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The Immigration Consequences of Relocating Guantanamo Detainees

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INTRODUCTION	540
I. DOES IMMIGRATION LAW APPLY?: ASSESSING HISTORICAL PRECEDENT ...	545
A. <i>Detainees Are Legally at the Border</i>	547
B. <i>Mixed Precedent on the Applicability of Immigration Law to Law- of-War Detainees</i>	551
C. <i>Significant Changes to Immigration Law Since WWII</i>	553
II. WHAT DOES THE LEGAL FRAMEWORK REQUIRE?: PROTECTIONS AGAINST REMOVAL FROM THE UNITED STATES	556
A. <i>International Law: The Non-Refoulement Principle and Exceptions</i>	557
1. The Refugee Convention.....	557
2. The Convention Against Torture	561
3. Diplomatic Assurances.....	563
B. <i>Domestic Law: Asylum, Withholding of Removal, and the CAT</i>	565
III. WHAT HAPPENS WHEN REMOVAL IS NOT AN OPTION?: INDEFINITE IMMIGRATION DETENTION OF ALIENS AWAITING REMOVAL.....	571
A. <i>Statutory Detention Authority</i>	572
B. <i>Constitutional Limits on Immigration Detention</i>	573
IV. DOES THE MOVE MATTER?: COMPARING LOCATIONS.....	576
A. <i>Protections Against Return for Former Detainees</i>	577

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B. <i>Indefinite Immigration Detention of Former Detainees</i>	581
CONCLUSION	583
INTRODUCTION	

Shortly after he took office in 2009, President Obama issued an executive order to close the military detention facility at Guantanamo Bay, Cuba.¹ At that time, the United States was holding over 200 detainees at the facility, most of whom had already been detained for at least several years.² In his executive order, the President noted “the significant concerns raised by these detentions, both within the United States and internationally” and argued that “closure of the facilities [at Guantanamo] . . . would further the national security and foreign policy interests of the United States and the interests of justice.”³ The President ordered that the detention facility be closed within one year, by January 2010.⁴ But that deadline came and went, and Guantanamo stayed open.

What went wrong? Put simply, the Administration could not find a new place for all of the detainees to go. Individuals held at Guantanamo Bay are detained as “enemy combatants” under the laws of war, and their detention may continue as long as hostilities persist.⁵ If the United States government wishes to remove a detainee from indefinite law-of-war detention, it has two options. It can either charge the detainee with a crime before a military commission or a civilian court, or it can release or transfer him to the custody of another country. During his first two years in office, President Obama pursued both of these options,⁶ but the Administration quickly realized that some “irreducible minimum” of detainees could neither be prosecuted by the United States (because

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1. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).
 2. *A History of the Detainee Population*, N.Y. TIMES (Aug. 15, 2016), <http://projects.nytimes.com/guantanamo> [<http://perma.cc/UY4B-URCA>].
 3. Exec. Order No. 13,492, 74 Fed. Reg. at 4897.
 4. *Id.*
 5. The United States government contends that under international and domestic law, it may lawfully detain members of Al Qaeda, the Taliban, and associated forces until the end of hostilities. See JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, WARTIME DETENTION PROVISIONS IN RECENT DEFENSE AUTHORIZATION LEGISLATION 8–12 (2016).
 6. An interagency working group called the Guantanamo Review Task Force reviewed each detainee’s case and recommended that many could be repatriated, transferred to a third-party country, or referred for prosecution in civilian or military court. Guantanamo Review Task Force, *Final Report*, U.S. DEP’T JUST. ET AL. (Jan. 22, 2010), <http://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf> [<http://perma.cc/Z9GZ-EVHD>].

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

prosecution would be too difficult) nor transferred to another country (because release would be too dangerous).⁷

The detainees in the “too dangerous to transfer but not feasible for prosecution”⁸ category—the “forever prisoners”—had to remain detained *some-where*. And therein lay the quagmire. To close Guantanamo, the Administration needed to identify a facility inside the United States that could hold the remaining detainees.⁹ But Congress foreclosed that option by prohibiting the use of any funds to support such a relocation,¹⁰ citing concerns over “bring[ing] terrorists into [our] backyard”¹¹ and worrying that “bring[ing] these enemy combatants to domestic soil is . . . gambling national security.”¹² So while President Obama made significant progress in reducing the Guantanamo population over his eight-year tenure, on the day he left office, forty-one detainees remained.¹³ Of these detainees, ten have been charged or tried before a military commission, while the rest remain in indefinite law-of-war detention without charge.¹⁴

7. *Id.* These detainees were considered poor candidates for prosecution because the evidence against them was insufficient, either because it was simply too thin or because it has been procured by torture. Connie Bruck, *Why Obama Has Failed To Close Guantánamo*, NEW YORKER (Aug. 1, 2016), <http://www.newyorker.com/2016/08/01/why-obama-has-failed-to-close-guantanamo> [<http://perma.cc/G6Z5-S7NL>].
8. *Final Report*, *supra* note 6, at ii.
9. See Marina Koren, *Who Is Left at Guantanamo?*, ATLANTIC (May 12, 2016), <http://www.theatlantic.com/politics/archive/2016/05/guantanamo-bay-forever-prisoners/482289/> [<http://perma.cc/83M8-TD4Y>].
10. See, e.g., Charlie Savage, *Obama Signs Defense Bill, Despite Guantánamo Objections*, N.Y. TIMES (Nov. 25, 2015), <http://www.nytimes.com/2015/11/26/us/politics/obama-signs-defense-bill-despite-guantanamo-objections.html> [<http://perma.cc/RA6U-3KQX>]. Congress has renewed this ban each year. See, e.g., National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454 (2009).
11. Ken Gude, *The Right Way To Close Guantánamo*, POLITICO (Feb. 22, 2016, 5:07 AM), <http://www.politico.com/agenda/story/2016/02/how-obama-can-close-guantanamo-without-violating-the-law-000049> [<http://perma.cc/BQ2U-9CFW>].
12. Associated Press, *Senate Bill Passes To Ban Guantanamo Bay Detainees from U.S.*, NBC NEWS (Nov. 10, 2015, 12:55 PM), <http://www.nbcnews.com/news/us-news/senate-bill-would-ban-guantanamo-bay-detainees-u-s-n460631> [<http://perma.cc/NW92-E3CB>].
13. Missy Ryan & Julie Tate, *The Trump Era Has Stranded These Five Men at Guantanamo Bay*, WASH. POST (Jan. 22, 2017), http://www.washingtonpost.com/news/checkpoint/wp/2017/01/22/the-trump-era-has-stranded-these-five-men-at-guantanamo-bay/?utm_term=.199ficbb7eda [<http://perma.cc/S7CC-KHPD>].
14. See Carol Rosenberg, *Final Obama Transfer Leaves 41 Prisoners at Guantánamo Bay*, MIAMI HERALD (Jan. 19, 2017, 5:51 PM), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article127537514.html> [<http://perma.cc/PPY3-2HG6>]. Five of the remaining forty-one detainees were cleared for transfer

Although nothing in politics is certain, it is safe to expect a very different kind of Guantanamo policy over the next four years. As a candidate, Donald Trump vowed to keep the detention facility open,¹⁵ and to “load it up with some bad dudes.”¹⁶ A draft executive order circulating in early February 2017 would have turned this campaign rhetoric into Administration policy by officially rescinding President Obama’s closure order and directing the Department of Defense to begin populating Guantanamo with detained ISIS fighters,¹⁷ although no such order has been issued as of this writing.¹⁸ A variety of indicators—including a statement by Attorney General Jeff Sessions declaring that he sees “no legal problem whatsoever” with adding to the prison’s population,¹⁹ a budget request for upgrades to the facility,²⁰ and a tweet from President Trump

by officials in the Obama Administration, but their releases were not finalized before President Obama left office. See Ryan & Tate, *supra* note 13. Early statements from President Trump indicate that he is unlikely to approve future transfers out of Guantanamo, meaning that these five detainees may remain on Guantanamo for at least four more years. Charlie Savage, *Fact-Check: Trump Is Wrong About Guantánamo Detainees*, N.Y. TIMES (Mar. 7, 2017), <http://www.nytimes.com/2017/03/07/us/politics/guantanamo-bay-trump.html> [http://perma.cc/B7WX-CPM5].

15. David Weigel, *Trump: Maybe Cuba Should Take over Guantanamo ‘and Reimburse Us,’* WASH. POST (Feb. 23, 2016), <http://www.washingtonpost.com/news/post-politics/wp/2016/02/23/trump-maybe-cuba-should-take-over-gitmo-and-reimburse-us/> [http://perma.cc/SF9J-R5SR].
16. Associated Press, *What’s Next for Guantanamo Bay Under President Trump*, FOX NEWS (Jan. 27, 2017), <http://www.foxnews.com/world/2017/01/27/what-next-for-guantanamo-bay-under-president-trump.html> [http://perma.cc/H49Y-FFGW].
17. See Charlie Savage, *ISIS Detainees May Be Held at Guantánamo, Document Shows*, N.Y. TIMES (Feb. 8, 2017), <http://www.nytimes.com/2017/02/08/us/politics/guantanamo-islamic-state-detainees.html> [http://perma.cc/Y79G-438V].
18. See Carol Rosenberg, *Obama’s Orders Still Stand as Troops Train for Trump’s Guantánamo*, MIAMI HERALD (June 11, 2017), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article155412599.html> [http://perma.cc/7B2W-GL5S]; Andrew Rudalevige, *Congress May Give Trump Legal Authority To Fight the Islamic State*, WASH. POST (Mar. 27, 2017), http://www.washingtonpost.com/news/monkey-cage/wp/2017/03/27/congress-may-give-trump-the-authority-to-fight-the-islamic-state-which-it-says-he-already-has/?utm_term=.228bad47d021 [http://perma.cc/UWP6-K56W].
19. Louis Nelson, *Sessions: I’d Advise Trump To Use Guantanamo Bay*, POLITICO (Mar. 9, 2017, 9:23 AM), <http://www.politico.com/story/2017/03/jeff-sessions-trump-should-use-guantanamo-bay-235863> [http://perma.cc/WG3B-UJWX].
20. See Phil Stewart & Mike Stone, *Trump Eyes ‘Flexible’ Islamic State War Fund, Guantanamo Upgrade*, REUTERS (Mar. 16, 2017, 5:57 PM), <http://www.reuters.com/article/us-usa-trump-budget-islamicstate-idUSKBN16N2ZP> [http://perma.cc/HJ8Y-69E7].

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

criticizing past prisoner releases²¹—appear to confirm that, although the finer contours of President Trump’s Guantanamo policy remain unclear, it almost certainly will not include closing the facility.

But that does not mean the end of the Guantanamo debate. Setting aside important discussions over the moral and political cost of Guantanamo, serious doubts remain about even its purported benefits. In many ways, Guantanamo has failed to deliver on the “promise” of providing a legal gray zone. The Supreme Court has ruled that the privilege of habeas corpus extends to Guantanamo detainees, who can now challenge their law-of-war detention in U.S. courts.²² And for those detainees whom the United States chooses to refer for prosecution before military commissions, the Court has required Congress to offer serious procedural protections.²³ If the purpose of the military commissions was to provide a quicker route to conviction than Article III civilian courts could offer, they have failed: fifteen years after Guantanamo received its first detainees, the military commissions have produced only eight convictions, six of which were subsequently overturned in part or in full.²⁴ Add to this Guantanamo’s exorbitant cost—\$445 million per year and \$10.85 million per detainee in 2015²⁵—and it becomes clear that the facility’s continued long-term operation is far from certain. And as long as the detention facility stays open, it will remain the topic of fierce debate both inside and outside of government during the Trump Administration, during the 2018 and 2020 elections, and during administrations to come.

