The Barron-Lederman view also reflects the Obama administration's position on the issue. Shortly after their articles were published, both Barron and Lederman joined President Obama's transition team, before being named to prominent positions in his administration.<sup>294</sup> David Barron, a Harvard Law Professor, was the acting head of the Office of Legal Counsel from the beginning of the administration until July 2010.<sup>295</sup> Martin Lederman, a Professor at Georgetown Law Center, served as a Deputy Assistant Attorney General in the Office of Legal Counsel from the start of Obama's term until August 2010.<sup>296</sup> Both were intimately involved in Guantanamo detainee issues.<sup>297</sup> Their presence helps to explain the administration's relatively mild response to the restrictions, at least until the 2012 NDAA, when the President finally raised a vague constitutional objection to the many legislative restrictions limiting his discretion in a signing statement.<sup>298</sup> But even then, unlike his predecessor who frequently invoked the Commander in Chief power in signing statements objecting to various pieces of legislation, President Obama declined to cite this provision as a basis for his reservations about the bill.

In sum, the weight of authority strongly supports the Obama administration view that the Commander in Chief Clause poses little or no conflict with congressional powers to regulate war through the power of the purse. Of course, the fact that spending restrictions related to Guantanamo might not conflict with the President's Commander in Chief power does not necessarily mean that such restrictions could not be considered unconstitutional if deemed to conflict with some other provision of the Constitution. That possibility is raised by several of the restrictions.

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<sup>294</sup> Joe Palazzolo, *Office of Legal Counsel Makes Wave with Work on Gitmo Cases*, MAIN JUST. (Jan. 26, 2010, 1:07 pm), <http://www.mainjustice.com/2010/01/26/office-of-legal-counsel-makes-waves-with-work-on-gitmo-cases>.

<sup>295</sup> Joe Palazzolo, *Top Official in Office of Legal Counsel to Step Down*, MAIN JUST. (June 24, 2010, 7:29 PM), <http://www.mainjustice.com/2010/06/24/top-official-in-office-of-legal-counsel-to-depart>.

<sup>296</sup> *Georgetown Law Center Faculty Profile of Martin S. Lederman*, GEORGETOWN LAW CENTER <http://www.law.georgetown.edu/faculty/lederman-martin-s.cfm> (last visited Dec. 2, 2012).

<sup>297</sup> Palazzolo, *supra* note 294 ("Barron and Martin Lederman . . . were part of Obama's Justice Department transition team, and they were heavily involved in detainee issues before they were appointed to lead the office . . ."). The author can personally attest to Martin Lederman's early involvement in Guantanamo detainee issues. Professor Lederman contacted me while he was on the Presidential Transition Team requesting a copy of one of my law review articles—David J.R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315 (2007).

<sup>298</sup> Statement on H.R. 1540, *supra* note 269.

## B. *Specific Restrictions*

### 1. Restrictions on Transfer to Third Countries

#### a. Court-Ordered Transfers

The clearest, and perhaps only example of a plainly unconstitutional restriction was the notice and waiting period rule, as applied to Mohammed Jawad and sixteen other detainees who had been ordered released by the federal courts after winning their habeas cases.<sup>299</sup> The constitutional problem was not a conflict with the President's Commander in Chief power, but rather with the power of the judiciary. There was simply no constitutional (or logical) basis for Congress to order the continued detention of persons declared to be unlawfully held while a risk assessment was prepared for an individual who had been determined by the courts (and in Jawad's case, the Executive as well) not to be an enemy combatant. Congress may very well have vast war powers, but the holding of innocent persons erroneously detained in an armed conflict is not a war power. My fellow counsel and I recognized the problematic nature of this provision within days of its passage. In our response to the Government's notice proposing to a continuation of his detention while the Government prepared the notice to Congress plus the statutory fifteen day waiting period, we suggested "that a statute obstructing the Executive from releasing an unlawfully detained individual for two weeks . . . effect[s] an unconstitutional suspension of the Great Writ,"<sup>300</sup> noting:

[T]he Supplemental Appropriations Act cannot have altered this Court's authority to order the most central of habeas remedies: Petitioner's immediate release. It is well established that an act of Congress does not constrict the scope of habeas by implication. See *INS v. St. Cyr*, 533 U.S. 289, 312 (2001). See also *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) ("The doctrine disfavoring repeals by implication applies with full vigor when . . . the subsequent legislation is an appropriations measure."<sup>301</sup>).

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<sup>299</sup> See *supra* Part II.A.1.

<sup>300</sup> Petitioner's Response to Respondents' Notice That Respondents Will No Longer Treat Petitioner as Detainable Under the AUMF and Request for Appropriately Tailored Relief at 4, *Halmandy v. Obama*, No. 1:05 CV 02385 (D.D.C. Apr. 22, 2009), 2009 WL 1078660 [hereinafter Petitioner's Response and Request].

<sup>301</sup> *Id.* at 4 n.2.

In an interview with journalist Andy Worthington, I was a bit less subtle in my critique of this provision, calling it “blatantly unconstitutional” as applied to “those detainees determined to be unlawfully held” because “this law simply arbitrarily extends their unlawful stay at Guantanamo.”<sup>302</sup>

Unfortunately for Mr. Jawad and the other sixteen detainees affected by this provision, it was impractical for their habeas counsel to mount a constitutional challenge to this provision, because an appeal on constitutional grounds would invariably take far longer than the fifteen-day delay period (plus the time to prepare the notice). Habeas lawyers did not want to do anything that would potentially delay the release of their Guantanamo clients, who wanted only to go home after years of unlawful and traumatic<sup>303</sup> detention, just to make a constitutional point. Thus, seventeen detainees were held beyond the time when they had been ordered released through habeas corpus and their transfers had been arranged with receiving countries in order to accommodate the congressional notice and waiting period.

Perhaps recognizing the glaring unconstitutionality of this provision, in 2011, Congress self-corrected. Starting with the 2011 NDAA and continuing with the 2012 NDAA, Congress included an exception to the notice and waiting period requirement for detainees ordered released through habeas corpus, thereby eliminating this problem for the time being.<sup>304</sup> As one commentator noted:

The Suspension Clause declares that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” This serves as an express restriction on the power of Congress to limit access to federal courts for individuals to challenge their detention by the executive. In June 2008, the Supreme Court declared that Congress could not deprive Guantánamo Bay detainees of the privilege of the writ of habeas corpus without “act[ing] in accordance with the requirements of the Suspension Clause.” The 2011 National Defense Authorization Act restrictions on transferring detainees to other countries could run afoul of the

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<sup>302</sup> Andy Worthington, *Lawyer Blasts “Congressional Depravity” on Guantanamo*, HUFFINGTON POST (Oct. 9, 2009, 9:35 AM), [http://www.huffingtonpost.com/andy-worthington/lawyer-blasts-congression\\_b\\_315084.html](http://www.huffingtonpost.com/andy-worthington/lawyer-blasts-congression_b_315084.html).

<sup>303</sup> See generally HUMAN RTS. WATCH, LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTANAMO (2008), available at <http://www.hrw.org/node/62183/section/1>.

<sup>304</sup> See § 1033(a)(2) of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137, 4351.

