



The Immigration Implications of Moving Guantanamo Detainees to the United States

A primer for the public

By Dan Cadman

Executive Summary

- Pursuant to presidential directives, the Department of Defense has developed, and submitted to Congress, plans to close the terrorist detention center at the U.S. naval base in Guantanamo Bay, Cuba.
- The naval base was once held by the Supreme Court not to be sovereign territory, as a result of which full constitutional protections were deemed not apply to aliens detained there.
- The presidential directives involve relocation of the remaining terrorists, deemed “enemy combatants”, to secure prison facilities in the continental United States because they are “too dangerous” to be transferred to foreign countries.
- Enemy combatants may only be held as long as hostilities last, but the “war on terror” has already lasted longer than America’s involvement in both World Wars, and in fact is our longest war, with no end in sight.
- Relocation would require parole of these aliens into the United States under the Immigration and Nationality Act, resulting in their unambiguous physical presence on sovereign soil.
- Once here, a multitude of legal and practical questions arise for which there are no sure answers, but which will undoubtedly be forced to resolution by the relocation onto American territory, perhaps to the detriment to American public safety and national security. These questions include the following:
 - What rights and due process guarantees would Guantanamo detainees be entitled to once indisputably in the United States?
 - Can they be detained indefinitely and, if not, what happens then?
 - Can they seek release from detention by means of a petition for habeas corpus in the federal courts?
 - Can they apply for or receive certain immigration benefits, such as asylum, withholding of removal, or Convention Against Torture relief?
 - If they may not be held indefinitely under either the rules of war or the Immigration and Nationality Act and if they are too dangerous for transfer to foreign nations or are protected from removal by being granted relief, what happens then?

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Introduction

The president has made clear from the beginning of his tenure that he is intent on closing the terrorist detention center at the U.S. naval base in Guantanamo Bay, Cuba;¹ it was a promise made prior to his first election, one probably based on world view, not necessarily public support, and to achieve it he has gone to great lengths to farm out as many terrorists detained there as possible, even when doing so stretched the bounds of credibility to even the most remotely attentive.²

The president asserts that the closure is in American national security interests because it is a marker that radical Islamists can point to for recruiting purposes. That may or may not be true, but if it is, so what? Pretty much everything we do, and how we live, and what we believe, is filtered through a twisted lens for jihadists. They also strongly oppose homosexuality and gay marriage, and point to their legality in the West as proof of our corrupt culture and a reason for devout Muslims to rise up against us, but the president hasn't argued that we should repeal those laws or ignore recent Supreme Court constitutionally mandated equality-under-the-law decisions in that area so as to avoid the wrath of Islamists. These facts are noted not as any declaration against such developments, but simply as evidence of the inconsistency in presidential thinking.

Speaking to this inconsistency, it's difficult to understand precisely why transferring alien terrorist detainees from one place of imprisonment to another makes any difference to Islamic fundamentalists. Will they stop recruiting would-be jihadists if Guantanamo is closed and the terrorists are locked down in a supermax prison facility in the middle of Illinois or Colorado?

It is also far from clear that transfer of detainees out of Guantanamo to other countries has made us safer. A substantial number (somewhere between 16 to 18 percent) of those detainees transferred to other countries, most of them senior figures in terrorist organizations, are known to have returned to acts of terrorism or terror support.³ The figure may even be much higher than the documented percentage because the most savvy would be careful in their roles as recruiters, mentors, and strategic advisers to not use telephones or electronic equipment susceptible to being trapped and traced, relying instead on personal visits by human intermediaries ("cutouts") to deliver their messages or carry out their instructions, thus making it difficult to positively confirm their reasserted involvement in terrorism.