But the debate over closing Guantanamo lacks a crucial piece of information. Much discussion has focused on the legal consequences *for detention* of relocating current Guantanamo detainees to an alternative facility inside the

21. See Michael A. Memoli, *White House Corrects Trump’s Tweet About Guantanamo Detainees, Sort of*, L.A. TIMES (Mar. 7, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-white-house-corrects-trump-s-tweet-1488919783-htmlstory.html> [<http://perma.cc/VTU3-PFYJ>].
22. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. . . . The [Military Commissions Act] does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.”).
23. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (“[W]e conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions.”).
24. David Welna, *Plenty of Room at Guantanamo Bay for Trump’s ‘Bad Dudes,’* NAT’L PUB. RADIO (Feb. 8, 2017, 10:51 AM), <http://www.npr.org/sections/parallels/2017/02/08/513979856/plenty-of-room-at-guantanamo-bay-for-trumps-bad-dudes> [<http://perma.cc/26Z9-5FQ9>].
25. See Rosenberg, *supra* note 14.

United States—i.e., if and how relocation would affect detainees' rights in habeas proceedings or criminal prosecutions. Far less attention, however, has been given to the legal consequences of relocation *once detention ends*. Inevitably, some number of Guantanamo detainees will exit U.S. custody in their lifetimes. For any given prisoner, the executive branch may determine that the individual is safe to transfer to another country, the detainee may complete a prison sentence imposed by a military commission or civilian court, or the U.S. government may lose the authority to detain the individual under domestic or international law. Under any of these scenarios, the United States would need to release the individual. But release him where?

Consider the following scenario: detainees currently held at Guantanamo are relocated to a prison inside the United States, where they continue to be detained as enemy combatants under the laws of war. Then, by judicial decree or administrative decision, a detainee that has been relocated to U.S. soil secures his release from law-of-war detention. (Perhaps a court finds that law-of-war detention is no longer lawful because hostilities have ended, or a detainee succeeds in obtaining a writ of habeas corpus by showing that he is not properly classified as an enemy combatant.) At this moment, the United States would have a foreign individual on its soil that, presumably, the government would like to remove from the country. The government begins immigration proceedings to remove the individual, but officials cannot repatriate the former detainee to his home country because conditions there entitle him to some sort of relief from removal (for example, if his home country would likely torture him).²⁶ The United States attempts and fails to identify a third-party country willing to take the former detainee, so immigration officials hold the individual in immigration detention. After several months of waiting in immigration detention, the individual files a habeas petition asking the court to order his release from continued, indefinite detention. What happens then?

This scenario is not fanciful, worst-case thinking. In 2010, in a case called *Kiyemba v. Obama*, the U.S. Supreme Court was asked to decide the fate of several Guantanamo detainees who, as determined by the U.S. government, could no longer be held under the laws of war.²⁷ But domestic and international law blocked the detainees' repatriation to their home country of China because of the high likelihood that they would face torture upon their return, and the United States could not find a third country willing to accept the detainees as immigrants.²⁸ So the prisoners remained detained at Guantanamo, despite the fact that they were no longer detainable under the laws of war. A late-breaking

26. Charlie Savage, *U.S. Report Addresses Concern over Obama's Plan To Close Guantánamo*, N.Y. TIMES (May 15, 2014), <http://www.nytimes.com/2014/05/16/us/politics/us-report-addresses-concern-over-obama-plan-to-shut-guantanamo.html> [<http://perma.cc/Q3DN-9JUM>].

27. 559 U.S. 131 (2010).

28. *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022, 1024 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010), and *judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

offer of resettlement saved the Supreme Court from having to decide if the United States was obligated to release the prisoners onto U.S. soil.

This Note seeks to inform the political debate over Guantanamo's closure by answering the question the Supreme Court skirted: what are the immigration consequences of relocating Guantanamo detainees to U.S. soil?

This Note proceeds to answer this question in five parts. First, Part I asks if immigration laws would apply to relocated detainees. Disagreeing with the position taken by the Obama Administration, this Note argues that they would. Precedent from the treatment of law-of-war detainees during World War II (WWII) indicates that relocated detainees would be legally, if not physically, at the border with a legal status equivalent to an alien seeking admission into the United States at a port of entry.

While WWII precedents tell us about detainees' immigration status, they do not clearly indicate what rights would attach to that status. To examine what protections immigration law would afford a former detainee, Part II details modern international and domestic law regarding the rights of aliens at the border. Such aliens enjoy limited protections against return to countries that would persecute or torture them, subject to some exceptions and limitations. This Note concludes that most avenues for relief from removal would be closed to a former law-of-war detainee, but the United States would remain absolutely barred from transferring an individual to a country likely to torture him.

Given the possibility that the United States could not lawfully remove an individual from U.S. soil, Part III discusses the government's authority to hold an unremovable alien in immigration detention. The current statutory scheme provides the United States with considerable flexibility to keep a former detainee in immigration custody for significant periods of time, but it is possible that indefinite detention could raise constitutional concerns.

Having analyzed the immigration law that would apply to a U.S.-located detainee, this Note then seeks to enable a comparative assessment by discussing the immigration law that likely applies at Guantanamo Bay. Acknowledging the likelihood of significant policy changes under the Trump Administration, however, Part IV avoids strong predictions and instead draws only the modest conclusion that relocation would have a minimal impact on the legality of indefinite immigration detention. Finally, Part V concludes by discussing this Note's implications for the political debate surrounding the status of Guantanamo and its detainees.

I. DOES IMMIGRATION LAW APPLY?: ASSESSING HISTORICAL PRECEDENT

In § 1039 of the Fiscal Year 2014 National Defense Authorization Act, Congress mandated that the Attorney General prepare a report detailing "the legal rights, if any, for which an individual detained at Guantanamo . . . , if transferred to the United States, may become eligible, by reason of such transfer."²⁹

29. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1039(a), 127 Stat. 672, 855 (2013).

In particular, § 1039(b) required an assessment of relocated detainees' eligibility for "relief from removal from the United States," "any required release from immigration detention," "asylum or withholding of removal," or "any additional constitutional right."³⁰ Underscoring the salience of the immigration issue to Congress, § 1039 did not ask for a report on the rights of detainees while they were lawfully detained,³¹ but rather for a report on their rights *at the conclusion of detention*.

In its report (the 1039 Report or the Report), released May 2014, President Obama's Department of Justice took the position that the laws of war can entirely displace the domestic immigration laws that would otherwise apply to detainees on U.S. soil.³² Only nine pages in length, the Report argues that immigration laws do not apply wholesale to former detainees. The DOJ's claim appears to be that individuals who enter the United States as detainees under the laws of war exist in a legal silo separate from all other immigrants. The Report states:

Historically, the courts have treated detainees held under the laws of war who are brought to the United States as outside the reach of the immigration laws. . . . The [Authorization for Use of Military Force (AUMF)] provides authority to detain these individuals within the United States and transfer them out of the United States.³³

Elsewhere, the Report concludes:

Most of the questions posed by the section 1039 report requirement concern relief relating to immigration detention or removal. If, however, detainees are held in the United States by the Department of Defense pursuant to the AUMF, as informed by the laws of war, and the immigration framework does not apply to their detention or subsequent transfer abroad, Guantanamo detainees relocated to the United States would not have a right to obtain the relief described in section 1039(b)(1)(A)–(C).³⁴

The 1039 Report provides no citations to support this claim. It plainly asserts, without more, that immigration laws do not touch former detainees.

This Note argues that the 1039 Report is inaccurate. Historical precedent indicates that the transfer of former detainees may be more constrained by immigration law than the 1039 Report contemplates. While immigration law does

30. *Id.* § 1039(b).

31. Aside, perhaps, from subsection D regarding constitutional rights. *Id.* § 1039(b)(1)(D).

32. Office of Legislative Affairs, *Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014*, U.S. DEP'T JUST. 1, 9 (May 14, 2014) [hereinafter 1039 Report].

33. *Id.* at 1.

34. *Id.* at 9.

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

not apply to an alien's transfer into the United States for detention, it will restrict options for his subsequent removal. Historical precedent clearly establishes that alien wartime detainees are not legally inside the United States. Rather, they are considered at the border—a legal fiction that distinguishes them from immigrants who have been formally admitted into the country.³⁵ Once a detainee is legally located at the border, however, the United States does not have unrestricted latitude to “transfer [him] out of the United States.”³⁶ First, practice during WWII offers mixed signals; it does not support the inference that the laws of war can supplant immigration laws once wartime detention has ended. Second, U.S. obligations to aliens at its borders, both under international and domestic law, have increased so dramatically over the intervening decades that the usefulness of WWII precedent is doubtful. In other words, WWII practice tells us where wartime detainees are, legally speaking, but not what rights that location triggers.

A. *Detainees Are Legally at the Border*

Two kinds of aliens were subject to wartime detention in the United States during WWII—prisoners of war (POWs) and enemy aliens—and both were considered legally at the border by U.S. courts. POWs were foreign soldiers captured abroad and brought into the United States; the United States detained 435,788 POWs on U.S. soil during WWII.³⁷ In contrast, enemy aliens, as defined by the Alien Enemies Act of 1798,³⁸ included all U.S.-dwelling citizens of a country against which the United States had declared war.³⁹ Of the approximately 900,000 “enemy aliens” living on U.S. soil when the United States entered WWII,⁴⁰ several thousand were interned throughout the war.⁴¹

Courts did not treat POWs held in the United States during WWII as immigrants. At the time, statutes capped annual immigration to 150,000 and implemented country-specific quotas intended to preserve the ethnic makeup of a

35. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (explaining that under some circumstances, an alien inside the United States may be treated “for constitutional purposes, ‘as if stopped at the border,’” and observing that “[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law” (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953))).

36. 1039 Report, *supra* note 32, at 1.

37. Martin Tollefson, *Enemy Prisoners of War*, 32S IOWA L. REV. 51, 51 (1946).

38. Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21 (2012)).

39. J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1406 (1992).

40. *Id.* at 1416.

41. *Id.* at 1417 (noting that interned enemy aliens numbered 4,132 in June 1943, 3,402 in December 1943, and 2,525 in June 1944).