Suspension Clause if such restrictions prevented the executive from complying with the order of a habeas court. However, the Act makes an express exception to transfer restrictions in order for the executive “to effectuate an order affecting the disposition of the individual that is issued by a court or competent tribunal of the United States having lawful jurisdiction.” The Act thus avoids any conflict with the Suspension Clause.<sup>305</sup>

#### b. Voluntary/Discretionary Transfers

As to the notification and waiting period for detainees cleared for transfer through discretionary review processes, this appears to be well within the constitutional authority of Congress. As I stated in an interview in October 2009, “It may be that, if the US [sic] is contemplating releasing a detainee that it has the lawful basis to detain under the laws of war, that Congress can legitimately condition the expenditure of US [sic] funds to effectuate the release on the provision of this notification to Congress.”<sup>306</sup> One potential caveat to this is if the administration determined that a detainee was being unlawfully held because he was not an unprivileged belligerent (or indeed a belligerent at all), for example, in a case of mistaken identity.<sup>307</sup> Could Congress constitutionally prevent the President from releasing someone determined to be detained in error? Suppose a detainee was cleared in a Combatant Status Review Tribunals or in a subsequent Administrative Review Board during the Bush administration? There were fifty-nine detainees already “approved for transfer or release by the prior administration”

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<sup>305</sup> Hains, *supra* note 198, at 2300–01 (internal citations omitted). The author failed to note the absence of such an exception in the 2009 and 2010 appropriations bills, or that seventeen detainees were directly affected.

<sup>306</sup> Worthington, *supra* note 302 (303).

<sup>307</sup> This is not such a far-fetched scenario. See Charlie Savage, William Glaberson & Andrew W. Lehren, *Classified Files Offer New Insights Into Detainees*, N.Y. TIMES, Apr. 24, 2011, <http://www.nytimes.com/2011/04/25/world/guantanamo-files-lives-in-an-american-limbo.html> (“The dossiers also show the seat-of-the-pants intelligence gathering in war zones that led to the incarcerations of innocent men for years in cases of mistaken identity or simple misfortune. In May 2003, for example, Afghan forces captured Prisoner 1051, an Afghan named Sharbat, near the scene of a roadside bomb explosion, the documents show. He denied any involvement, saying he was a shepherd. Guantánamo debriefers and analysts agreed, citing his consistent story, his knowledge of herding animals and his ignorance of “simple military and political concepts,” according to his assessment. Yet a military tribunal declared him an “enemy combatant” anyway, and he was not sent home until 2006.). See also Editorial, *U.S. Should Resettle Uighurs Held at Guantanamo*, L.A. TIMES, Apr. 22, 2011, <http://articles.latimes.com/2011/apr/22/opinion/la-ed-uighurs-20110422> (“The U.S. acknowledges the five detainees are victims of mistaken identity who were in the wrong place at the wrong time.”).

when President Obama assumed office.<sup>308</sup> Having been told they were cleared for release and would be transferred home or to a third country as soon as it could be arranged, these cleared detainees would have had no incentive to pursue a habeas corpus petition. Could there be completely innocent men (other than those who have already been ordered released through habeas corpus) at Guantanamo right now? Although the Guantanamo Review Task Force Final Report was at pains to note that even detainees approved for transfer were still legally detained,<sup>309</sup> they did acknowledge that “[f]or a small handful of these detainees, there was scant evidence of any involvement with terrorist groups or hostilities against Coalition forces in Afghanistan.”<sup>310</sup> The Executive order for the Periodic Review Boards also acknowledges the possibility that there might be persons unlawfully detained, directing that “[i]f, at any time during the periodic review process established in this order, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.”<sup>311</sup> The Executive order does not say what appropriate action would be, but logically the only morally appropriate action to finding that a detainee was illegally detained would be to promptly release him. Under the current spending restrictions, absent a court order, the executive branch could not do so. Under such circumstances, it seems incontrovertible that any restrictions on transfer would be unconstitutional, in violation of the Fifth Amendment for depriving a person of liberty without due process of law,<sup>312</sup> and that the executive branch would be obligated to either seek an extraordinary writ in federal court granting the detainee’s release or unilaterally ignore the restriction.

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<sup>308</sup> FINAL REPORT, *supra* 111.

<sup>309</sup> *Id.* at 17 (“It is also important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee.”).

<sup>310</sup> *Id.* at 16; *see also id.* at 13–14, (roughly 5% of the detainees are categorized as “miscellaneous others”—neither “[l]eaders, operatives, and facilitators involved in terrorist plots against U.S. targets,” nor “[o]thers with significant organizational roles within al-Qaida or associated terrorist organizations,” nor “Taliban leaders and members of anti-Coalition militia groups” nor “[l]ow-level foreign fighters.”).

<sup>311</sup> Exec. Order No. 13,576, 3 C.F.R. 230 (2011).

<sup>312</sup> For the application of the due process clause to detainees, see Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719 (2012).

### C. *Restrictions on Countries to Which Detainees Could Be Transferred*

Another interesting constitutional question relates to the onerous restrictions on countries to which detainees can be transferred first included in the 2011 NDAA. Is this an unconstitutional restriction on the President's foreign affairs powers, including his ability to negotiate with foreign countries? This possibility was raised, but rejected by one commentator, although he called it a close question.<sup>313</sup> The Obama administration seems initially to have come to the same conclusion.

In a statement objecting to the proposed provision in the 2011 NDAA relating to transfers to foreign countries, the White House noted “[t]he [e]xecutive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.”<sup>314</sup> But the administration stopped short of calling the provision unconstitutional. The President reiterated and expanded upon his disagreement with this provision in a signing statement<sup>315</sup> accompanying the 2011 NDAA, objecting strenuously to the restriction on policy grounds, but again not raising any constitutional objection:

With respect to section 1033, the restrictions on the transfer of detainees to the custody or effective control of foreign countries interferes with the authority of the executive branch to make important and consequential foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur in the context of an ongoing armed conflict. We must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries. The executive branch has sought and obtained from countries that are prospective recipients of Guantanamo detainees assurances that they will take or have taken measures reasonably designed to be effective in preventing, or ensuring against, returned detainees taking action to threaten the United States or engage in terrorist

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<sup>313</sup> Hains, *supra* note 198, at 2313–14.

<sup>314</sup> Statement of Administration Policy, Executive Office of the President, Office of Mgmt. & Budget, S. 1867 National Defense Authorization Act for FY 2012 (Nov. 17, 2011), [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s\\_20111117.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf) [hereinafter Statement of Administration Policy on NDAA].

<sup>315</sup> See generally Memorandum from the Administration of Barack H. Obama on Presidential Signing Statements to the Heads of Executive Dep'ts & Agencies, 74 Fed. Reg. 10,669–70 (Mar. 9, 2009) (discussing the President's policy on the appropriate uses of signing statements).

activities. Consistent with existing statutes, the executive branch has kept the Congress informed about these assurances and notified the Congress prior to transfers. Requiring the executive branch to certify to additional conditions would hinder the conduct of delicate negotiations with foreign countries and therefore the effort to conclude detainee transfers in accord with our national security.<sup>316</sup>

The President vowed that his “[a]dministration will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future.”<sup>317</sup> If such efforts were made, they failed. When a nearly identical provision was inserted into the 2012 NDAA, President Obama restated his objection to this provision more aggressively, for the first time suggesting that the provision could potentially violate the Constitution, under certain unspecified conditions:

Section 1028 modifies but fundamentally maintains unwarranted restrictions on the executive branch’s authority to transfer detainees to a foreign country. This hinders the executive’s ability to carry out its military, national security, and foreign relations activities and like section 1027, would, under certain circumstances, violate constitutional separation of powers principles. The executive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers. In the event that the statutory restrictions in sections 1027 and 1028 operate in a manner that violates constitutional separation of powers principles, my [a]dministration will interpret them to avoid the constitutional conflict.<sup>318</sup>

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<sup>316</sup> Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Administration of Barack Obama 2011, DAILY COMP. PRES. DOC. 10 (Jan. 7, 2011), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201100010/pdf/DCPD-201100010.pdf> [hereinafter Statement on Signing NDAA FY 2011]; see Steven D. Schwinn, *President Obama’s Signing Statement on Guantanamo Restrictions*, CONST. L. PROF BLOG (Jan. 9, 2011), <http://lawprofessors.typepad.com/conlaw/2011/01/president-obamas-signing-statement-on-guantanamo-restrictions.html> (analyzing the signing statement and noting that it was unusual in that it did not raise constitutional objections to the legislation); Jack Goldsmith, *The Weakness in the Obama Signing Statement*, LAWFARE (Jan. 9, 2011, 12:36 PM), <http://www.lawfareblog.com/2011/01/the-weakness-in-the-obama-signing-statement> (offering a blistering critique of the signing statement and the Administration’s approach to seeking its national security goals generally, for its lack of aggressiveness).