In recent testimony before Congress, Secretary of Defense Ashton Carter has confirmed how dangerous it is to transfer Guantanamo detainees to other countries: "[B]ecause many of the current detainees currently cannot be safely transferred to another country, we need an alternative to this detention facility. Therefore, I support the president's plan to establish and bring those detainees to an appropriate, secure, alternative location in the United States."⁴ With regard to Carter's statement, the one thought (relocation to the United States) logically follows the other (transfer to other countries is unsafe) *only* if Guantanamo ceases to remain available. Closure may be the essence of an Obama election campaign promise about which he is determined to have his way in the waning months of his presidency, but it's by no means preordained.

The problem for the president is that the law expressly forbids expenditure of any funds to transfer the remaining, extremely hard-core detainees to the United States. These statutory provisions have been embedded in a series of annual defense authorization acts.⁵ Even this administration, often feckless in the extreme in interpreting its legal responsibilities and limits, has been obliged to acknowledge this massive obstacle to Obama's closure plan, as evident in remarks by Attorney General Loretta Lynch during her own congressional testimony: "That is the state of the law. It's certain that we would be prohibited from doing so. I'm not aware of any efforts to do so at this time, in any event."⁶

However, Lynch's testimony isn't precisely in sync with Carter's since it is clear from his remarks that they do wish to transfer detainees to the United States: "I appreciate that Congress has indicated a willingness to consider such a proposal and, in accordance with the 2016 National Defense Authorization Act, DoD delivered that plan to Congress earlier this week. We look forward to working with Congress to identify the most appropriate design, legislative foundation, and geographic location for future detention and to lift the restrictions preventing the responsible closure of the facility at Guantanamo."⁷

The Immigration Implications of Transfer to the U.S.

What are the immigration implications of transferring Guantanamo terrorist detainees to the United States? Let's start with the basics. All of the detainees are aliens, that is to say foreign nationals with no intrinsic right to enter the United States.

They possess no visas and are beyond unlikely to be issued any. In fact, they appear to be excludable from the United States under immigration law, as terrorists.

We must say they “appear to be” excludable because we don’t know the specific evidence against them. Is it classified? Almost certainly and, if so, then it may be significantly easier to bring them into the United States than to eject them later (if or when such a time comes) because in the past both Democratic and Republican administrations have been loath to use the statutory and regulatory provisions available for introduction of classified information, such as to oppose relief from removal, because of the controversy that surrounds its use.⁸

What’s more, the originator of the classified information intended for use as evidence (the Department of Defense, the Central Intelligence Agency, etc.) has the right to determine whether or not it will permit its use in a proceeding — or, conversely, whether the information is so sensitive that it won’t be permitted even under the controlled circumstances defined by immigration law and regulations for the introduction of such evidence. This poses a dilemma right from the start that needs to be considered soberly by policy makers, and it needs done before the fact, not afterward when things could start to slide downhill to the dismay of the public at large.

However, presuming that Congress were to acquiesce to the administration’s desire to move these dangerous incorrigibles onto U.S. territory by amending the law presently preventing the move, the mechanism that would almost surely be used is immigration parole, which is discussed a bit further below. But there’s an issue that arises even before that.

Does the Guantanamo Bay Naval Base Constitute U.S. Territory?

Since the detainees are locked down in a high-security brig on a U.S. naval base, the question must be asked: Are they technically already within the United States? This is an important question because if the naval base *is* U.S. territory, the Constitution and laws apply and grant foreigners, even terrorists, significantly more due process rights than they have when outside of our lands. This bright-line distinction was most recently articulated by the Supreme Court in *Kerry v. Din*, in which even the United States citizen petitioning on behalf of an alien spouse outside the United States was held not to hold substantive rights to challenge the alien’s denial of a visa to enter after he was deemed ineligible by consular officials for having provided support to the Taliban, a designated terrorist organization.⁹