1890s-era United States.⁴² This quota system could not have accommodated the huge influx of foreigners that entered as POWs, specifically 378,898 Germans, 51,455 Italians, and 5,435 Japanese.⁴³ Instead, as explained by the Ninth Circuit in *In re Territo*, these POWs' transfer into the United States occurred outside of the immigration law framework. The court stated:

[P]etitioner was brought to this country under a war measure by orders of the military authorities as a prisoner of war and not in accord with nor under the immigration laws limiting and regulating entries of residents or nationals of another nation. His personal presence within the border of the United States, as is true of many thousands brought here as prisoners of war, is merely for his safe keeping under the restraint of the Army and arrangement with the immigration authorities and does not constitute residence.⁴⁴

To support the conclusion that immigration law did not apply to POWs, the *Territo* court cited *Kaplan v. Tod*,⁴⁵ a 1925 Supreme Court case broadly standing for the proposition that aliens must be formally admitted to be legally inside the United States. *Kaplan* addressed the immigration status of a young woman who had arrived at Ellis Island in the summer of 1914. She was denied admission into the United States but could not be deported due to the onset of World War I.⁴⁶ Kaplan was held at Ellis Island for almost a year and then released to the Hebrew Society's temporary custody "until she could be deported safely."⁴⁷ In January 1923 the government began deportation proceedings against Kaplan, and she argued that she had become a citizen by virtue of being "a minor and in this country" when her father became a naturalized citizen in 1920.⁴⁸ The Court rejected her claim, holding that she had never entered the United States. "[W]hile [Kaplan] was at Ellis Island she was to be regarded as stopped at the boundary line When her prison bounds were enlarged by committing her to the custody of the Hebrew Society, . . . [s]he was still in theory of law at the boundary line and had gained no foothold in the United States."⁴⁹

While *In re Territo* addressed POWs, a separate line of cases applied similar reasoning to "enemy aliens." Under the authority of the Alien Enemies Act, the

42. See Donald S. Dobkin, *Race and the Shaping of U.S. Immigration Policy*, 28 CHICANA/O-LATINA/O L. REV. 19, 30–31 (2009).

43. Tollefson, *supra* note 37, at 51.

44. *In re Territo*, 156 F.2d 142, 145–46 (9th Cir. 1946).

45. 267 U.S. 228 (1925).

46. *Id.* at 229.

47. *Id.*

48. *Id.* at 230.

49. *Id.* (citations omitted).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

Immigration and Naturalization Service had assumed “responsibility from the Army for detention of interned [enemy] aliens” and had established over a dozen detention facilities.⁵⁰ At the end of hostilities, the United States began repatriating many of the formerly detained enemy aliens, and a handful of these detainees challenged their repatriation in court.⁵¹

The Second Circuit consistently held that no matter where prisoners were held, aliens brought into the United States involuntarily were not legally inside the United States. For example, in *U.S. ex rel. Bradley v. Watkins*, the court considered the status of a Norwegian national who had been seized by a U.S. Coast Guard vessel in Greenland, detained at the East Boston Immigration Station, held as an enemy alien at Ellis Island, and finally transferred to a detention center in North Dakota, where he was granted “limited parole” to serve as a track worker for the railroad.⁵² Again citing *Kaplan*, the court held that Bradley had never entered the United States.

Certainly [Bradley] was not “seeking to enter” the United States when brought to the port of Boston. Nor has he ever made an entry. When held at the Immigration Station at East Boston he is to be regarded as stopped at the boundary line, and when his prison bounds were enlarged by committing him to the custody of the Attorney General for detention and parole in North Dakota, the nature of his stay in the United States was not changed. . . . With respect to the immigration laws the status of the relator on arrival was the same, in our opinion, as that of a prisoner of war.⁵³

In *U.S. ex rel. Ling Yee Suey v. Spar*, the Second Circuit succinctly summarized the caselaw: “The cases hold that a person brought into the United States by the authorities, and then released on bond, never entered the United States. His case is like that of one who had been stopped at the border and kept there all the time.”⁵⁴

Thus, in both POW and enemy-alien cases, the courts described detained aliens as being in various states of here-but-not-here: “personal presence within the border . . . [that] does not constitute residence” in *Territo*,⁵⁵ “stopped at the boundary line” in *Kaplan*⁵⁶ and *Bradley*,⁵⁷ or “stopped at the border and kept

50. Sidak, *supra* note 39, at 1417.

51. *Id.* at 1418–19.

52. United States *ex rel. Bradley v. Watkins*, 163 F.2d 329 (2d Cir. 1947).

53. *Id.* at 330–31 (citations omitted).

54. United States *ex rel. Ling Yee Suey v. Spar*, 149 F.2d 881, 883 (2d Cir. 1945).

55. *In re Territo*, 156 F.2d 142, 146 (9th Cir. 1946).

56. *Kaplan v. Tod*, 267 U.S. 228, 230 (1925).

57. *Bradley*, 163 F.2d at 330–31.

there all the time” in *Ling Yee Suey*.⁵⁸ To this day, aliens who have not received formal admission into the United States remain legally at the border even if they are physically present on U.S. soil. As the Court has more recently observed, “[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”⁵⁹

Applying this historical precedent to modern enemy combatants leads to the conclusion that U.S.-located law-of-war detainees would, like POWs and enemy aliens during WWII, remain legally at the border throughout their detention in the United States. The Immigration and Nationality Act (INA) provides the Attorney General with a modern mechanism to preserve at-the-border status. Through the authority to “parole” aliens into the United States, the Attorney General can grant an individual legal permission to physically enter the United States without according him formal, legal admittance. The statute indicates:

The Attorney General may . . . in his discretion parole [an alien] into the United States temporarily . . . , but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole . . . have been served . . . [the alien’s] case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.⁶⁰

It appears that the Attorney General has often used his parole power to facilitate the extradition of foreign aliens into the United States for criminal prosecutions.⁶¹ Such parole decisions allow the United States to charge and detain an individual inside the United States without granting him the legal rights that come with “admitted” status. While criminal prosecutions may be an imperfect analogue for law-of-war detention, the use of the parole power in this parallel

58. *Ling Yee Suey*, 149 F.2d at 883.

59. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

60. 8 U.S.C. § 1182(d)(5)(A) (2012).

61. See, e.g., *United States v. Cordon*, No. CR 03-331-14 (CKK), 2015 WL 5011446, at *1 (D.D.C. Aug. 24, 2015) (noting that “Defendant was paroled into the United States for the purposes of this case”); *United States v. Arreola-Leon*, No. 2:09-CR-00164-JCM-GWF, 2010 WL 1553411, at *2 (D. Nev. Jan. 27, 2010) (stating that “[i]nstead of being physically removed from the United States . . . Defendant was paroled into the United States and sent to the Yuma County Detention Facility pending extradition to California on the warrant for his arrest”), *report and recommendation adopted*, No. 2:09-CR-164 JCM (GWF), 2010 WL 1553413 (D. Nev. Apr. 16, 2010); *United States v. Brown*, 148 F. Supp. 2d 191, 196–97 (E.D.N.Y. 2001) (explaining that the defendant “was admitted into the United States pursuant to 8 U.S.C. § 1182(d)(5)(A), which permits the Attorney General to parole aliens into the United States for, among other purposes, prosecution”); *Klapholz v. Esperdy*, 201 F. Supp. 294, 298 (S.D.N.Y. 1961) (holding that parole of the defendant for the purposes of “secur[ing] a conviction for diamond smuggling” was in the public interest), *aff’d*, 302 F.2d 928 (2d Cir. 1962).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

situation indicates that it would likely be available for use in the relocation of Guantanamo detainees as well.

B. Mixed Precedent on the Applicability of Immigration Law to Law-of-War Detainees

After establishing a former detainee’s status as legally at the border, the usefulness of WWII precedent drops precipitously. Historical precedent offers mixed evidence on the law governing the transfer and repatriation of wartime detainees. On the one hand, POWs were summarily repatriated without any interaction with the immigration system. Martin Tollefson, former Director of the Prisoner of War Operations Division, explained in 1946:

Many prisoners of war of Italian and German nationality desired to remain in this country rather than to be repatriated. More than a hundred Italians and several hundred Germans claimed to be American citizens The policy was adopted early in the prisoner-of-war program that every prisoner of war must be repatriated and that none could remain here as residents or citizens irrespective of their desire or supporting reasons. No exception was made to this rule and, to the extent there was litigation, the courts supported this policy.⁶²

This explanation indicates that the repatriation of POWs did not resemble immigration removal proceedings, at which the alien’s citizenship claim would have been material.

Other evidence corroborates the observation that the United States prioritized its wartime strategy over individual POW’s requests to remain in the country. For example, the United States, anxious to conclude an agreement with the Soviet Union as Soviet troops arrived in areas of Germany and Manchuria containing American POWs, agreed to repatriate all Soviet citizens—including those captured in German uniforms.⁶³ Many of these Soviet POWs feared repatriation and some “violently resisted returning home.”⁶⁴ Secretary of War Henry Stimson noted, “[T]he State Department has consented to [repatriation] in spite of the fact that it seems very likely the Russians will execute them when they get them home. Yet we still sent them home.”⁶⁵

62. Tollefson, *supra* note 37, at 75. For his last claim regarding the courts’ support, Tollefson cites *In re Territo*. This is a confusing citation, however, because Territo relied on his claim of U.S. citizenship in a petition for release from POW captivity, not a request to remain in the United States. It is not clear that any POW challenged his repatriation in court.

63. ANTONIO THOMPSON, *MEN IN GERMAN UNIFORM: POWS IN AMERICA DURING WORLD WAR II* 69 (2010).

64. *Id.*

65. *Id.*

On the other hand, unlike POWs, enemy aliens who had been forcibly brought into the United States were subject to U.S. immigration law once their detention ended. Because the Second Circuit held that aliens who had entered the United States involuntarily remained legally at the border,⁶⁶ such aliens retained the right to voluntarily depart before being subjected to detention awaiting deportation. In *United States ex rel. Schirrmeyer v. Watkins*, the court explained:

[A]n alien forcibly brought into the United States . . . has not made an “entry” into the country and is not an “immigra[nt]” subject to deportation under the immigration laws. . . . “Hence he has the right of voluntary departure, and only after his refusal or neglect to leave may the Government deport him.”⁶⁷

Importantly, the court did not state that immigration law *in general* was inapplicable to the enemy alien. Rather, the court explained that because the alien had never entered the United States as an immigrant, he could not be deported as an immigrant. The court concluded, however, that if the alien failed to voluntarily depart, he would then be inside the United States without authorization and thus deportable.⁶⁸ In applying this deportation-second logic and affording the former detainee the rights of an alien at the border, the court treated him as an immigrant within the framework of immigration law.

Thus, the law that applied to former POWs in WWII differed from the law that applied to former enemy alien detainees: while POWs were returned without immigration proceedings, enemy aliens’ removal was governed by domestic immigration law. Presumably, to choose the right line of precedent to follow when considering Guantanamo detainees, modern courts would need to decide whether Guantanamo’s “enemy combatants” more closely resemble POWs or enemy aliens.

But the category of “enemy combatant” does not neatly map onto either WWII category for two reasons. First, the status of a POW or an enemy alien under international law differs from that of an enemy combatant. POWs are

66. See *supra* notes 52–54 and accompanying text.

67. *United States ex rel. Schirrmeyer v. Watkins*, 171 F.2d 858, 859–60 (2d Cir. 1949) (quoting *United States ex rel. Ludwig v. Watkins*, 164 F.2d 456, 457 (2d Cir. 1947)) (citations omitted).