<sup>317</sup> Statement on Signing NDAA FY 2011, *supra* note 316.

<sup>318</sup> Statement on H.R. 1540, *supra* note 269.

It is unclear what, if anything changed in the administration's legal analysis.<sup>319</sup> One possibility, suggested by an article in the *New York Times*, is that the administration had begun a new kind of negotiation over the release of several detainees.<sup>320</sup> Rather than simply negotiating a transfer or resettlement of cleared detainees, the administration had reportedly entered into negotiations with the Taliban to exchange an American soldier, Sergeant Bowe Bergdahl, held prisoner by the Taliban, for five Taliban detainees at Guantanamo.<sup>321</sup> The administration might be concerned that the requirement that the President notify Congress and wait thirty days<sup>322</sup> before transferring the Taliban detainees could interfere with this delicate negotiation, and might unconstitutionally interfere with the Executive's power to negotiate prisoner of war exchanges.<sup>323</sup> Thus, the administration might conceivably "interpret" the provision to not apply under these circumstances.

#### D. *Restrictions on Transfer to the U.S. for Trial*

The only other legislative restriction to raise potential constitutional issues is the restriction on transfer to the United States for the purpose of prosecution. Two different theories have been suggested as to why blocking transfers for trials in

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<sup>319</sup> See Wells Bennett, *Signing Statement on the Budget Bill*, LAWFARE (Dec. 25, 2011, 9:04 AM), <http://www.lawfareblog.com/2011/12/4567> (discussing the mysterious change from one signing statement to the next).

<sup>320</sup> Elisabeth Bumiller & Matthew Rosenberg, *Parents of P.O.W. Reveal U.S. Talks on Taliban Deal*, N.Y. TIMES, May 10, 2012, at A1.

<sup>321</sup> *Id.*

<sup>322</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028(a)(1), 125 Stat. 1298, 1567.

<sup>323</sup> But, it is not clear that even this power resides exclusively with the President. See Prakash, *supra* note 279, at 340 (noting that while the President was authorized "to make such regulations and arrangements for the safe keeping, support and exchange of prisoners of war as he may deem expedient" Congress has the power to circumscribe this authority, and has done so, for example in the 1798 Naval War with France and in the War of 1812); see also Yoo, *supra* note 276, at 1204 ("When drafting and ratifying the Constitution in 1787, the Framers would have understood the President's Commander in Chief and Chief Executive powers as encompassing the power to dispose of the liberty of prisoners of war. The Framers made no express allocation in the Constitution of the power to dispose of persons captured during military engagements; their silence on the point signals their intent to leave the executive nature of the power untouched."); Ingrid Brink Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 83 (2007) ("[George] Washington, under title [C]ommander in [C]hief during the Revolutionary War, looked to Congress to manage many aspects of the conduct of war, including the treatment and exchange of prisoners . . . . [I]f the [P]resident was expected to enjoy significantly greater war-prosecution powers than Washington had during the Revolutionary War, then that authority must come from some language other than 'Commander in Chief.'")

federal court (thereby forcing the administration to prosecute detainees in military commissions or not at all) might violate the Constitution.

The first theory is that the restriction violates the Bill of Attainder Clause.<sup>324</sup> This theory was first advanced by Professor Peter Margulies in a blog post in September 2010, when such a restriction was merely a hypothetical possibility.<sup>325</sup> Professor Margulies, a respected national security scholar at Roger Williams Law School, argued that any spending restriction on bringing Guantanamo detainees to civilian trial in the United States would violate separation of powers and the Bill of Attainder Clause.<sup>326</sup>

According to Professor Margulies, to ensure the proper balance of separation of powers, “prosecution must follow the pattern that the Framers preferred: Congress passes general laws that identify offenses, and prosecutors decide when to bring charges.”<sup>327</sup>

He continued:

A congressional limit on transfers for criminal prosecution would upset this careful balance. Prosecutors might well believe that a prosecution in a civilian court for terrorism-related offenses would be the most appropriate path for particular detainees . . . [A] bar on transferring detainees to the United States for criminal prosecution would effectively remove this alternative from the prosecutor’s arsenal. A bar on civilian trials would also preclude a civilian jury, and make a military commission the sole mode of trial available. Military proceedings can be fair, but a congressional requirement that they be the sole mode of trial for conduct that has already occurred singles out current detainees for harsh treatment, and therefore would violate the Bill of Attainder Clause.<sup>328</sup>

The ACLU also advanced the bill of attainder theory in a letter to President Obama urging him to veto the 2011 NDAA:

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<sup>324</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>325</sup> Benjamin Wittes, *More on S. 3707 from Peter Margulies*, LAWFARE (Sept. 13, 2010, 9:00 PM), <http://www.lawfareblog.com/2010/09/more-on-s-3707-from-peter-margulies/>.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

A ban, or material limitation, on transfers both to the United States and to foreign countries would be a bill of attainder, which the Constitution bars Congress from enacting. As the Supreme Court explained in *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977), the Bill of Attainder Clause in Article I of the Constitution prohibits Congress from passing “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” The three elements of a bill of attainder are “[1] specification of the affected persons, [2] punishment, and [3] lack of a judicial trial.” *Selective Serv. Sys. v. Minn. Public Interest Research Group*, 468 U.S. 841, 847 (1984). The transfer provisions of H.R. 6523 are unconstitutional because they would meet each requirement.<sup>329</sup>

The letter failed to persuade President Obama, and he signed the bill despite his misgivings about it. The ACLU’s bill of attainder theory was subsequently analyzed by a commentator in the *Brigham Young University Law Review*, Mr. William Hains, who concluded that “[u]pon closer examination, the restrictions

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<sup>329</sup> The letter further explained:

First, H.R. 6523 would satisfy the specificity prong of the inquiry because the transfer provisions single out an identifiable group of people for differential treatment: foreign nationals who are not members of the United States military and were held at Guantanamo on or after January 20, 2009. There are exactly 174 specifically identifiable men affected by the transfer provisions.

Second, if the transfer restrictions, particularly when the two provisions are read together, are interpreted to act as a complete ban or material limit on transfers, they would constitute punishment because they effectively prohibit detainees from leaving their Guantanamo prison. Legislatively enforced continued imprisonment or confinement to Guantanamo would, in fact, constitute punishment more severe than any punishment held to be unconstitutional under any of the bill of attainder challenges decided by the Supreme Court during its entire history—none of those decisions involved any person being imprisoned or having his or her release from imprisonment blocked.

Third, the “lack of a judicial trial” element would be met because the vast majority of detainees subject to enforced legislative imprisonment will not face trial. Only three Guantanamo detainees have been convicted of crimes, while 171 have never been tried for any crime. In fact, the government has stated that fewer than 40 of the detainees will ever be tried for any crime.