From a legal point of view, the answer to whether Guantanamo Bay Naval Base is U.S. territory seems to be a slightly ambiguous “probably not”. This is because the naval base at Guantanamo is not actually owned, but is leased by the U.S. government under conditions originally laid out in 1903. The conditions provide for no end-date unless certain things occur, including failure to pay the stipulated yearly amount, which is placed in escrow since the Communist government refuses to accept the money by way of protesting the existence of the naval base on its territory. Still, although the lease is potentially in perpetuity, at least in theory the Cuban government retains ultimate sovereignty over the property. Another condition for ending the lease is by mutual agreement between the parties, i.e. the United States and Cuba, which raises the question of the Obama administration’s intentions over the coming months in light of the president’s announced plan to visit Cuba in the near future, having opened up diplomatic relations in the recent past. Guantanamo Bay is one of the sticking points to full normalization, but that is neither here nor there with regard to questions of sovereignty and application of the U.S. Constitution and laws to the territory on which the naval base now sits.¹⁰

The question of whether the naval base is U.S. territory in which the Constitution and laws should apply to foreigners has been extensively litigated, although in a different context. Readers may recall that Guantanamo was used as a detention center for thousands of Haitian asylum seekers trying to make their way to the United States who were interdicted at sea by the Coast Guard. In addition to the fact that none had visas, hundreds of those interdicted were also HIV-positive and thus subject to the medical exclusion grounds applicable at the time under the Immigration and Nationality Act (INA). The case on their behalf wound its way through the lower federal court with adverse decisions to the government’s position on the matters of sovereignty, the limited territorial applicability of asylum law and withholding of return, and aliens’ due process rights.¹¹ The case was appealed to the Supreme Court, which held that interdiction in international waters of asylum seekers did not violate the INA and, by implication, because the decision left intact the government’s prerogative to return these individuals to Haiti from Guantanamo, tacitly acknowledged that it was foreign soil despite our lease.¹²

To the extent there is ambiguity, it is because the Supreme Court's decision focused primarily on the government's right to interdict and return aliens found in international waters; and because, despite the favorable decision arising from the Court's review, the government reversed its own policy and operating procedures and ultimately permitted the detained Haitians to enter in a negotiated settlement with their legal representatives.

Although the interdiction of Haitians involved serious matters of public policy and national interest, it didn't implicate terrorism or national security. Interestingly though, in arriving at its decision the Court did consider such implications:

If Article 33.1 [of the international treaty forbidding return of refugees and asylees] applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: Dangerous aliens on the high seas would be entitled to the benefits of Article 33.1 while those [portions of the treaty under Article 33.2] that sought to expel them would not.

This speaks to the overarching understanding of nearly all Americans, even including otherwise strident immigration advocacy groups, that these terrorist detainees represent an existential danger. This may be the reason that no one has chosen to significantly push the legal envelope on the matter of sovereignty and applicability of the Constitution, due process, and criminal and immigration laws where the subject of Guantanamo is concerned.

The Use of Immigration Parole

As discussed, were a decision to be arrived at to transfer the detainees from Guantanamo into secure facilities in the United States, it would likely be by means of immigration parole. The courts have generally held that parole of an alien doesn't constitute an "admission" into the United States, but is rather a limited permission to physically enter for reasons having to do with the national interest, or for humanitarian purposes.¹³

Many people tend to think of immigration parole as a kind of benefit, because it can be — and most assuredly has been — used as a catch-all way to permit entry of, and the right to remain (sometimes for long periods) for individuals not otherwise entitled to enter, often because they are barred by a provision of law. This is the way in which the White House has, in a profligate manner, authorized tens of thousands of otherwise inadmissible aliens who are illegally in the United States to remain "under color of law" while concurrently granting work permits to further embed them into our communities, despite statutory language that requires that grants of parole be limited to a case-by-case basis.¹⁴ All of these instances, including those that appear to abuse the statutory scope of parole by indiscriminate use, were at least ostensibly for humanitarian purposes.

But in fact, parole is Janus-faced: It can be used to permit entry of ineligible aliens who *want* to enter, such as those described above, yet can also be used to bring aliens into the United States against their will. The most common scenario for this is parole of criminals like drug cartel members who have been indicted and are taken into custody outside of our shores. Their extradition to face trial in the United States is accomplished on the immigration side by use of the "involuntary" parole power. This use of parole falls into the category of national interest, such as protecting the public safety and national security against transnational criminals and international terrorists.