68. See also *United States ex rel. Paetau v. Watkins*, 164 F.2d 457, 458 (2d Cir. 1947) (“[A]n alien seized by the United States elsewhere and brought here against his will for internment for security reasons as an alien enemy cannot be deported as an ‘immigrant’—at least not before he has been afforded an opportunity to depart voluntarily. . . . There would seem to be statutory authority for the eventual removal of an alien whose entrance originally involuntary becomes clearly voluntary by his continued unforced stay.”); *Ludwig*, 164 F.2d at 457 (“Since Ludwig was brought in as an enemy alien the United States should treat him as such for purposes of removal. Hence he has the right of voluntary departure, and only after his refusal or neglect to leave may the Government deport him.”).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

“privileged combatants” who must be released at the end of hostilities, “enemy aliens” are non-combatant civilians, and “enemy combatants” are unprivileged combatants who may be charged with crimes under the laws of war.⁶⁹ Second, although it would be tempting to differentiate POWs from enemy aliens based on their location at the beginning of hostilities—POWs in foreign theaters and enemy aliens inside the United States—that distinction does not comport with reality. In fact, many “enemy aliens” were not in the United States at the onset of the war, but rather were forcibly brought into the United States for detention.⁷⁰ Given these analytic difficulties, historical precedent cannot provide a coherent analogue to modern-day law-of-war detainees.

C. *Significant Changes to Immigration Law Since WWII*

Fortunately, courts’ inconsistent historical treatment of POWs and enemy aliens is now largely beside the point. Even if WWII practice did set a clear precedent on the applicability of immigration law to the transfer of former detainees, domestic and international laws have changed so dramatically that 1940s practice is now largely obsolete. Specifically, the principle of *non-refoulement*, which is enshrined in both U.S. and international law, bars repatriation of an alien at the border in certain situations.⁷¹ While former WWII POWs did not enjoy this right, they were not denied because the laws of war superseded *non-refoulement* protections; rather, they were denied because such protections did not yet exist.

The international law governing refugees was in its infancy during WWII.⁷² Until 1928, no international agreement regarding refugees imposed any obliga-

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69. See Oona Hathaway et al., *The Power To Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT’L L. 123, 157–58 (2013).
70. See, e.g., Cindy G. Buys, *Nottebohm’s Nightmare: Have We Exorcised the Ghosts of WWII Detention Programs or Do They Still Haunt Guantanamo?*, 11 CHI.-KENT J. INT’L & COMP. L. 1, 18 (2011) (explaining that the “Roosevelt Administration perceived a possibility of Germans living in Latin America becoming a destabilizing force and presenting a ‘fifth column’ for Nazi Germany”); Lika C. Miyake, *Forsaken and Forgotten: The U.S. Internment of Japanese Peruvians During World War II*, 9 ASIAN L.J. 163, 164 (2002) (describing the “coordinated . . . deportation program to remove dangerous enemy aliens from Latin American nations and place them in U.S. custody”).
71. Ana María Salinas de Frías, *States’ Obligations Under International Refugee Law and Counter-Terrorism Responses*, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 111, 115 (Ana María Salinas de Frías, Katja L.H. Samuel & Nigel D. White eds., 2012).
72. See GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 203 (3d ed. 2007) (“[I]n the inter-war period . . . [t]he need for protective principles for refugees began to emerge, but limited ratifications of instruments containing equivocal and much qualified provisions effectively prevented the consolidation of a formal principle of *non-refoulement*.”).

tion on the state with respect to the refugee; instead, agreements only specified terms of cooperation between states.⁷³ The 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees was the first agreement to establish a “standardize[d] . . . range of rights that should be extended to refugees,” and these rights were “formalized and amplified” by the subsequent League of Nations 1933 Convention Relating to the International Status of Refugees.⁷⁴ The 1933 Convention also imposed a weak version of the *non-refoulement* principle, mandating each contracting party “not to remove or keep from its territory by . . . non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly.”⁷⁵ However, the 1933 Convention was ratified by only eight states, “several with major reservations.”⁷⁶ And the Convention’s new office—the High Commission on Refugees (Jewish and Other) Coming from Germany—was marginalized, reporting not to the League of Nations but rather to a governing board of interested nations.⁷⁷

States were wary of agreeing to additional responsibilities towards refugees, especially as economic crisis loomed. Advocates of the 1933 Convention went on the defensive,⁷⁸ and the principle of *non-refoulement* did not appear in the subsequent 1938 Convention concerning the Status of Refugees coming from Germany.⁷⁹ The feebleness of the refugee regime appeared in stark relief during WWII, when many countries, including the United States, forcibly returned European Jews to their countries of origin.⁸⁰ Partially in reaction to this atrocity, the 1951 Refugee Convention, “the cornerstone of modern international refugee law,”⁸¹ established the modern principle of *non-refoulement*.

73. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 86 (2010).

74. *Id.* at 86–87.

75. Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, 159 L.N.T.S. 199, 205 (1935–1936).

76. HATHAWAY, *supra* note 73, at 88.

77. RICHARD BREITMAN & ALLAN J. LICHTMAN, *FDR AND THE JEWS* 81 (2013).

78. HATHAWAY, *supra* note 73, at 89 (“[T]he international agenda was very much focused on easing the requirements of the 1933 Convention or even drafting a new, more flexible, accord to induce states to bind themselves to some standard of treatment, even if a less exigent one.”).

79. League of Nations, Convention Concerning the Status of Refugees Coming from Germany, Feb. 10, 1938, 192 L.N.T.S. 59; Shauna Labman, *Looking Back, Moving Forward: The History and Future of Refugee Protection*, 10 CHI.-KENT J. INT’L & COMP. L. 1, 11 (2010).

80. See, e.g., Valerie Neal, *Slings and Arrows of Outrageous Fortune: The Deportation of “Aggravated Felons,”* 36 VAND. J. TRANSNAT’L L. 1619, 1638 n.127, 1640 (2003); Geoffrey Jones, Note, *The Fifth Amendment Due Process Rights of Interdicted Haitian Refugees*, 21 HASTINGS CONST. L.Q. 1071, 1113–14 (1994).

81. HATHAWAY, *supra* note 73, at 91.

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

Similar to international law, domestic law during WWII left the United States wide latitude in its treatment of aliens at the border. At this time, the United States was still operating under the restrictive Johnson-Reed Act of 1924, which established strict national-origin quotas on immigrants.⁸² These quotas prevented the immigration of “tens of thousands” of German Jews requesting entry into the United States in the 1930s and 1940s.⁸³ During hostilities, the United States established just one refugee camp, at Fort Ontario. Refugees at Fort Ontario were not admitted under the immigration quotas and thus were not permitted “to obtain any rights to be at liberty in the United States or remain here.”⁸⁴ Like enemy aliens at internment camps, the immigrants at Fort Ontario never legally entered the United States.

After the war, Congress passed a series of ad hoc statutes to address the flow of post-WWII refugees. The Displaced Persons Act of 1948, as subsequently amended in 1950, created a “quota mortgaging” option to allow for faster immigration of refugees.⁸⁵ The 1952 INA granted the Attorney General the authority to parole refugees into the United States as non-resident immigrants.⁸⁶ And the Refugee Relief Act of 1953 created a quota-exempt path for roughly 200,000 additional refugees.⁸⁷ None of these statutes, however, obligated the government to provide asylum for, or prevent the repatriation of, refugees. In fact, U.S. law did not implement the 1951 Refugee Convention until the enactment of the Refugee Act of 1980.⁸⁸

The paucity of domestic and international law regarding refugees during WWII creates serious doubt about the utility of drawing parallels between that era and today. The Department of Justice’s 1039 Report is technically correct in stating that historically “the immigration framework” did not apply to law-of-

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82. David M. Reimers, *Post-World War II Immigration to the United States: America’s Latest Newcomers*, 454 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 2 (1981). Some nationalities were barred from immigration entirely; immigrants of Asian descent were largely barred from the United States until 1946. *Id.*
83. BREITMAN & LICHTMAN, *supra* note 72, at 75; Harvey Strum, *Fort Ontario Refugee Shelter, 1944–1946*, 73 AM. JEWISH HIST. 398, 398 (1984) (“Congress . . . reflected the anti-refugee feelings of the American public, and refused to either alter the quotas or admit Jewish refugees outside of the existing immigration laws. American consular officials and upper level State Department administrators, particularly Assistant Secretary of State Breckinridge Long who headed the Visa Division, used visa regulations to limit the admission of Jews.”).
84. Strum, *supra* note 83, at 406 (quoting Attorney General Francis Biddle).
85. Reimers, *supra* note 82, at 2. Over 400,000 immigrants entered the United States under the new program. *Id.*
86. *Id.* at 4.
87. *Id.* at 3.
88. Jones, *supra* note 80, at 1097.

war detainees.⁸⁹ But this is because “the immigration framework” at the time contained only restrictive quotas, lacking now-existing protections for aliens at the border. Thus, this Note rejects the 1039 Report’s contention that international and domestic immigration law does not cover former law-of-war detainees. The remainder of this Note therefore analyzes the precise ways in which the immigration law framework would apply to former detainees on U.S. soil.

II. WHAT DOES THE LEGAL FRAMEWORK REQUIRE?: PROTECTIONS AGAINST REMOVAL FROM THE UNITED STATES

In some ways, the 1039 Report anticipated the tenuousness of its contention that immigration law simply would not apply to relocated detainees. The 1039 Report argues in the alternative that even if immigration laws apply to former detainees, the statutory scheme creates “numerous bars to the relief identified in section 1039(b)(1)(A)–(C).”⁹⁰ The Report argues that statutory exclusions bar former detainees from asylum⁹¹ and withholding of removal,⁹² two forms of immigration relief that could result in release into the United States. Next, the Report acknowledges that deferral of removal, available under the Convention Against Torture (CAT), does not come with any statutory bars.⁹³ However, the Report argues that the United States could comply with the CAT by removing the detainee to a third-party country, which would also avoid release into the United States.⁹⁴ Finally, the Report argues that current Supreme Court precedent would not prohibit indefinite immigration detention of a former detainee.⁹⁵ Thus, the 1039 Report sanguinely concludes that “immigration-related relief . . . is circumscribed by a variety of statutory and executive authorities that provide robust protection of our national security.”⁹⁶

89. 1039 Report, *supra* note 32, at 1, 9.

90. *Id.* at 1.

91. *Id.* at 2.

92. *Id.* at 4.

93. *Id.* at 5.

94. *Id.*

95. *Id.* at 7–8.

96. *Id.* at 9. The Obama Administration reiterated this position in a 2016 press conference, stating that the Administration has “authority to detain individuals in the United States until the end of hostilities, and then to transfer them out” and that “assuming immigration laws would not apply to their detention or subsequent transfer abroad, . . . the 1039 [R]eport concludes . . . that detainees relocated would not have a right to the type of relief that that report analyzed.” Press Release, White House Office of the Press Sec’y, Background Press Call on the Closing of the Prison at Guantanamo Bay (Feb. 23, 2016), <http://obamawhitehouse.archives.gov/the-press-office/2016/02/23/background-press-call-closing-prison-guantanamo-bay> [<http://perma.cc/D2TT-WJ2G>].

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

This Note argues that, when considering how immigration laws might affect former detainees, the 1039 Report provides only a partial answer. First, the 1039 Report mentions the international laws that motivate the U.S. statutory scheme, but it largely fails to independently assess the United States' obligations to former detainees under international law.⁹⁷ Filling this gap, Section II.A supplies the international legal background that the 1039 Report lacks. Second, Section II.B largely confirms the 1039 Report's analysis of U.S. domestic immigration law. However, this Note underscores what the 1039 Report obscures: under the right combination of circumstances, the CAT would prevent the United States from transferring a former detainee abroad.