Letter from ACLU to President Barack Obama, Re: Guantanamo Transfer Provisions in H.R.652 (Jan. 5, 2011), [http://www.aclu.org/files/assets/2011-15\\_ACLU\\_Letter\\_to\\_Obama\\_RE\\_Guantanamo\\_Transfer\\_Provisions\\_in\\_the\\_NDAA.pdf](http://www.aclu.org/files/assets/2011-15_ACLU_Letter_to_Obama_RE_Guantanamo_Transfer_Provisions_in_the_NDAA.pdf).

do not seem to meet the punishment requirement of a bill of attainder.”<sup>330</sup> Mr. Hains reasoned that “indirectly lengthen[ing] a detainee’s imprisonment” at Guantanamo did not amount to legislative punishment because the law of war detention was lawful and for a non-punitive purpose. He also rejected the notion that a “policy preference for prosecuting wartime detainees in military commissions rather than civilian courts” constitutes punishment.<sup>331</sup>

In my view, Mr. Hains has the better of the argument. There are some additional flaws with the bill of attainder theory. First, the restriction occurs in a spending bill, and is temporary in nature. Thus, the restriction is not a permanent bar to prosecution in federal court. More importantly, the provision does not force any particular detainee to be prosecuted in military commissions.<sup>332</sup> The Government still retains complete prosecutorial discretion over whom to charge in the military commissions. Furthermore, none of the thirty-six detainees who potentially might have been transferred to the United States to face federal trials have been cleared for release or otherwise determined to be unlawfully held as unprivileged belligerents, and there is no statute of limitations in military commissions, so the administration is not forced to make a decision to prosecute within any specific deadline. Finally, the argument that forcing someone to be tried in a military commission versus a federal court amounts to punishment based on the fact that military commissions offer fewer due process protections than federal courts is unpersuasive. After the reforms in the Military Commissions Act of 2009, the procedural and substantive differences between the two systems are relatively minor. Despite the weakness of the theory and the low probability of success, defense counsel for Guantanamo detainees facing trial by military commissions are likely to craft a motion based on the Margulies-ACLU bill of attainder theory.<sup>333</sup>

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<sup>330</sup> Hains, *supra* note 198, at 2302.

<sup>331</sup> *Id.* at 2302–03.

<sup>332</sup> Professor David Cole also has rejected the Bill of Attainder theory, which was raised by Professor Michael Haas in a letter to the New York Review of Books in response to an article by Professor Cole. According to Professor Cole, the “bill of attainder theory is creative, but I’m afraid too creative to pass muster in the courts.” *Obama and Terror: Michael Haas, reply by David Cole: In Response to Obama and Terror: The Hovering Questions from the July 12, 2012 Issue*, N.Y. POST REV. OF BOOKS, Sept. 27, 2012, <http://www.nybooks.com/articles/archives/2012/sep/27/obama-and-terror/?pagination=false> (last visited Nov. 23, 2012) (“The Constitution’s Bill of Attainder Clause bars the legislative imposition of punishment on individuals, but the detainees at Guantanamo are being held under a theory of preventive military detention, not punishment.”).

<sup>333</sup> A Bill of Attainder motion has already been argued in pretrial litigation in *United States v. Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri*, the first contested case under the 2009 MCA, although the restrictions in the NDAA were not mentioned. *See* Motion to Dismiss Charges, *U.S. v. Abd al-Rahim*

Khalid Sheikh Mohammed has potentially the strongest bill of attainder argument, since he was mentioned by name in both the 2011 and 2012 NDAA, and because the bills clearly prevented the administration from transferring him to the United States (where he had already been indicted prior to the legislation)<sup>334</sup> to face trial, thereby satisfying the “specificity” prong of the bill of attainder test. Nevertheless, I consider it highly improbable that any commission or reviewing court would dismiss the charges against the alleged mastermind of 9/11 on the basis that being detained at Guantanamo to face trial in a military commission, as opposed to being held in federal custody awaiting a federal criminal trial, constitutes punishment and “lack of a judicial trial.”

The second theory of unconstitutionality of the bar on transferring detainees for trial is an argument based on prosecutorial discretion. This constitutional objection to the 2011 NDAA was advanced by an unlikely source, staunch conservatives David B. Rivkin Jr. and Lee A. Casey. In an opinion piece in the *Wall Street Journal* in December 2010, Rivkin and Casey asserted:

The [P]resident is the chief federal law enforcement officer and prosecutor. Whether, when and where to bring a particular prosecution lies at the very core of his constitutional power. Conditioning federal appropriations so as to force the [P]resident to exercise his prosecutorial discretion in accordance with Congress’s wishes rather than his own violates the Constitution’s separation of powers.<sup>335</sup>

The authors continued:

Congress cannot use its spending power to force the president or the states to surrender their core constitutional authority. Thus, although Congress can require a

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Hussein Muhammed Abdu Al-Nashiri, AE-052 (Mar. 12, 2012), *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx>. Mr. al Nashiri has the weakest argument that the prosecution restrictions amount to a bill of attainder because he was designated for prosecution in the military commissions at a time when the Executive still had a choice between military commissions and federal trials. Bill of attainder motions have been filed repeatedly in the military commissions. All have been denied. *See* United States v. Al Bahlul, No. 09-001, at 122–28 (USCMCR Sept. 9, 2011) (finding that 2006 MCA was not a bill of attainder).

<sup>334</sup> *See* Indictment (S14) 93 CR 180 (KTD) (Dec. 14, 2009), *available at* <http://www.justice.gov/opa/documents/ksm-indictment.pdf>.

<sup>335</sup> David B. Rivkin Jr. & Lee A. Casey, Opinion, *The Wrong Way to Stop Civilian Terror Trials*, WALL ST. J., Dec. 21, 2010, at A17.

decent human rights record before U.S. aid flows to a particular regime, it cannot condition federal money on the [P]resident's refusal to recognize a particular government, or on his particular exercise of the U.S. veto in the U.N. Security Council. Such decisions—including where, when and how to prosecute—are the President's to make.<sup>336</sup>

Rivkin and Casey's article drew a forceful rebuttal from prominent conservative Andrew C. McCarthy. Writing in the *National Review*, McCarthy disputed their entire premise:

Prosecutorial authority . . . is inferred from Article II's endowment of all "executive power" in the President. Obviously, since prosecution is an executive function, it is a power the executive branch must have if it is to be exercised by the [F]ederal [G]overnment at all—Congress may prescribe laws, but it may not enforce them. Still, whether and under what circumstances the prosecution power was to be exercised at the federal level are questions the Constitution left entirely up to Congress. The fact that some authority is executive in nature does not make it a "core" presidential power.<sup>337</sup>

A scholarly analysis of the prosecutorial discretion argument by Mr. Hains reached the same conclusion. Although he notes that, "[p]rosecutorial discretion arises from the Vesting and Take Care Clauses,"<sup>338</sup> he ultimately concludes that the restrictions do not run afoul of the Constitution, noting that "[d]efining the conditions of prosecution—which is what every criminal law does in essence—does not infringe on the exclusive power of the President."<sup>339</sup> Further, he concluded, "to the extent prosecutorial discretion is grounded in general separation-of-powers concerns, it primarily deals with separation between the executive and the judiciary."<sup>340</sup>

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<sup>336</sup> *Id.*

<sup>337</sup> Andrew C. McCarthy, *The President Is No Prosecutor*, NAT'L REV. ONLINE, Dec. 28, 2010, <http://www.nationalreview.com/articles/255982/president-no-prosecutor-andrew-c-mccarthy> ("From its basic premises to its overwrought conclusion, the lawyers' argument is wrong.")