An important point to remember about parole is that it was not designed to be a permanent solution to anything. Rather, it was a statutory creation devised as a mechanism to enable a means to an end. When that end has been achieved, parole is terminated. In the scenario described above, a parole for prosecution permits the government to seek justice; if convicted, the alien serves his sentence and upon completion is ejected from the United States. If acquitted, he is still obliged to leave, absent certain ameliorating factors such as successfully seeking relief from removal (withholding of removal or even asylum come to mind) — unlikely, but not impossible if no conviction ensued. This would also raise difficult issues surrounding the propriety of continued confinement during the pendency of the benefit application once detention was no longer related to the criminal process, but was instead a function of the immigration process.

Constitutional Protections and Due Process

Certain constitutional protections and due process requirements apply to aliens once they have been paroled into the United States. The protections are not so many nor as stringent as those that apply, for example, to citizens or lawfully resident aliens (or even nonimmigrants), but they nonetheless exist. This is where things get tricky, because, unlike the example described above relating to individuals who are paroled to face a criminal prosecution, there is no suggestion as yet that terrorists detained in Guantanamo will be tried for crimes against the United States.

Any question of prosecution would inevitably raise very serious policy matters that would have to be confronted and overcome, including the key issue of classified evidence mentioned earlier, an issue that looms as large in criminal trials as it does in immigration proceedings. Would our intelligence agencies agree to their use in a criminal proceeding, which would have to be held under the stringent provisions of the Classified Intelligence Procedures Act (CIPA),¹⁵ or would they decline as they might in immigration expulsion proceedings, and for the same reasons — fear of inadvertently disclosing highly sensitive sources and methods?

And would the government, writ large, wish to go that route knowing that inevitably one of the defenses that would be invoked to block any evidence would surround whether or not the detainee had been subjected to aggressive interrogations, or other practices or techniques that might amount to cruel and inhumane treatment sufficient to oblige a judge to order that evidence excluded under constitutional protections such as the Fourth, Fifth, Sixth, Eighth, or other amendments?¹⁶ It is not at all clear the government would wish to open this Pandora's box.

Nor is it entirely clear that the detainees are entitled to "enemy combatant" status under international conventions and treaties relating to the rules of war, given that those rules were crafted in a post-World War environment that did not envision anything like the asymmetrical hostilities engaged in by non-state actors such as al Qaeda or Islamic State in the modern era — especially since those actors themselves do not recognize or abide by the Geneva Conventions on the rules of war. Nonetheless, the United States has opted to treat them that way, and in any case, whether held within or outside of the territories of the United States, they must be treated humanely and accorded protections pursuant to the provisions of the Detainee Treatment Act.¹⁷

Assuming for the sake of argument that the transfers were to go forward, one of the conundrums that immediately arises is that there is no clear end-date to the detentions, nor even a readily articulable, easily recognizable ongoing process (such as a trial) that one might observe to its completion. This is signally different than most immigration paroles, which are at least theoretically finite in nature and intent.

Under the rules of war, enemy combatants are to be held for the duration of armed conflict. How will we know, though, when the war on terror has ended, given that there are often no clear fields of battle, there is no state actor, and terror by its very intent is deliberately inflicted on noncombatants — a clear violation of the rules of war in itself — and often done in the most calculatedly cruel ways imaginable? How will we know, when we aren't even sure who the combatants are? They wear no uniforms, respond to unknown commanders in uncertain hierarchies, operate in secret cells, and, as a tactic of terror, solicit through global social media networks freelance acts of violence from other unknowns living in those societies that are the target of the terrorists. In all of these ways, the terrorist detainees more closely resemble spies, saboteurs, agents provocateurs, and other unlawful combatants (whom the rules of war permit to be executed under many circumstances) than they do legitimate enemy combatants.