A. *International Law: The Non-Refoulement Principle and Exceptions*

1. The Refugee Convention

While international law largely respects the fundamental principle that sovereign states may control who enters their borders,⁹⁸ it also recognizes the limited right of aliens at the border to be safe from return to unsafe countries. This principle of *non-refoulement*—literally, the right against return—has been enshrined in various international treaties and, arguably, customary international law since the 1951 Convention Relating to the Status of Refugees.⁹⁹ While pro-

97. I do not mean to indict the 1039 Report or its authors. The Report's authors forthrightly explain that the Report "focuses on the specific information sought by the reporting requirements in section 1039 and does not purport to address all issues presented by, or that may arise from, the relocation of detainees from Guantanamo to the United States." 1039 Report, *supra* note 32, at 1 n.1.

98. See, e.g., Laura S. Adams, *Divergence and the Dynamic Relationship Between Domestic Immigration Law and International Human Rights*, 51 EMORY L.J. 983, 996–98 (2002). But for an argument that international law could compel countries to open their borders, see Elizabeth M. Bruch, *Open or Closed: Balancing Border Policy with Human Rights*, 96 KY. L.J. 197, 212–22 (2008). Also note that international law may impose additional obligations on a state with respect to noncitizens within its borders, although the United States has been slow to recognize such responsibilities. See Shayana Kadidal, "Federalizing" *Immigration Law: International Law as a Limitation on Congress's Power To Legislate in the Field of Immigration*, 77 FORDHAM L. REV. 501, 514–26 (2008).

99. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. Note that because the United States accepts treaties that it has ratified as binding law under the Supremacy Clause, such treaties constitute U.S. law as well. U.S. CONST. art. VI, cl. 2 ("[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . ."); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) ("Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants.").

tection against return has remained the primary, and likely solitary, obligation owed by states to aliens at the border, the question of “return to what” has been expanded and elaborated over time.¹⁰⁰

The principal source of international refugee law is the 1951 Convention Relating to the Status of Refugees.¹⁰¹ The Convention entered into force in 1954 and was followed by an additional Protocol in 1967.¹⁰² One hundred forty-eight countries, including the United States, are currently party to one or both instruments.¹⁰³ Article 33(1) of the 1951 Convention states, “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁰⁴ Notably, the Convention establishes a negative right against return, but does not create a positive right to stay.¹⁰⁵ To fulfill their *non-refoulement* obligations, states “remain free to grant or to reject the claim of an asylum seeker within their territories as long as the person in question is not compulsorily returned to the country of persecution.”¹⁰⁶

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100. Salinas de Frías, *supra* note 71, at 113–14. States do not have an obligation under international law to *admit* aliens who qualify for *non-refoulement*; however, allowing an alien to temporarily remain in the jurisdiction of a state may be requisite to fulfilling the *non-refoulement* obligation. See GOODWIN-GILL & MCADAM, *supra* note 72, at 207–08 (“‘No duty to admit’ begs many questions; in particular, whether States are obliged to protect refugees to the extent of not adopting measures which will result in their persecution or exposure to danger. State practice in fact attributes little weight to the precise issue of admission, but far more to the necessity for *non-refoulement* through time, pending the obtaining of durable solutions.”).
101. Refugee Convention, *supra* note 99.
102. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
103. *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMMISSIONER FOR REFUGEES 1 (Apr. 2015), <http://www.unhcr.org/3b73bod63.html> [<http://perma.cc/P4UN-XP82>]. Note that the United States is not a signatory of the 1951 Convention, but it has signed the 1967 Protocol, which incorporates Articles 2–34 of the Convention and the relevant definition of “refugee” from Article 1. See Eileen Dorfman, *Testing the Boundaries: Does US Asylum Law Satisfy the Refugee Convention?*, 32 WIS. INT’L L.J. 752, 755 (2014).
104. Refugee Convention, *supra* note 99, art. 33(1).
105. Salinas de Frías, *supra* note 71, at 115; see also GOODWIN-GILL & MCADAM, *supra* note 72, at 206–07 (“States were not prepared to include in the Convention any article on admission of refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum.”).
106. Salinas de Frías, *supra* note 71, at 115. That said, *non-refoulement* creates a “*de facto* duty to admit” if the result of refusal would be the alien’s return to the country of persecution. *Id.*

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

Whether or not *non-refoulement* has acquired the status of customary international law or *jus cogens*—peremptory norms from which states may not derogate—is the subject of much debate.¹⁰⁷ A survey of state practice indicates that while most countries affirm the *non-refoulement* principle in theory, many have also distinguished, limited, or outright violated the norm in practice.¹⁰⁸

The Refugee Convention contains two exceptions to the *non-refoulement* obligation that may be applicable in the context of relocated Guantanamo detainees. First, Article 1(F) excludes individuals who have previously committed certain offenses from the definition of “refugee,” thus denying them protection. It states:

[T]his Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) [H]e has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) [H]e has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) [H]e has been guilty of acts contrary to the purposes and principles of the United Nations.¹⁰⁹

Second, and more specifically, Article 33(2) denies the benefit of Article 33(1)’s *non-refoulement* protections to individuals who pose a security risk to the country in which they seek protection. Article 33(2) excludes from protection “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”¹¹⁰

There appears to be an emerging international consensus that these exceptions deny terrorists the protection of *non-refoulement*.¹¹¹ First, various international bodies recognize an affirmative obligation to deny asylum to terrorists. Even before 9/11, the U.N. General Assembly stated, “States must . . . fulfill their obligations . . . with respect to combating international terrorism and are urged to . . . take appropriate measures, before granting asylum, for the purpose of en-

107. See, e.g., GOODWIN-GILL & MCADAM, *supra* note 72, at 218; Salinas de Frías, *supra* note 71, at 120–21.

108. For a discussion of state practice, see GOODWIN-GILL & MCADAM, *supra* note 72, at 218–32.

109. Refugee Convention, *supra* note 99, art. 1(F).

110. *Id.* art. 33(2).

111. See Ben Saul, *Protecting Refugees in the Global “War on Terror”* 6 (Univ. of Sydney, Sydney Sch. of Law Legal Studies Research Paper No. 08/130, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292604 [http://perma.cc/6FSP-2KDK] (noting “international and regional trends towards the restriction of refugee status for suspected terrorists”).

sureing that the asylum seeker has not engaged in terrorist activities”¹¹² The General Assembly’s declarations were mirrored a few years later by the U.N. Security Council. Resolution 1269 requires states to deny “safe havens” to individuals involved in terrorism and, “in conformity with the relevant provisions of national and international law,” to deny refugee status to asylum-seekers who have “participated in terrorist acts.”¹¹³ Similar language can be found in Resolution 1373, adopted on September 28, 2001. Resolution 1373 “[c]alls upon” states to

[t]ake appropriate measures . . . , before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts; [and] [e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists¹¹⁴

Although this section of Resolution 1373 is “only recommendatory,” it has been applied by the U.N. Security Council’s (UNSC) Counter-Terrorism Committee so as to give “the impression that States are required to exclude terrorists, without full application of international refugee law.”¹¹⁵ The obligation to deny asylum to terrorists also appears in the Inter-American Convention Against Terrorism,¹¹⁶ to which the United States is party, and in an EU Common Council Position.¹¹⁷

The obligation to withhold asylum does not necessarily undermine the *non-refoulement* principle: a state could exclude an individual without returning him. However, if every country has such an obligation to exclude, then states collectively face a Catch-22. If every state excludes the individual, then the only

112. G.A. Res. 49/60, annex, Declaration on Measures to Eliminate International Terrorism, ¶¶ 4–5 (Dec. 9, 1994).

113. S.C. Res. 1269, ¶ 4 (Oct. 19, 1999).

114. S.C. Res. 1373, ¶ 3(f)–(g) (Sept. 28, 2001).

115. Saul, *supra* note 111, at 3.

116. Inter-American Convention Against Terrorism art. 13, June 3, 2002, S. TREATY DOC. NO. 107-18, 42 I.L.M. 19 (“Each state party shall take appropriate measures, consistent with the relevant provisions of national and international law, for the purpose of ensuring that asylum is not granted to any person in respect of whom there are reasonable grounds to believe that he or she has committed an offense established in the international instruments listed in Article 2 of this Convention.”).

117. Council Common Position (EC) No. 2001/930 of 27 December 2001, art. 16, 2001 O.J. (L 344) 90, 91 (“Appropriate measures shall be taken in accordance with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts.”).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

option left is *refoulement* to his home country. A 1996 General Assembly declaration seemingly addresses this tension. The declaration explicitly states that individuals engaged in terrorism do not enjoy *non-refoulement* protections under the Refugee Convention:

The General Assembly, . . . [n]oting that the Convention relating to the Status of Refugees . . . does not provide a basis for the protection of perpetrators of terrorist acts, noting also in this context articles 1, 2, 32, and 33 of the Convention, . . . [s]olemnly declares . . . that States should take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts, considering in this regard relevant information as to whether the asylum-seeker is subject to investigation for or is charged with or has been convicted of offences connected with terrorism¹¹⁸

These declarations do not modify the Convention, and they create authoritative public international law only insofar as they express customary practice, but the U.N. High Commissioner for Refugees treats them as binding on itself.¹¹⁹

Notably, establishing that “terrorists” do not enjoy the protections of *non-refoulement* does not end the inquiry. The Convention does not use the label “terrorism,” and even if it did, there is no agreed-upon definition of “terrorism” in international law.¹²⁰ Articles 1(F) and 33(2) of the Refugee Convention establish grounds for excludable conduct that may or may not align with the U.S. definition of an “enemy combatant” and the actual conduct of relocated detainees who have been released from law-of-war detention.

2. The Convention Against Torture

Article 3 of the CAT prohibits the return of “a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹²¹ The CAT applies to all individuals facing torture, even those who would not qualify as refugees under the Refugee Convention.¹²²

118. G.A. Res. 51/210, annex, Declaration To Supplement the 1994 Declaration on Measures To Eliminate International Terrorism (Dec. 17, 1996).

119. Saul, *supra* note 111, at 2.

120. *Id.* at 1.

121. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113.

122. JULIA WOJNOWSKA-RADZINSKA, THE RIGHT OF AN ALIEN TO BE PROTECTED AGAINST ARBITRARY EXPULSION IN INTERNATIONAL LAW 98 (2015) (“In contrast to the Convention Relating to the Status of Refugees, the aim of Article 3 of the CAT is to protect an alien from expulsion to a country where he would be subject to torture,

The risk of torture “need not be highly probable, but it must be personal and present.”¹²³

In contrast to the Refugee Convention, the CAT, which binds the United States as a party, does not contain a security exception; it provides “an absolute prohibition against *refoulement*.”¹²⁴ The U.N. Committee Against Torture (UNCAT) has found that obligations under Article 3 of the CAT supersede a state’s binding obligation to comply with UNSC Resolutions requiring the denial of safe havens to terrorists.¹²⁵ Additionally, some have argued that the return of an alien to a torturing country would violate *jus cogens* because the prohibition on torture is itself a non-derogable obligation with *jus cogens* status.¹²⁶ Altogether, this means that the United States could not transfer a former law-of-war detainee to a country that would torture him, regardless of the security risk posed by the detainee to the United States.¹²⁷

regardless of his race, religion, nationality, political views and membership to a particular social group.”). The CAT’s definition of torture, however, only covers treatment by state officials; private parties are not included. *Id.* at 99.