<sup>338</sup> Hains, *supra* note 198, at 2304.

<sup>339</sup> *Id.* at 2305.

<sup>340</sup> *Id.* See generally Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIRCUIT REV. 1 (2009).

President Obama singled out this provision for harsh criticism, but did not, at least initially, assert that it was unconstitutional. Responding to the 2011 NDAA, the President said: “Section 1032 [barring the use of funds to transfer detainees into the United States] represents a dangerous and unprecedented challenge to critical [e]xecutive [b]ranch authority to determine when and where to prosecute Guantanamo detainees.”<sup>341</sup> Other senior members of the administration made similar comments. For example, Attorney General Holder discussed the legislative restrictions on transfers for prosecution in remarks about the decision to shelve the plan to try the 9/11 case in federal court and refer it back to a military commission:

Unfortunately . . . [m]embers of Congress have intervened and imposed restrictions blocking the administration from bringing any Guantanamo detainees to trial in the United States, regardless of the venue. As the President has said, those unwise and unwarranted restrictions undermine our counterterrorism efforts and could harm our national security. Decisions about who, where[,] and how to prosecute have always been—and must remain—the responsibility of the [e]xecutive [b]ranch. Members of Congress simply do not have access to the evidence and other information necessary to make prosecution judgments. Yet they have taken one of the nation’s most tested counterterrorism tools off the table and tied our hands in a way that could have serious ramifications. We will continue to seek to repeal those restrictions.<sup>342</sup>

Attorney General Holder also stopped short of calling the restrictions unconstitutional, and did not say they would be challenged in court. Indeed, he indicated that he expected the restrictions to continue: “we must face a simple truth: those restrictions are unlikely to be repealed in the immediate future.”<sup>343</sup>

Attorney General Holder was right. When the administration sought to have these provisions removed from subsequent appropriations bills, it failed. When Congress was putting the finishing touches on the 2012 NDAA, the White House issued a rare veto threat over this provision and several other objectionable items in

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<sup>341</sup> Statement on Signing NDAA FY 2011, *supra* note 316.

<sup>342</sup> Statement of the Attorney Gen. on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011), <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html>.

<sup>343</sup> *Id.*

the bill.<sup>344</sup> Congress ignored the threat and passed the measure unchanged. President Obama raised similar concerns to those he had voiced with regard to the restriction on transfers to other countries. In his signing statement accompanying the 2012 NDAA, the President suggested that his objections to the provision were not merely based on public policy, as previously suggested, but could rise to a constitutional dimension. However, the signing statement was again very unclear about the specific situations which might give rise to such a determination:

Section 1027 renews the bar against using appropriated funds for fiscal year 2012 to transfer Guantanamo detainees into the United States for any purpose. I continue to oppose this provision, which intrudes upon critical [e]xecutive [b]ranch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests. For decades, Republican and Democratic administrations have successfully prosecuted hundreds of terrorists in Federal court. Those prosecutions are a legitimate, effective, and powerful tool in our efforts to protect the Nation. Removing that tool from the [e]xecutive [b]ranch does not serve our national security. Moreover, this intrusion would, under certain circumstances, violate constitutional separation of powers principles.<sup>345</sup>

There is reason to believe that the administration does not have much faith in its own suggestion of a possible constitutional violation. In a recent law review, David Kris, former head of the National Security Division in the Obama Department of Justice, compared the advantages and disadvantages of military commissions and the federal criminal justice system and argued that the executive branch must have discretion to choose which to use in specific cases. He noted the congressional restrictions and argued that they were bad policy, but never suggested that they were unconstitutional.<sup>346</sup> Surely, if he believed there was a plausible constitutional argument to be advanced, he would have done so.

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<sup>344</sup> Statement of Administration Policy on NDAA, *supra* note 314 (“Any bill that challenges or constrains the President’s critical authorities to collect intelligence, incapacitate dangerous terrorists, and protect the Nation would prompt the President’s senior advisers to recommend a veto.”).

<sup>345</sup> Statement on H.R. 1540, *supra* note 269.

<sup>346</sup> David Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT’L SECURITY L. & POL’Y 1 (2011).

I have been a strong critic of the military commissions,<sup>347</sup> and a strong advocate for trying detainees suspected of terrorism in civilian courts.<sup>348</sup> I wholeheartedly agree with Mr. Kris, Professor Lobel, and others that the restriction on transferring detainees to the United States for trial is abysmally bad policy; nevertheless, I cannot conclude that there is a serious constitutional flaw with this provision. My conclusion is bolstered by the fact that although several leading civil rights and civil liberties groups have expressed strong public policy objections to the 2011 and 2012 NDAA, particularly to the bar on transfer for federal prosecution, none of them have suggested that the restrictions are unconstitutional.<sup>349</sup>

In conclusion, with the exception of the unlawful suspension of the writ for a small group of detainees by a few weeks (caused by delaying immediate release to those detainees granted habeas corpus relief in federal court from July 2009 to the end of December 2010 to comply with the notice and waiting period restrictions in the 2009 and 2010 appropriations acts), the various restrictions on the transfer and release of Guantanamo detainees are a lawful, if ill-advised exercise of congressional constitutional authority over national wartime policy. While it may still be appropriate to characterize some Guantanamo detainees as Prisoners of Congress, none that I can identify are currently unconstitutionally imprisoned by Congress.

#### IV. CONCLUSION

Nearly four years after the Executive order to close Guantanamo was signed, there are still 166 detainees at Guantanamo, over half of whom were cleared for release years ago, and there is no prospect of releasing many of them, much less closing the facility in the immediate future. For those who supported the President's initial pledge to close the island detention complex, this state of affairs

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<sup>347</sup> See, e.g., David Frakt, *Let the Military Commissions Die*, SALON.COM (Aug. 4, 2009), [http://www.salon.com/opinion/feature/2009/08/04/military\\_commissions/index.html](http://www.salon.com/opinion/feature/2009/08/04/military_commissions/index.html).

<sup>348</sup> David Frakt, *Terrorists Should Be Tried in Court*, CNN.COM (Mar. 17, 2010), <http://www.cnn.com/2010/OPINION/03/17/frakt.military.trials/index.html>.

<sup>349</sup> See, e.g., HUMAN RIGHTS WATCH, INDEFINITE DETENTION NINE YEARS LATER WITH NO END IN SIGHT (2011); Press Release, Center for Constitutional Rights Condemns President Obama for Signing the 2012 National Defense Authorization Act (Jan. 4, 2012), <http://ccrjustice.org/newsroom/press-releases/center-constitutional-rights-condemns-president-obama-signing-2012-national-defense-authorization-ac>; Press Release, President Obama Signs Indefinite Detention Bill Into Law (Dec. 31, 2011), <https://www.aclu.org/national-security/president-obama-signs-indefinite-detention-bill-law>.

is deeply frustrating. There has been much finger-pointing as to who is to blame, with some attributing the uncompleted task to a failure of leadership on the part of the President,<sup>350</sup> and others to an obstructionist Republican Congress.<sup>351</sup> For nearly every argument that Congress should be held responsible, there is a counterargument. For example, before Congress blocked the release into the U.S. of wrongfully held detainees legislatively, the administration effectively blocked the release of the only detainees ever seriously considered for resettlement in the United States, choosing to appeal the D.C. District Court's decision<sup>352</sup> to order the release of Uighurs in the United States even though the administration agreed that they were innocent and had no real objection to them being resettled in the United States. Indeed, the administration developed its own plan to resettle several Uighurs in the United States while such a move was legally permissible, but then voluntarily abandoned this plan in the face of congressional and public opposition, making it much more difficult to find other countries willing to accept detainees for resettlement.<sup>353</sup> According to an unnamed Obama administration official this "show of weakness doomed the effort to close Guantanamo."<sup>354</sup>