If the Guantanamo detainees are transferred to the United States, we are faced with the very real likelihood of open-ended immigration paroles that rely on indefinite imprisonment under amorphous, little-understood rules and protocols, because, as Secretary Carter has made so abundantly clear, they are a threat to the safety and security of Americans everywhere if released. That such circumstances of confinement will exist on U.S. soil is bound to make many Americans queasy, even when they believe in the importance of not permitting the individuals who are confined a chance to pick up where they left off if they are released.

Is indefinite detention of an alien, which is not based upon any criminal violation of law for which sentence has been imposed, constitutional? It is, perhaps, in the prisoner of war context, but how long will the American public or the courts

be willing to accept this legal argument — at least, while the detainees are likely to be held on American shores in isolated conditions at supermax penitentiaries specifically designed for the purpose, in stark contrast to more typical POW facilities¹⁸ — when our policy makers and subject matter experts all tell us that the war on terror is unlikely to end? So, at least, they are serially quoted in a *Time Magazine* article of 2003; in a *Guardian* newspaper article of 2013; and once again in *National Interest* magazine in two different items from the spring of 2015.¹⁹ It has already been observed that our war against al Qaeda and allied Islamist groups (from which was born our current nemesis Islamic State, and which inevitably includes the theater of hostilities in Afghanistan and Iraq) is the longest war in American history.²⁰

Putting aside the rules of war and enemy combatants, in the purely immigration context there is an argument to be made that indefinite detention is constitutional, based on a past Supreme Court precedent, but the case in point is now more than 60 years old and many notions of fairness and justice, equality under the law, and due process for aliens have changed fundamentally in society and the courts during that time. In that case one Mezei, a former resident alien who had been gone so long his status was deemed abandoned, attempted to reenter the United States and was refused. He was instead excluded as a security threat and confined to Ellis Island in lieu of permitting him to land. He filed a petition for writ of habeas corpus that eventually reached the high court, which denied his request for relief, saying in part:

*[T]he times being what they are, Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs. Whatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.*²¹

When the Supreme Court most recently considered indefinite detention of aliens in February 2001, it went to great lengths to distinguish the particulars of the case under review from the prior Mezei case, so as not to be forced to revisit the previous can of worms. But in the case at hand, *Zadvydas v. Davis et al.*, it rejected the government's argument that deportable aliens, even dangerous aliens and aggravated felons, being held under a final order of removal could be detained indefinitely when that order could not be executed in a reasonable or timely manner.²²

For the reasons articulated above, it is a near-certain bet that at some juncture not too distant from the time the detainees are relocated to whatever facility is created or beefed up to take them, petitions for writs of habeas corpus²³ will be filed in the federal courts by their attorneys or pro bono organizations seeking to obtain their release. The argument will be made that the detainees are not properly being held; that the government cannot vouchsafe any projected future date when they might be released; and that in effect they are aliens being held in indefinite detention with few due process rights by which they may contest their lockdown, thus requiring, in the petitioners' views, that the federal courts intervene by means of the writs.

But even were habeas proceedings to be initiated, there is nothing to stop the detainees through their representatives from simultaneously moving forward on other fronts as well. Consider, again, that absent convictions or other publicly available adverse evidence, there is nothing to stop them from seeking asylum — laughable at first glance, not so funny on second thought. It pushes front-and-center the questions raised earlier about the government's ability, willingness, or desire to use classified evidence to prove ineligibility for such relief.²⁴ But would an alien who hates the United States, and all it stands for, seek asylum? Quite possibly. It wouldn't be the first time; consider that Omar Abdel Rahman, the "Blind Sheikh" who was convicted and sentenced to life imprisonment for terrorist offenses against the United States, did seek asylum.²⁵ While some jihadists might find the notion of seeking asylum in the United States, or anywhere in the West, morally repugnant within the context of their fundamentalist Islamic beliefs, others might delight in the mischief and public consternation that doing so would cause — in addition to which, there is nothing to lose by doing so since, if they are granted asylum and released, they're free to pursue their aims free of constraint, from within our society.