123. *Id.* at 100.

124. *Id.* at 97.

125. See *Agiza v. Sweden*, Comm. Against Torture, Communication No. 233/2003, ¶ 13.1, U.N. Doc. CAT/C/34/D/233/2003 (2005). For a discussion of *Agiza*, see Salinas de Frías, *supra* note 71, at 123–24.

126. See, e.g., WOJNOWSKA-RADZINSKA, *supra* note 122, at 93 (“Professor Manfred Nowak, former United Nations Special Rapporteur on Torture, claims that prohibition against *refoulement* in Article 3 of the . . . Convention [Against Torture] formulates an important principle of international law, . . . meaning a State violates the absolute prohibition of torture not only if its own authorities subject a person to torture, but also if a person is sent to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.”); Salinas de Frías, *supra* note 71, at 119 (“Due to the indivisible normative link between the absolute, non-derogable prohibition against torture and *non-refoulement*—including in relation to states’ counter-terrorist responses—the issue then becomes whether the former not only reinforces the apparent customary status of the latter, but whether it further introduces a new element. . . . [T]he questions arise as to whether the *jus cogens* nature of the prohibition against torture is transferred across to the *non-refoulement* principle . . .”).

127. The Refugee Convention and the CAT create the most relevant *non-refoulement* obligations to former law-of-war detainees held by the United States, but other treaties contain *non-refoulement* protections as well. These additional instruments have been called “complementary protection,” “a shorthand term for the widened scope of *non-refoulement* under international law.” GOODWIN-GILL & MCADAM, *supra* note 72, at 285. First, the International Covenant on Civil and Political Rights (ICCPR) has been interpreted to include a *non-refoulement* protection. *Id.* at 93. Article 7 states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]. The Human Rights Committee’s (HRC) General Comment No. 20

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

3. Diplomatic Assurances

Diplomatic assurances may alleviate a state's *non-refoulement* obligations in some circumstances, but their use is controversial. Such a diplomatic assurance, often stylized as a memorandum of understanding, would exact a promise from the destination country not to subject the alien in question to the ill-treatment that generated his original claim for protection. The international bodies charged with supervising the relevant instruments providing for *non-refoulement* have viewed diplomatic assurances with skepticism.¹²⁸ The U.N. High Commissioner for Refugees (UNHCR) argues that diplomatic assurances can never suffice in cases involving the Refugee Convention because "[o]nce the country of refuge has made [a] finding [of a well-founded fear of persecution], it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the sending State to look to the very agent of persecution for

states that parties have an obligation to avoid subjecting individuals to such treatment "by way of their extradition, expulsion, or *refoulement*." U.N. Human Rights Comm., General Comment No. 20, ¶ 9, 44th Sess., 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) (quoted in WOJNOWSKA-RADZINSKA, *supra* note 122, at 94). While the applicability of Article 7 is broader than the CAT (in applying to degrading treatment in addition to torture), the applicant's burden of proof under Article 7 is higher than under the CAT; he must demonstrate that unlawful treatment is "an inevitable and foreseeable consequence of the removal." WOJNOWSKA-RADZINSKA, *supra* note 122, at 102. Similarly to the UNCAT, the HRC has found that a state cannot return an individual with connections to terrorist organizations to his home country if *refoulement* would subject him to mistreatment as defined by Article 7 of the ICCPR. See *Alzery v. Sweden*, Human Rights Comm., Communication No. 1416/2005, ¶¶ 11.3–11.5, U.N. Doc. CCPR/C/88/D/1416/2005 (2006); see also WOJNOWSKA-RADZINSKA, *supra* note 122, at 111 (discussing *Alzery*). Second, Article 45 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War prohibits the *refoulement* of protected persons. It states: "In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 45, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Third, *non-refoulement* obligations have been reaffirmed in various binding regional instruments to which the United States is not a party, including the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1969 American Convention on Human Rights, the 1981 African Charter of Human and Peoples' Rights, and the 1950 European Convention on Human Rights. See GOODWIN-GILL & MCADAM, *supra* note 72, at 209–11. Finally, the *non-refoulement* principle also appears in numerous non-binding declarations and resolutions. See *id.* at 211–15.

128. See Cornelis (Kees) Wouters, *Reconciling National Security and Non-Refoulement: Exceptions, Exclusion, and Diplomatic Assurances*, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE, *supra* note 71, at 579, 588.

assurance that the refugee will be well-treated upon *refoulement*.¹²⁹ The UNHCR looks more favorably upon diplomatic assurances in the context of the CAT. It notes:

Where the receiving State has given diplomatic assurances . . . , these form part of the elements to be assessed in making [the] determination [that the transfer would not expose the alien to impermissible risk]. . . . [T]he sending State acts in keeping with its human rights obligations only if such assurances effectively remove the risk that the individual concerned will be subjected to violations of the rights guaranteed therein. Thus, diplomatic assurances may be relied upon only if they are (i) a *suitable* means to eliminate the danger to the individual concerned, and (ii) if the sending State may, in good faith, consider them *reliable*.¹³⁰

Some implicitly agree with the UNHCR's position that assurances present a question of fact regarding the likelihood of torture,¹³¹ but they argue that states with a track record of abuse cannot reliably give a sufficient assurance.¹³² Assuming the alien asking for protection can establish a history of torture, this rule would functionally morph into a per se bar to diplomatic assurances. The U.N. Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment has taken this uncompromising stance, stating that diplomatic assurances are per se insufficient to meet a country's CAT obligations.¹³³

129. Prot. Operations & Legal Advice Section, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, U.N. HIGH COMMISSIONER FOR REFUGEES ¶ 30 (Aug. 2006), http://www.unhcr.ch/fileadmin/unhcr_data/UNHCR_Note_on_Diplomatic_Assurances_and_International_Refugee_Protection.pdf [<http://perma.cc/7NP2-ANBU>].

130. *Id.* ¶¶ 19–20.

131. See, e.g., Helen Duffy & Stephen A. Kostas, 'Extraordinary Rendition': A Challenge for the Rule of Law, in COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE, *supra* note 128, at 539, 551 ("The controversial use of diplomatic assurances against torture does not per se alleviate the risk of torture, and the question remains one of fact as to whether there are, in all circumstances in the state in question and in light of the facts concerning the individual, substantial reasons for believing that there is a risk to his or her rights upon transfer.").

132. See, e.g., GOODWIN-GILL & MCADAM, *supra* note 72, at 261–62; WOJNOWSKA-RADZINSKA, *supra* note 122, at 111.

133. See, e.g., GOODWIN-GILL & MCADAM, *supra* note 72, at 261; Wouters, *supra* note 128, at 590.

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

B. Domestic Law: Asylum, Withholding of Removal, and the CAT

Codification of U.S. obligations under the Refugee Convention and the CAT has produced three forms of relief against repatriation and third-country transfer: asylum, withholding of removal, and deferral of removal. All three forms of relief are available to aliens at the border,¹³⁴ but there are many statutory obstacles that would make it difficult for a former law-of-war detainee to successfully secure them. The one exception, however, is deferral of removal on CAT grounds. If an alien can establish that he is likely to be tortured upon transfer to a country, then the United States cannot legally make such a transfer.

The Refugee Act of 1980, which implements U.S. obligations under the Refugee Convention,¹³⁵ makes available two forms of relief: asylum and withholding of removal. Both avenues are only open to individuals falling under the definition of “refugee,” which includes any individual with a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” who is “unable or unwilling” to return to his home country.¹³⁶

Asylum is the more difficult status to obtain. Some individuals may meet the statutory definition of “refugee” but nonetheless be denied asylum because of statutory exceptions to the availability of asylum—for example, a one-year application window.¹³⁷ Additionally, asylum is “formally discretionary”¹³⁸ and the Attorney General may promulgate regulations that narrow its scope of availability.¹³⁹

134. Asylum claims can be raised “affirmatively” at the border or “defensively” during removal proceedings. 8 U.S.C. § 1158(a)(1) (2012) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum”); *see also* DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 23–25 (2011) (“A person who applies for asylum protection must be physically present or ‘arriving’ in the United States Generally, those persons who have not been intercepted at a border or apprehended . . . may apply ‘affirmatively’ [I]f the [Department of Homeland Security] arrests, apprehends, or otherwise initiates proceedings against the person, he or she may apply ‘defensively’ during a formal adversarial removal proceeding”). Withholding of removal and deferral of removal are both exclusively defensive claims, which can be raised during removal proceedings. *Id.* at 25.

135. ANKER, *supra* note 134, at 2.

136. 8 U.S.C. § 1101(a)(42)(A) (2012). The Refugee Act’s definition of “refugee” includes all individuals that fall under the Convention’s definition. *See* ANKER, *supra* note 134, at 6.

137. 8 U.S.C. § 1158(a)(2).

138. ANKER, *supra* note 134, at 6.

139. *Id.* at 517.

When an individual has met the definition of refugee but has been denied asylum, withholding of removal fills the gap.¹⁴⁰ Unlike asylum, withholding of removal is non-discretionary; an alien who qualifies for withholding of removal must be granted such relief.¹⁴¹ However, unlike other Convention signatories, the United States demands a higher burden of proof to establish withholding of removal than to establish a claim to asylum.¹⁴² Additionally, withholding of removal does not grant a refugee immigration status in the United States, but rather it only prevents the United States from returning the refugee to the country of persecution.¹⁴³ Thus, an alien who has received a grant of withholding of removal can be removed to any acceptable third-party country.¹⁴⁴

The availability of both asylum and withholding of removal are limited by various statutory bars that generally define and exclude aliens deemed unworthy of refugee protection.¹⁴⁵ Theoretically, bars under domestic law that deny asylum should align with bars under international law that deny refugee status (and thus *non-refoulement* protection).¹⁴⁶ In practice, however, the United States bars more asylum seekers than the Refugee Convention.¹⁴⁷ Most of these bars are found in section 208(b)(2)(A) of the INA.¹⁴⁸ They exclude, *inter alia*, individuals who participated in the persecution of others;¹⁴⁹ who have been convicted of a serious crime;¹⁵⁰ for whom “there are serious reasons” to believe they committed “a serious nonpolitical crime” before entering the United States;¹⁵¹ for whom “there are reasonable grounds” to regard them as a danger

140. *Id.* at 7.

141. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 2:1 (2015).

142. ANKER, *supra* note 134, at 7.

143. *Id.* at 7–8. The availability of withholding of removal aligns U.S. domestic law with the 1951 Refugee Convention; *non-refoulement* provides protection from return, not an affirmative right to asylum. *Id.* at 497.

144. 8 C.F.R. § 208.16(f) (2017).

145. ANKER, *supra* note 134, at 443.

146. *Id.*

147. *Id.* at 444–45.

148. 8 U.S.C. § 1158(b)(2)(A) (2012).

149. *Id.* § 1158(b)(2)(A)(i).

150. *Id.* § 1158(b)(2)(A)(ii).