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<sup>350</sup> See, e.g., Goldsmith, *supra* note 316 ("The Obama administration, by contrast, has not obviously expended any real political capital in support of its supposed commitment to close GTMO and conduct civilian trials for terrorists. During the two-year period in which the president's party dominated Congress, the administration avoided confrontation with Congress over these issues and consistently traded away GTMO-closing initiatives for other congressional goals. And for the last year, the administration has acquiesced, without any political or legal fight, in what it correctly describes as 'unprecedented' intrusion into the president's traditional prerogatives to transfer wartime detainees. The administration clearly lacks the courage of its convictions on the disposition of GTMO detainees."); Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test Of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1 (asserting that the President "shunned the legislative deal-making required to close the detention facility at Guantánamo Bay in Cuba" citing a comment to his national security adviser that he "had never devised a plan to persuade Congress to shut down the prison"); see also Erin B. Corcoran, *Obama's Failed Attempt to Close Gitmo: Why Executive Orders Can't Bring About Systemic Change*, 9 UNIV. N.H. L. REV. 207 (2011) (arguing that an Executive order was the wrong way to try to close Guantanamo and that the President should have tried to get legislative approval early in his presidency when there was broad public support for such a closure).

<sup>351</sup> See, e.g., Carol Rosenberg, *Congress, Rules Keep Obama From Closing Guantanamo Bay*, MIAMI HERALD, Jan. 9, 2012, <http://www.mcclatchydc.com/2012/01/09/135179/congress-rule-keep-obama-from.html>.

<sup>352</sup> *Kiyemba v. Bush*, 581 F. Supp. 2d 33 (D.D.C. 2008).

<sup>353</sup> Manel, *supra* note 87 ("It is fair to say, it is just an objective statement, that the US could resettle more detainees [worldwide], had we been willing to take some.").

<sup>354</sup> Becker & Shane, *supra* note 350.

Similarly, while congressional action has delayed the transfer of numerous detainees already cleared for release, the administration's own actions have contributed significantly to the failure, establishing the principle that some countries are too dangerous to send detainees to because of the domestic security situation. Before Congress blocked transfers to all countries but our most stable allies with its onerous certification requirements, the administration had imposed its own moratorium on release to Yemen (where the majority of the remaining detainees are from), and had identified the conditions under which transfers there would resume. Thus, it gave a blueprint on how to keep detainees in Guantanamo to Congress, which then essentially codified the moratorium and broadened it.

Although Congress unconstitutionally delayed several habeas corpus transfers, including Mohammed Jawad, for a few weeks, the administration prevented several potential habeas corpus releases completely. After accepting the habeas corpus decision of the district courts and declining to appeal in six of the first seven detainee cases, the Obama Department of Justice appealed eight out of the next nine times that the district court granted relief, winning on appeal seven times.<sup>355</sup> While the fact that they won on appeal might suggest that there was merit to the appeals,<sup>356</sup> it is unclear what prompted the Department of Justice's more aggressive posture. Certainly, it is inconsistent with the overall goal of reducing the Guantanamo detainee population. In fact, the administration appealed the grant of habeas corpus in three cases where the detainee review task force had approved the

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<sup>355</sup> *Guantanamo Habeas Scorecard*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf> (last updated Feb. 9, 2011) (listing the results of each detainee habeas petition, whether it was appealed, and the result on appeal).

<sup>356</sup> Another possibility is that the Court of Appeals for the District of Columbia has been more deferential to the government's factual assertions, making it increasingly difficult for a detainee to win habeas corpus relief. See Mark Denbeaux et al., *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review*, SETON HALL UNIVERSITY SCHOOL OF LAW CENTER FOR POLICY & RESEARCH, May 1, 2012, available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/hearing-habeas.pdf> (empirical analysis of trends in habeas corpus cases revealing pattern of greater deference to government factual assertions, resulting in lack of meaningful review); Editorial, *Delaying Justice at Guantanamo*, N.Y. TIMES, May 9, 2012, at A22 (criticizing D.C. Court of Appeals for blocking meaningful right to challenge detention through a decision "which eviscerates the . . . ruling in *Boumediene v. Bush*"). Perhaps the strongest example of the court's deference to the government's evidence is *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011), in which the Court of Appeals held that government intelligence reports are entitled to both a presumption of accuracy and a presumption of reliability, essentially shifting the burden of proof to the detainee. See Linda Greenhouse, *Goodbye to Gitmo*, N.Y. TIMES, May 16, 2012, <http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/?hp>; Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus After Boumediene*, 57 WAYNE L. REV. 91 (2012).

detainee for release.<sup>357</sup> In all three cases, the grant of habeas was reversed on appeal, resulting in the continued detention of individuals the administration ostensibly wished to release. The administration also successfully contested the habeas corpus petitions of five other detainees from the cleared list.<sup>358</sup>

Some might also fault the President for failing to follow through on his threat to veto the legislation containing the spending restrictions.<sup>359</sup> But it simply was not realistic for the President to veto an entire defense budget bill in the midst of an armed conflict (two armed conflicts when the 2011 NDAA was passed).

The President can be faulted for failing to forcefully articulate the moral and national security imperative of closing Guantanamo, and for not giving this task a higher priority.<sup>360</sup> The administration's repeated failure to meet self-imposed deadlines has not conveyed the sense of urgency that emptying Guantanamo should receive. The failure of the Pentagon to produce guidelines for the Periodic Review Boards and to commence the reviews by the President's March deadline is just the latest example of executive branch dawdling on Guantanamo issues. A key opportunity to stress the urgency and importance of closing Guantanamo came in an interview with Major Garrett of *Fox News* in Beijing on November 18, 2009. According to an account of the interview in the *Washington Post*, when asked his feelings about the fact that Guantanamo would not close by his one-year deadline,

Obama said he was "not disappointed" that the Guantanamo deadline had slipped, saying he "knew this was going to be hard." "People, I think

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<sup>357</sup> The three detainees were Adnan Farhan Abdul Latif (ISN 156), Said Muhammed Salih Hatim (ISN 255) and Hussein Salem Mohammad Almerfedi (ISN 1015), all Yemenis. See *Guantanamo Habeas Scorecard*, CENTER FOR CONST. RTS., <http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf> (last updated Feb. 9, 2011); Current Guantanamo Bay Detainee Population—Petitioners Approved For Transfer (Sept. 21, 2012) Document 314-2 Case No. 1:04-cv-01166-RJL, <http://images.politico.com/global/2012/09/gitmolist55.pdf>.

<sup>358</sup> Hisham Sliti (ISN 174), a Tunisian, Suleiman Awadh Bin Aqil Al-Nahdi (ISN 511) of Yemen, Fahmi Salem Al-Assani (ISN 554) of Yemen, Shawali Khan (ISN 899) Afghanistani, Belkacem Bensayah (ISN 10001) a Bosnian-Algerian. *Id.*

<sup>359</sup> See Josh Gerstein, *On National Defense Authorization Act, Obama Pulls Veto Threat*, POLITICO (Dec. 14, 2011), <http://www.politico.com/blogs/under-the-radar/2011/12/obama-pulls-veto-threat-on-defense-bill-107514.html>.