Failing asylum, which establishes a path to permanent resident status, an alien may also seek withholding of removal, or protection under the Convention Against Torture (CAT), both of which are embedded in domestic law and founded upon international treaties to which the United States is a party. Neither offers a path to residency.²⁶

Withholding of removal, found at Section 241(b)(3) of the INA,²⁷ requires a finding that it's "more likely than not" that the individual's life or freedom are at risk based on the same five grounds that cover asylum: "on account of race, religion, nationality, and/or membership in a particular social group or political opinion". Language found at 241(b)(3)(B)(iv) precludes granting of withholding when "there are reasonable grounds to believe that the alien is a danger to the security of

the United States”, but this once again throws us into the question of how to establish that reasonable grounds exist outside the arena of classified information, or failing that, deciding whether or not to use such evidence.

The statute relating to CAT forbids the return of an alien to a country in which he is likely to be subject to “an extreme form of cruel and inhumane treatment … that cause[s] severe pain and suffering.” In the case of alleged terrorists, the form of CAT relief involves “deferral of removal”, which is not a permanent bar to removal in that it requires periodic review of the conditions in the country to which removal is contemplated to determine if circumstances have changed. And, although detention of dangerous individuals such as terrorists who receive CAT relief is permitted, the length of that detention again puts us into a legal loop, because the longer the detention, the more significant the constitutional questions and issues arising from petitions for habeas writs.

In sum, bringing even hard-core terrorist detainees from Guantanamo into the United States is to wander into a legal no man’s land, replete with figurative land mines that will explode to the detriment of the American public’s safety and security. In the nightmare worst-case scenario, the courts at some juncture might feel obliged to order release from detention, possibly under rules that rely in part on supervision and oversight, and perhaps in part on electronic monitoring technology such as ankle bracelets. But, of course, such restrictions are fallible, and the more determined or fanatic the individual, the more likely it is that these minimal safeguards will fail.

Conclusion

Transfer of terrorist detainees from Guantanamo to a U.S. prison facility would force a reckoning with serious constitutional issues that lie dormant at present — issues fraught with risk and the potential for a descent into legal quicksand. What would happen as the result of extended litigation to free these individuals from indefinite detention once present on unambiguously sovereign American soil?

If obliged to look squarely at indefinite detention of aliens, even dangerous terrorists, what the Supreme Court would likely do is anyone’s guess. The guessing game based on speculating about the outcome has become even more challenging since the death of Justice Antonin Scalia, and one imagines that the next justice appointed to replace him may very well stand in the balance that will tip the court one way or the other. Whether that justice will be an Obama appointment or not remains to be seen. Certainly a liberal justice appointed by this president would be more likely to find constitutional infringements against the notion of indefinite detention under such amorphous conditions.

Under these circumstances, for the federal government to push now to close Guantanamo with no viable alternative facilities outside of the United States is akin to playing Russian roulette with public safety and national security.

And yet, that is precisely what appears to be going on. The provisions of the National Defense Authorization Act of 2016 relating to closure of the Guantanamo detention facility, because they are restrictions upon funding, apply only during the applicability of the appropriation act on which they are based. In practical terms, and as specifically written into the law, this means only that it may not be closed earlier than December 31, 2016.²⁸ The original House version of the bill was vetoed, but after revision by the Senate,²⁹ was signed into law by the president on November 25, 2015.³⁰

Although it would be a closely run thing, the president will still be in office on January 1, 2017, when the restrictions toll, giving him time to promptly move the detainees into the country, perhaps to the Naval Brig at Norfolk, Va., (which has in the past detained “dual citizen” terrorist Yasser Hamdi) as a holding pattern pending the designation, funding, and build-out of another supermax facility elsewhere. Doing so would force the hand of Congress, and note that if this were to occur, it would happen *after* the upcoming election; thus he does not risk alienating independents and moderate Democrats by the move. And on January 20, having fulfilled his commitment, Barack Obama neatly washes his hands of the matter and passes the reins to the newly inaugurated president.