151. *Id.* § 1158(b)(2)(A)(iii).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

to the United States;¹⁵² and who have engaged in terrorist activities, broadly defined.¹⁵³ Bars to withholding of removal generally mirror these bars to asylum.¹⁵⁴

Domestic implementation of Article 3 of the CAT provides a different avenue of relief for qualified aliens, distinct from asylum and withholding of removal under the Refugee Act. Relief under the CAT is available to any individual who can establish that he is “more likely than not” to be tortured upon transfer to another country.¹⁵⁵ As most courts have applied it, the more-likely-than-not CAT standard requires a higher showing than the well-founded-fear asylum requirement.¹⁵⁶ While “more likely than not” implies a probability above fifty percent, the Court has held that establishing a well-founded fear requires a significantly lower probability.¹⁵⁷

Although it may be harder for an applicant to establish his claim to CAT protection as compared to an asylum claim, once such a showing is made under the CAT, it is much harder for the government to remove him. Regulations¹⁵⁸ promulgated under authority of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)¹⁵⁹ create two options to prevent *refoulement*: withholding of removal and deferral of removal.¹⁶⁰ Withholding of removal under the CAT is subject to the same eligibility bars as withholding of removal under the Refu-

152. *Id.* § 1158(b)(2)(A)(iv).

153. *Id.* § 1158(b)(2)(A)(v), as defined in 8 U.S.C. § 1182(a)(3)(B)(i) (2012) and 8 U.S.C. § 1227(a)(4)(B) (2012).

154. ANKER, *supra* note 134, at 447.

155. 8 C.F.R. §§ 208.16–.17 (2017).

156. *See, e.g.*, DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 7:38 (May 2016) (“The probability/more-likely-than-not standard of risk applicable in Torture Convention cases is different from, and in some respects higher than, the well-founded fear standard for refugee status and asylum eligibility.”).

157. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (“That the fear must be ‘well-founded’ does not alter the obvious focus on the individual’s subjective beliefs, nor does it transform the standard into a ‘more likely than not’ one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.”). The Court has suggested that at least a one-in-ten chance would suffice to meet the standard. *See id.* (citing a “leading authority” which explains that if “in the applicant’s country of origin every tenth adult male person is either put to death or sent to some remote labor camp,” then “it would be only too apparent that anyone who has managed to escape from the country . . . will have ‘well-founded fear of being persecuted’ upon his eventual return” (quoting 1 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966))).

158. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478-01 (Feb. 19, 1999) (codified at 8 C.F.R. §§ 208.16–.18 (2017)).

159. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681.

160. ANKER, *supra* note 134, at 537.

gee Act.¹⁶¹ Deferral of removal, on the other hand, is unconditionally available without security exceptions.¹⁶² Unlike asylum and withholding of removal, deferral of removal under the CAT cannot be refused to serious criminals, terrorists, or other security risks.¹⁶³ Like withholding of removal, however, deferral of removal does not grant the alien status and does not prevent his removal to a third-party country.¹⁶⁴

As summarized in Figure 1, there are many statutory obstacles that would make it difficult—but not impossible—for a former law-of-war detainee to successfully secure relief from removal. It is unlikely that he would receive asylum, either due to a statutory bar or a discretionary denial. If denied asylum, the alien could apply for relief from removal or deferral of removal during removal proceedings.¹⁶⁵ Withholding of removal is non-discretionary, but subject to the same statutory bars as asylum.¹⁶⁶ In contrast, although deferral of removal is available only in the case of torture, it is non-discretionary and, unlike asylum and withholding of removal, not subject to any statutory bars.¹⁶⁷ Thus, if a former detainee can establish that his repatriation would result in torture, and if the U.S. government cannot secure sufficient diplomatic assurances from the alien's home country or find a suitable third-party country for resettlement,¹⁶⁸ then the United States cannot remove the individual.

161. See *id.* The CAT implementing regulations simply made the pre-existing withholding provisions of the INA available to CAT applicants. See 8 C.F.R. § 208.16. The availability of withholding of removal under the CAT is not, however, redundant with its availability under asylum law. If an alien would be tortured upon return to his home country, but that torture is unrelated to one of the protected identity categories under the Refugee Convention and asylum law, then the alien's only avenue for withholding of removal runs through the CAT. See 2 SHANE DIZON & NADINE K. WETTSTEIN, IMMIGRATION LAW SERVICE § 10:236 (2d ed. 2015).

162. ANKER, *supra* note 134, at 539.

163. *Id.* at 542.

164. *Id.* at 537. There are other procedural differences between withholding and deferral of removal; for example, a grant of deferral can be terminated more quickly and with fewer procedural protections than a grant of withholding. *Id.* at 537 n.9.

165. See ANKER, *supra* note 141, at app. A § A1:1.

166. See *id.* § 2:1.

167. ANKER, *supra* note 134, at 539.

168. 8 U.S.C. § 1231(b) (2012).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

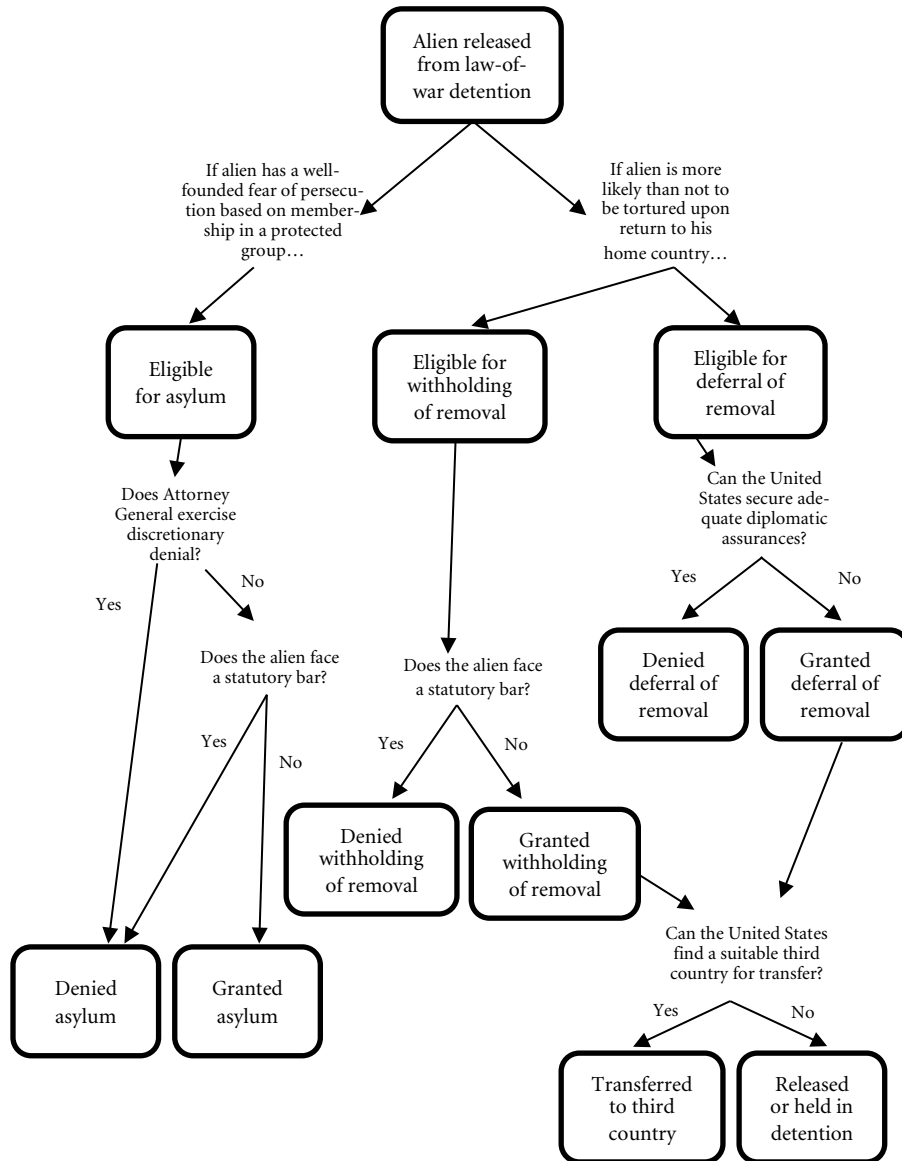


Figure 1: Domestic Immigration Law Applicable to a Former Law-of-War Detainee¹⁶⁹

169. This figure offers a stylized depiction of available relief from removal. It omits some nuances for the sake of simplicity.

The 1039 Report fails to clearly acknowledge the possibility that a detainee may obtain relief under the CAT. The CAT does not contain national security exceptions, and therefore Congress could not modify the statutory availability of relief from removal without running afoul of its international legal obligations. Thus, the 1039 Report's claim that "Congress could . . . expressly preclude . . . forms of relief by statute"¹⁷⁰ only applies to asylum and relief from removal, not withholding of removal. And although the 1039 Report accurately notes that the United States could pursue diplomatic assurances,¹⁷¹ this optimism may be misplaced given the mechanism's dubious status under international law and the potential difficulty of securing adequate guarantees.

It is difficult to predict if and how many detainees at Guantanamo Bay may be able to substantiate a claim for deferral of removal under the CAT. But there are several reasons to believe that such an outcome is possible. First, just such a situation presented itself in the *Kiyemba* case, in which the United States found itself holding Chinese Uighurs—formerly but no longer classified as enemy combatants—in indefinite immigration detention at Guantanamo. The detainees "fear[ed] that if they [were] returned to China they [would] face arrest, torture or execution,"¹⁷² so the United States declined to repatriate the detainees based on its policy "not to transfer individuals to countries where they will be subject to mistreatment."¹⁷³ With nowhere else to go, the detainees remained in

170. 1039 Report, *supra* note 32, at 9.

171. The Report states: "The United States could also consider whether to pursue diplomatic assurances and other measures related to humane treatment with the goal of addressing concerns and ensuring that the United States satisfies its treaty obligations and its humane treatment policy." *Id.* at 5; *see also* 8 C.F.R. § 208.18(c) (2017) (describing the process for evaluating and relying upon diplomatic assurances); DIZON & WETTSTEIN, *supra* note 161, § 10:239 (noting that "[o]nce the assurances are found to be reliable, the noncitizen's claim for protection under the Convention Against Torture will not be considered any further by an immigration judge, the Board of Immigration Appeals, or by an asylum officer").

172. *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022, 1024 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010), *and judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010).

173. *Id.* Because of the Obama Administration's "policy" not to seek removal, the detainees never raised a formal CAT claim for adjudication. In her opinion concurring in the judgment, Judge Rogers emphasized the importance of the CAT to the case:

[W]hile the majority states it is the "policy" of the United States not to render people into countries in which they will be subject to torture or other mistreatment, that is also the legal obligation of the United States as a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Id. at 1033 n.3 (Rogers, J., concurring in the judgment) (internal citations omitted).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

limbo on Guantanamo Bay.¹⁷⁴ Second, at least one detainee currently held at Guantanamo Bay raises a red flag: Muieen al-Din Jamal al-Din al-Sattar, a member of the Rohingya Muslim-minority group¹⁷⁵ which is concentrated in Southeast Asia and historically subjected to persecution, especially in Burma.¹⁷⁶ Sattar was cleared for transfer by the Obama Administration, but the transfer could not be completed because no state would take him.¹⁷⁷ Finally, with the inauguration of Donald Trump came an end to the assumption that Guantanamo's detainee population will remain stable or decline over time.¹⁷⁸ If President Trump carries out his campaign promise to add ISIS prisoners to Guantanamo, then any subsequent administration will have a new set of detainees with potential CAT claims to consider.