<sup>360</sup> See, e.g., Matthew Harwood, *Obama's Gitmo Betrayal*, SALON.COM (Oct. 26, 2012), [http://www.salon.com/2012/10/26/habeas\\_lawyers\\_against\\_obama/](http://www.salon.com/2012/10/26/habeas_lawyers_against_obama/) (detailing disappointment of habeas lawyers who supported Obama in 2008 based on his promises to restore the rule of law to Guantanamo detention operations).

understandably, are fearful after a lot of years where they were told that Guantanamo was critical to keep terrorists out,” Obama said. Closing the facility, he added, is “also just technically hard.”<sup>361</sup>

This comment conveyed exactly the wrong message if the President was intent on closing Guantanamo.

More important than his lukewarm advocacy for closing Guantanamo were two key policy decisions by the President that at a minimum reduced the likelihood of success, if they did not completely doom his plan to close Guantanamo. First, before Congress limited the ability to transfer detainees to the United States for trial, essentially forcing military commissions as the sole option, the administration had already embraced “reformed” military commissions in May 2009, which was followed by announcing plans to try several detainees in military commissions in December 2009. As one commentator has noted, “the administration . . . fatally undermined its case for federal trials in the first place by announcing the revival of the military commissions on the same day that the 9/11 trial was announced.”<sup>362</sup> Having spent tens-of-millions of previously authorized funds to build a state of the art courthouse complex (the Expeditionary Legal Center or “Camp Justice”) at Guantanamo for the sole purpose of holding military commissions, can Congress be blamed for forcing the administration to use these facilities for the commissions that the administration independently decided to pursue? The administration did not help matters by publishing criteria for choosing civilian courts versus military commission, which offered no principled basis to prefer one over the other.<sup>363</sup> Also, before Congress specifically barred K.S.M. and the 9/11 conspirators from being tried in federal court in the U.S., the administration had apparently voluntarily

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<sup>361</sup> Finn & Kornblut, *supra* note 115.

<sup>362</sup> Andy Worthington, *The Torture Trials at Guantanamo*, ANDYWORTHINGTON (Apr. 20, 2012), <http://www.andyworthington.co.uk/2012/04/20/the-torture-trials-at-guantanamo/>.

<sup>363</sup> See Frakt, *supra* note 348 (“So far, the attorney general has failed to offer any principled basis for which defendants are sent to which forum, leaving many with the disturbing impression that the decisions are based on political, rather than legal, considerations.”). See generally GUANTANAMO CASES REFERRED FOR PROSECUTION, *supra* note 222 (joint protocol between DOJ and DoD establishing criteria for selecting federal courts or military commissions).

abandoned its plan to try them in federal court in the face of opposition from local politicians.<sup>364</sup>

Secondly, and perhaps more important, was the continuation of the Bush-era policy of indefinite detention.<sup>365</sup> By embracing long-term indefinite detention, establishing a category of forty-eight detainees who were “too dangerous to release but could not be tried” (and doing so just one month before the President’s self-imposed deadline for closing Guantanamo) the administration established a conclusive need to have a Guantanamo somewhere, if not necessarily at the Cuban naval base, for the foreseeable future. Thus, although Congress has blocked the use of funds to “close Guantanamo,” and refused to fund the administration’s plan to purchase or build a long-term detention facility (such as the Thomson Correctional Center in Illinois), arguably all this has done is prevent the administration from establishing “Guantanamo North.” After investing hundreds of millions of dollars to build safe, secure, modern detention facilities and bring them up to internationally acceptable standards, it is reasonable to ask whether Congress should be blamed for not providing the funds to the administration to establish a functionally identical facility elsewhere.

But, Congress can and should be blamed for hypocrisy. Although legislators on the right expressly claimed that the President’s adoption of two of the central pillars of the Bush administration’s detention policies (military commissions and indefinite detention) vindicated the Bush-era approach to detainee issues, they have prevented the President from following another important Bush administration policy, namely the transfer or release of innocent and low-risk detainees. President Bush transferred, on average, 76 detainees per year out of Guantanamo from January 2002 to January 2009.<sup>366</sup> Due in large part to congressional restrictions, President Obama has been unable to transfer 76 detainees in his entire four-year term.<sup>367</sup>

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<sup>364</sup> Editorial, *Cowardice Blocks the 9/11 Trial*, N.Y. TIMES, Apr. 5, 2011, at A22. (“That retreat [from trying Khalid Sheikh Mohammed in New York City] was a victory for Congressional pandering and an embarrassment for the Obama administration, which failed to stand up for it.”).

<sup>365</sup> Kristine A. Huskey, *Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention*, 9 UNIV. N.H. L. REV. 183 (2011) (discussing failure to close Gitmo as reflection of policy to continue practice of indefinite detention).

<sup>366</sup> As noted *supra* note 181, the Bush administration transferred 532 detainees.

<sup>367</sup> Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba, Director of National Intelligence (Mar. 1, 2012), <http://www.dni.gov/index.php/newsroom/reports-and-publications/93-reports-publications-2012/487-summary-of-the-reengagement-of-detainees-formerly-held-at->

In the end, even though there is much to criticize about the President's handling of Guantanamo, there is a critical distinction when it comes to moral blameworthiness between the President and the Congress—the President is trying to do the right thing, however haltingly, and Congress is not. The President has made good faith efforts to release and resettle many detainees, consistent with national security.<sup>368</sup> He recognizes that the Guantanamo detainees, whatever the basis for their detention, are real human beings who have experienced great hardship and suffering. The same cannot be said of the Republican-dominated Congress, which, along with some Democrats who are fearful of being labeled as soft on terrorists, regards detainees as tools to be exploited for political gain. The blanket condemnation of all Guantanamo detainees and the exaggerated statements about the threats they pose to domestic security, even while they are incarcerated, demonstrate the unfortunate political truth that it is always easy to demonize those who have no constituency to defend them, and there is no political price to be paid for holding them up to scorn.

While many members of both parties of Congress pay lip service to national security and express fear of recidivism, these concerns do not justify holding scores of men who have been determined to pose little or no risk to the U.S. in perpetual detention, however improved the current conditions at Guantanamo may be. It should not be forgotten that the primary reason for closing Guantanamo in the first place was national security. Guantanamo symbolized all of the excesses of the Bush administration's arbitrary and cruel detention and interrogation policies, and its continued operation provides a potent recruiting tool to our enemies abroad. By forcing the President to keep Guantanamo open, Congress has provided our enemies with priceless propaganda to help them recruit the next generation of jihadists. With tens of thousands of troops still deployed to a hostile environment in Afghanistan, and continued active recruitment of potential terrorists among disaffected youths throughout the world, even the maintenance of a more humane Guantanamo facility is deeply troubling and potentially far more dangerous to our troops and Americans in general than the potential harm in releasing a few dozen

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guantanamo-bay,-cuba (stating that there were 43 in 2009, 24 in 2010, 1 in 2011, 3 in 2012 for a total of 71). After this report was issued, Ibrahim al Qosi and Omar Khadr were transferred, bringing the total to 73.

<sup>368</sup> For example, he appointed a senior diplomat, Ambassador Daniel Fried, as a special envoy on the closure of Guantanamo to lead the effort to negotiate the resettlement of Guantanamo detainees to third countries. William Glaberson & Mark Landler, *Top Diplomat to Be Named Special Envoy on Guantanamo*, N.Y. TIMES, Mar. 12, 2009, at A18.

detainees to a score of countries, mostly far from the battlefield. The argument that Congress is protecting Americans from detainees who might return to the fight does not bear scrutiny. Even if we accept the highest estimate of recidivism, only one in four released detainees have returned to jihadist or insurgent activities over the course of several years after their release; that would mean approximately 20–22 of those detainees cleared for release might also be expected to engage or re-engage in such activities in the coming years. Given the thousands of fighters that we are facing, this is a negligible added risk. But the potential benefits of resettling or sending home the remaining detainees cleared for release is enormous. If the majority of these men are, as the Guantanamo Review Task Force suggested, low-level Taliban foot soldiers, what better way to jump-start the effort to engage in peace talks with the Taliban than with a large-scale prisoner transfer?