One way to sidestep this possible crisis is for the Republican-majority Congress to pass a 2017 defense authorization bill, or even a standalone bill, retaining the prohibitions. Of course, the president could and would likely veto such a measure. If he did, leaving the Defense Department with no funding, or in a holding pattern on a short-term continuing resolution, would

Congress have the will for an out-and-out dogfight holding Defense funding hostage, especially during an election year? It's hard to say, although past history suggests they might not have the stomach for it.

On the other hand, the president could potentially shrug his shoulders, accept that closing Guantanamo will not happen on his watch, and simply walk away leaving it for the next president to consider. Either way, the issue remains with us, as will the consequences of poor decision-making in either the legislative or executive (or, for that matter, the judicial) branch of government.

Guantanamo is without doubt an imperfect answer to a nearly insoluble dilemma. But it also may well be the best of the many bad alternatives facing the government — and the American people, who have no small stake in the outcome of events, and who must be protected against the “rule of unintended consequences” that will inevitably arise from closing the detention facility there and relocating the detainees to the United States.

End Notes

¹ See, for example, the [“Presidential Memorandum for the Secretary of Defense and Attorney General — Closure of Detention Facilities at Guantanamo Bay Naval Base”](#), December 15, 2009.

² Dan Cadman, [“Keeping the Homeland Safe”](#), Center for Immigration Studies blog, December 12, 2014.

³ See, for instance, Chris Lawrence, [“Former Gitmo detainees return to terrorism”](#), CNN Video, October 8, 2013; Jim Hoft, [“Confirmed: 117 Gitmo Detainees Returned to Terrorism So Far or 18% of Released Detainees”](#), TheGateWayPundit.com, February 23, 2016; and Malia Zimmerman, [“Ex-Gitmo detainee nabbed in Spain latest on growing list of terrorists returning to battle”](#), Fox News, March 1, 2016.

⁴ [“Hearing on the FY 2017 Budget Request for the Department of Defense”](#), testimony of Secretary of Defense Ashton Carter before the House of Representatives Committee on Appropriations, February 25, 2016.

⁵ For a couple of previous reactions to the limiting appropriations language, see [“Obama signs \[FY 2011\] Defense authorization bill”](#), FederalNewsradio.com, January 7, 2011; and [“Amnesty International Condemns Guantanamo Transfer Restrictions in the 2013 National Defense Authorizations Act”](#), Amnesty International USA, January 3, 2013.

⁶ Edwin Mora, [“Lynch Confirms: Obama ‘Prohibited’ from Transferring GITMO Detainees to the U.S.”](#), Breitbart.com, February 25 2016.

⁷ Carter, *op. cit.*

⁸ See, for instance, Matthew R. Hall, [“Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings”](#), *Cornell International Law Journal*, Vol. 35, No. 3, Article 5, Winter 2002.

⁹ *Kerry et al. v. Din*, [S. Ct. 13-1402](#) (2015)

¹⁰ See, e.g. Nick Miroff, [“Why the U.S. base at Cuba’s Guantanamo Bay is probably doomed”](#), *The Washington Post*, May 15, 2015.

¹¹ Thomas L. Friedman, [“U.S. to Release 158 Haitian Detainees”](#), *The New York Times*, June 10, 1993.

¹² *Sale v. Haitian Centers Council, Inc.*, [S. Ct., 509 U.S. 155](#) (1993).

¹³ For one member of the private immigration bar’s explanation of humanitarian parole, see Sarah E. Murphy, Esq. [“Parole Into the United States”](#), BorderImmigrationLawyer.com, undated.

¹⁴ The terms of parole are outlined in [Title 8 U.S.C., Sec. 1182\(d\)\(5\)](#): “The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe *only on a case-by-case basis* for urgent humanitarian reasons or significant public benefit.” (Emphasis added.)