While, for those who advocate the closure of Guantanamo, there has been much to criticize in the President's policies concerning Guantanamo detainees, the bottom line is this—throughout his first term in office, the President wanted to send most of the detainees home and Congress did not let him. In essence, Congress forced the President to imprison twice as many detainees at Guantanamo as the administration believed necessary for national security purposes, which not only affected the individual detainees, but made the overall task of closing Guantanamo far more complicated than it needed to be.

Interestingly, after being a hot issue in the last presidential election, Guantanamo was a virtual non-issue in the 2012 election cycle. Understandably, given the widespread public support even among liberals for keeping Guantanamo open,<sup>369</sup> the President did not make the closure of Guantanamo a major campaign issue. In fact, Guantanamo was not mentioned by either candidate in the presidential debate on foreign policy (or either of the other two debates, focusing on domestic policy), quite possibly disappointing a number of Guantanamo detainees, who were permitted to watch the debate in their cellblocks.<sup>370</sup> In fact, the only reported mention of Guantanamo by the President during the fall campaign

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<sup>369</sup> Scott Wilson & Jon Cohen, *Poll Finds Broad Support for Obama's Counterterrorism Policies*, WASH. POST (Feb. 7, 2012), [http://www.washingtonpost.com/politics/poll-finds-broad-support-for-obamas-counterterrorism-policies/2012/02/07/gIQAFrSEyQ\\_story.html](http://www.washingtonpost.com/politics/poll-finds-broad-support-for-obamas-counterterrorism-policies/2012/02/07/gIQAFrSEyQ_story.html). (“The survey shows that 70 percent of respondents approve of Obama's decision to keep open the prison at Guantanamo Bay.” “53 percent of self-identified liberal Democrats—and 67 percent of moderate or conservative Democrats—support keeping Guantanamo Bay open.”).

<sup>370</sup> *Guantanamo prisoners tuned in for Obama-Romney debate*, REUTERS, Oct. 23, 2012, <http://www.reuters.com/article/2012/10/23/us-usa-campaign-debate-guantanamo-idUSBRE89M15720121023>.

came on the *Daily Show with Jon Stewart* on October 18, 2012, when the President said he still wanted to close Guantanamo, but “we haven’t been able to get that through Congress.”<sup>371</sup> He further expounded, “[o]ne of the things we have to do is put a legal architecture in place, and we need Congressional help to do that.” Obama added, “any President’s reined in in terms of some of the decisions we’re making.”<sup>372</sup> These comments suggest not only that the President holds Congress responsible for the continued presence of detainees at Guantanamo, but also that he recognizes that Congress can legitimately constrain the President on detainee policy. Although it was suggested by some pundits that Republic nominee Mitt Romney should press Obama on his failed Guantanamo pledge,<sup>373</sup> he chose not to. Presumably, Mr. Romney did not think it wise to criticize the President for failing to follow through on his pledge to close Guantanamo both because his own party played a pivotal role in making it impossible for him to fulfill that pledge, and because he personally supported keeping Guantanamo open.<sup>374</sup>

Now that the President has been re-elected, it will be interesting to see if the Republican-controlled House of Representatives will still seek to thwart his stated goal of closing Guantanamo by continuing to impose restrictions in defense appropriation bills, and whether the slightly increased Democratic majority in the Senate will acquiesce to such efforts, as they have in the past. For now the dozens of detainees awaiting transfer remain, in essence, political prisoners, held not because of their beliefs, but as pawns in a political chess match between the executive and legislative branches of government. In other words, they are Prisoners of Congress.

### AUTHOR’S POSTSCRIPT

Since submitting the final manuscript for this article, there have been some additional developments worth noting. Despite veto threats from the Obama

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<sup>371</sup> Joseph Straw, *Obama Reiterates Call to Close Guantanamo Prison*, N.Y. DAILY NEWS, Oct. 18, 2012, [http://articles.nydailynews.com/2012-10-18/news/34562049\\_1\\_prison-purchase-guantanamo-prison-thomson-correctional-center](http://articles.nydailynews.com/2012-10-18/news/34562049_1_prison-purchase-guantanamo-prison-thomson-correctional-center).

<sup>372</sup> *Id.*

<sup>373</sup> Brian Fung, *Romney’s Golden Guantanamo Opportunity*, THEATLANTIC.COM (Oct. 22, 2012), <http://www.theatlantic.com/international/archive/2012/10/romneys-golden-guantanamo-opportunity/263939/#>.

<sup>374</sup> *Romney Position on Guantanamo*, 2012 PRESIDENTIAL CANDIDATES, <http://2012.republican-candidates.org/Romney/Guantanamo.php> (last visited Dec. 2, 2012).

Administration,<sup>375</sup> Congress once again included all of the restrictions related to Guantanamo detainees in the 2013 National Defense Authorization Act.<sup>376</sup> As in previous years, the President declined to follow through on his veto threat, signing the bill into law on January 3, 2013. Also, as in previous years, his signing was accompanied by a signing statement objecting to the provisions restricting detainee transfers, and questioning their constitutionality.<sup>377</sup> What was new about this year's signing statement was that the President, for the first time, directly accused Congress of intentionally blocking his efforts to close Guantanamo: "The Congress designed these sections, and has here renewed them once more, in order to foreclose my ability to shut down the Guantanamo Bay detention facility."<sup>378</sup> The President also accused the Congress of substituting its "blanket political determination for careful and fact-based determinations" and of undermining national security by restricting the Executive's options.<sup>379</sup> The President reiterated his intention to close Guantanamo: "I continue to believe that operating the facility weakens our national security by wasting resources, damaging our relationships with key allies, and strengthening our enemies."<sup>380</sup> Despite the President's tough talk, the Administration appears to have all but given up on closing down the facility anytime soon. Just two weeks after signing the 2013 NDAA into law, the State Department announced that Ambassador Daniel Fried, the special envoy for closing the Guantanamo Bay detention facilities, had been reassigned to other duties, and would not be replaced.<sup>381</sup> Thus, the constitutional and political clash

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<sup>375</sup> Statement of Administration Policy, S. 3254—National Defense Authorization Act for FY 2013, Executive Office of the President, Nov. 29, 2012 (Stating objections to restrictions on the transfer of detainees and threatening a veto: "If the bill is presented to the President for approval in its current form, the President's senior advisers would recommend that the President veto the bill."), *available at* [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps3254s\\_20121129.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps3254s_20121129.pdf).

<sup>376</sup> Section 1022 prohibits the use of funds to construct or modify a facility in the U.S. to house Guantanamo detainees. Section 1027 bars the transfer of detainees to the U.S for any purpose. Section 1028 extends the restrictions on overseas transfers of Guantanamo detainees.

<sup>377</sup> Statement by the President on H.R. 4310, Jan. 3, 2013, *available at* <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310>. "Sections 1022, 1027 and 1028 continue unwise funding restrictions that curtail options available to the executive branch." These provisions "would, under certain circumstances, violate constitutional separation of powers principles."

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> Charlie Savage, *Office Working to Close Guantanamo Is Shuttered*, NY TIMES, Jan. 29, 2013, at A14. (Ambassador Fried's duties were to be assumed by the State Department Office of the Legal Adviser).

over detainees and the closure of Guantanamo continues, with no apparent end in sight.