¹⁵ A synopsis of the [Classified Information Procedures Act](#) is contained in the Department of Justice U.S. Attorney’s Criminal Resources Manual for use by government trial lawyers.

¹⁶ The amendments mentioned, as well as the other amendments that form the Bill of Rights, can be seen [here](#).

¹⁷ [“The Legal Basis of U.S. Detention Policies”](#), a concise précis of the rules of war, enemy combatants, and detention, may be found online at the Heritage Foundation’s website.

¹⁸ Compare, by way of example, the circumstances and reminiscences described by J. Malcolm Garcia in his article, “[German POWs on the Homefront: Thousands of World War II prisoners ended up in mills, farm fields, and even dining rooms across the United States](#)”, *Smithsonian Magazine*, September 15, 2009.

¹⁹ Michael Elliott, “[Why the War on Terror Will Never End](#)”, *Time Magazine*, May 18, 2003; Glen Greenwald, “[Washington gets explicit: its ‘war on terror’ is permanent](#)”, *The Guardian*, May 17, 2013; Micah Zenko, “[The Trillion-Dollar Question: Will the War on Terror Ever End?](#)”, *The National Interest*, April 8, 2015; and Robert Golan-Villela, “[America is Never \(Ever, Ever\) Ending the War on Terror](#)”, *The National Interest*, April 27, 2015.

²⁰ See, for instance, Peter Bergen, *[The Longest War: The Enduring Conflict between America and Al-Qaeda](#)*, London: Free Press, June 28, 2011. ISBN 0743278933, 2011.

²¹ *Shaughnessy v. United States ex. Rel. Mezei*, [S. Ct. 345 U.S. 206](#) (1953).

²² *Zadvydas v. Davis et al.*, [S. Ct., 533 U.S. 678](#) (2001).

²³ The statutory provisions relating to writs of habeas corpus may be found at [Title 28 U.S.C. Sec. 2241 et seq.](#) and a brief explanation of the provisions can be found online at Cornell University’s [Legal Information Institute](#).

²⁴ For a discussion on the use of classified evidence in the immigration context, see “[Hearing Concerning the Use of Classified Evidence in Immigration Proceedings](#)”, testimony of Paul W. Virtue, general counsel, Immigration and Naturalization Service, before the Senate Judiciary Committee, Subcommittee on Technology, Terrorism, and Government Information, October 8, 1998. Surprisingly little has changed in the intervening 15-plus years because of the infrequency of the use of classified information in immigration proceedings.

²⁵ See “[Blind sheikh loses appeal but deportation isn’t near](#)”, Associated Press, July 10, 1993; and “[Sheikh, Calling Imprisonment Humiliating, Seeks Support](#)”, Associated Press, April 15, 1996 .

²⁶ For additional brief information on the similarities and differences between asylum, withholding of removal, and CAT relief, see the Fact Sheet “[Asylum and Withholding of Removal Relief; Convention Against Torture Protections: Relief and Protection Based on Fear of Persecution or Torture](#)”, DOJ Executive Office for Immigration Review, January 15, 2009; or Dagmar R. Myslinska, “[Differences Between Asylum, Withholding of Removal, and Protection Under Convention Against Torture](#)”, NOLO.com, undated; or “[Immigration Equality Asylum Manual](#)”, particularly Chapters 3, 6, and 7, Immigration Equality and Midwest Immigrant and Human Rights Center, 2006.

²⁷ Withholding of removal is codified at [Title 8 U.S.C. Sec. 1231\(b\)\(3\)](#).

²⁸ See, particularly, [Sections 1031 et. seq. of Subtitle D of Title X of that Act](#).

²⁹ Adam Lidgett, “[Military Budget 2016: Senate Passes Revised National Defense Authorization Act](#)”, IBTimes.com, November 10 2015.

³⁰ “[Statement by the President](#)”, Office of the Press Secretary, the White House, November 25, 2015; and Leon Shane III, “[Obama signs defense bill, finalizing military retirement overhaul](#)”, Military Times, November 25, 2015.