III. WHAT HAPPENS WHEN REMOVAL IS NOT AN OPTION?: INDEFINITE IMMIGRATION DETENTION OF ALIENS AWAITING REMOVAL

Consider a former law-of-war detainee who has successfully secured deferral of removal under the CAT, and for whom the U.S. government has not yet found an alternative country for removal. In such a situation, the United States must confront a knotty question: how long can the government detain an individual whom the United States prefers not to release into the United States, but who *cannot* be removed to any other country? The INA gives the Attorney General authority to detain aliens who are subject to an order of removal. There are questions, however, about how long an alien may be held lawfully in immigration detention if he cannot be timely removed. Because the U.S. government has not yet held former Guantanamo detainees on U.S. soil in immigration detention, the lawfulness of such a practice remains untested. Current case law indicates that indefinite detention of former law-of-war detainees may be constitutional, provided that the detainees continue to fall under relevant terrorist-alien statutes and that their detention continues to receive regular review pursuant to those statutes.¹⁷⁹ But constitutional uncertainty remains.

174. For a longer discussion of the *Kiyemba* case, see *infra* notes 234–41 and accompanying text.

175. Ryan & Tate, *supra* note 13.

176. See, e.g., Amanda Crews Slezak, et al., *Stateless and Fleeing Persecution: The Situation of the Rohingya in Thailand*, 35 CHILD. LEGAL RTS. J. 44, 56 (2015); Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683, 710 (2014); Nikolas Feith Tan, *The Rohingya and Refoulement in Southeast Asia*, MIDDLE E. INST. (Oct. 12, 2016), <http://www.mei.edu/content/map/rohingya-and-refoulement-south-east-asia> [<http://perma.cc/6868-52Z7>].

177. Ryan & Tate, *supra* note 13.

178. Savage, *supra* note 17.

179. See *infra* Section III.B.

A. *Statutory Detention Authority*

The authority to hold former law-of-war detainees in immigration detention could be grounded in three separate statutory provisions. First, general detention requirements are set out in 8 U.S.C. § 1231. The Attorney General is required to remove an alien within 90 days of a removal order under § 1231(a)(1),¹⁸⁰ and she is required to detain the alien during this 90-day removal period under § 1231(a)(2).¹⁸¹ If an alien cannot be removed within 90 days, § 1231(a)(6) gives the Attorney General discretionary authority to continue detention.¹⁸²

Unlike the general § 1231 provision, two additional sources of statutory authority apply specifically to immigration detention of aliens accused of terrorist activity. Section 412 of the USA PATRIOT Act,¹⁸³ codified at 8 U.S.C. § 1226a, applies to detention of “terrorist aliens.”¹⁸⁴ Under § 1226a, the Attorney General may certify an alien to be a terrorist threat, as broadly defined by other provisions of the INA.¹⁸⁵ In most cases, the statute requires that the alien be charged with a crime or placed in removal proceedings within seven days.¹⁸⁶ However, if an alien’s “removal is unlikely in the reasonably foreseeable future,” he may be detained for additional six-month periods if “the release of the alien will threaten the national security of the United States or the safety of the community or any person.”¹⁸⁷ The statute provides for judicial review of the initial dangerous-

180. 8 U.S.C. § 1231(a)(1) (2012).

181. *Id.* § 1231(a)(2).

182. *Id.* § 1231(a)(6); *see also* *Zadvydas v. Davis*, 533 U.S. 678, 683 (2001) (“After entry of a final removal order and during the 90-day removal period . . . aliens must be held in custody. § 1231(a)(2). Subsequently, as the post-removal-period statute provides, the Government ‘may’ continue to detain an alien who still remains here or release that alien under supervision. § 1231(a)(6).”).

183. *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350 (codified at 8 U.S.C. § 1226a (2012)).

184. For a longer discussion of § 1226a, *see* Stephen I. Vladeck, *Detention After the AUMF*, 82 *FORDHAM L. REV.* 2189, 2196–98 (2014).

185. 8 U.S.C. § 1226a(a)(3); *see also* Stephanie Cooper Blum, “*Use It and Lose It*”: *An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies*, 16 *LEWIS & CLARK L. REV.* 677, 692 (2012) (describing certification under § 1226a).

186. *See* Vladeck, *supra* note 184, at 2196–97.

187. 8 U.S.C. § 1226a(a)(6); *see also* Vladeck, *supra* note 184, at 2197 (“[B]y design, section 412 authorizes potentially long-term civil detention of noncitizen terrorism suspects based upon a specific and individualized showing of dangerousness.”).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

ness determination and requires the Attorney General to provide a report to Congress on her use of this detention authority every six months.¹⁸⁸

Finally, the Alien Terrorist Removal Procedures (ATRP), created by the Antiterrorism and Effective Death Penalty Act of 1996¹⁸⁹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,¹⁹⁰ create a separate special procedure for removal of terrorist aliens.¹⁹¹ Under 8 U.S.C. § 1537, the Attorney General is allowed to detain a terrorist alien when “no country is willing to receive such an alien,” provided that the Attorney General “make[s] periodic efforts to reach agreement with other countries to accept such an alien and at least every 6 months . . . provide[s] to the attorney representing the alien . . . a written report on the Attorney General’s efforts.”¹⁹²

B. Constitutional Limits on Immigration Detention

Regardless of what Congress legislates, any statutory authority for immigration detention must comport with the U.S. Constitution.¹⁹³ The Supreme Court

188. See Vladeck, *supra* note 184, at 2197–98.

189. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

190. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

191. Note that § 1226a applies to a broader category of terrorist aliens than the ATRP. Under the ATRP, an alien terrorist is any alien so defined by 8 U.S.C. § 1227(a)(4)(B). See 8 U.S.C. § 1531(1) (2012). Under § 1226a, an alien terrorist is any alien so defined by 8 U.S.C. § 1227(a)(4)(B); any alien so defined by §§ 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), and 1227(a)(4)(A)(iii); and any alien “engaged in any other activity that endangers the national security of the United States.” 8 U.S.C. § 1226a(a)(3). Practically speaking, the difference between § 1226a and the ATRP’s definitions involves aliens engaged in espionage, sabotage, unlawful export, or activities to overthrow the U.S. government.

192. 8 U.S.C. § 1537(b)(2)(C) (2012).

193. Independent of the requirements of the U.S. Constitution, holding an alien in indefinite immigration detention may also be in tension with various U.S. obligations under international law. Article 31(2) of the Refugee Convention requires that “[c]ontracting States shall not apply to the movements of such refugees restrictions other than those which are necessary” Refugee Convention, *supra* note 99, art. 31(2). More broadly, both Article 9 of the ICCPR and the Universal Declaration of Human Rights prohibit arbitrary detention. Alexandra Olsen, Note, *Over-Detention: Asylum-Seekers, International Law, and Path Dependency*, 38 BROOK. J. INT’L L. 451, 464–65 (2012). The ICCPR also requires that a detainee have access to judicial review of his detention. ICCPR, *supra* note 127, art. 9(4). Finally, the Geneva Conventions’ Common Article 3 requires that a civilian detained under the laws of war must be “treated humanely.” Fourth Geneva Convention, *su-*

underscored this proposition in *Zadvydas v. Davis*,¹⁹⁴ which concerned two immigrants who had been lawfully admitted into the United States but, because of subsequent criminal activity, were subject to removal. Although both aliens were under a final order of removal, neither could be removed to his home country—either because his country refused to recognize his citizenship, or because the United States did not have a repatriation agreement with his country.¹⁹⁵ The immigrants were being detained past § 1231’s 90-day deadline, pursuant to § 1231(a)(6)’s discretionary authority for continued detention. The immigrants challenged this continued detention.

In *Zadvydas*, the Court read a reasonableness requirement into § 1231(a)(6)’s discretionary authority. Noting that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem,”¹⁹⁶ the Court chose to interpret the INA so as “to avoid [this] serious constitutional threat”¹⁹⁷ by reading into it “an implicit limitation . . . [on] an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States.”¹⁹⁸ The Court established a rebuttable presumption that an “alien not removed must be released after six months.”¹⁹⁹

The Court extended *Zadvydas*’s reasoning in *Clark v. Martinez*.²⁰⁰ Whereas the immigrants in *Zadvydas* had once been lawfully admitted into the United States, the aliens in *Clark* had been “paroled,” meaning they technically remained unadmitted. Both aliens in *Clark* had their parole revoked due to criminal activity, but the United States could not affect their removal to their home country, Cuba, within the 90-day window.²⁰¹ The Court felt constrained by the interpretation it had given § 1231(a)(6) in *Zadvydas* and extended *Zadvydas*’s interpretation of the INA with respect to admitted aliens to *unadmitted* aliens. The Court explained that “because the statutory text provides for no distinction between admitted and nonadmitted aliens, we find that it results in the same

pra note 127, art. 3. Article 75(3) of Protocol I to the Geneva Conventions, which enjoys the status of customary international law, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 634 (2006), includes within its definition of humane treatment the mandate that detainees “shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75(3), June 8, 1977, 1125 U.N.T.S. 3.

194. 533 U.S. 678 (2001).

195. *Id.* at 684, 686.

196. *Id.* at 690.

197. *Id.* at 699.

198. *Id.* at 689.

199. *Id.* at 701.

200. 543 U.S. 371 (2005).

201. *Id.* at 376.

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

answer.”²⁰² As a result, the Court applied the six-month presumption to both admitted and unadmitted aliens,²⁰³ functionally prohibiting indefinite immigration detention under § 1231.²⁰⁴

While *Zadvydas* and *Clark* limit detention authority under § 1231, the constitutionality of §§ 1226a and 1537 remains untested. The Attorney General has never exercised authority under these terrorist-specific statutory provisions,²⁰⁵ so any prediction about future judicial review is necessarily speculative. At a minimum, it is relatively clear that *Zadvydas* and *Clark* do not themselves cast significant doubt on the constitutionality of §§ 1226a and 1537. First, the *Clark* Court grounded its holding in *Zadvydas*’s statutory, rather than constitutional, reasoning. The Court explained:

The Government . . . argues that the statutory purpose and the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present for aliens . . . who have not been admitted to the United States. Be that as it may, it cannot justify giving the *same* detention provision a different meaning when such aliens are involved. It is not at all unusual to give a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though

202. *Id.* at 379.

203. *Clark*, 543 U.S. at 386.

204. Both *Zadvydas* and *Clark* concern the government’s authority to detain an alien *after* a final order of removal. In *Demore v. Kim*, 538 U.S. 510 (2003), the Court considered the constitutionality of 8 U.S.C. § 1226(c), which mandates that the Attorney General detain certain “criminal aliens” pending their removal proceedings—*before* a removal order is final. The *Demore* Court distinguished *Zadvydas* based on the presence of a final removal order:

First, in *Zadvydas*, the aliens challenging their detention following final orders of deportation were ones for whom removal was ‘no longer practically attainable.’ . . . In the present case, the statutory provision at issue governs detention of deportable criminal aliens *pending their removal proceedings*. . . . [Second,] [w]hile the period of detention at issue in *Zadvydas* was ‘indefinite’ and ‘potentially permanent,’ the detention here is of a much shorter duration.

Demore v. Kim, 538 U.S. 510, 527–28 (2003) (quoting *Zadvydas*, 533 U.S. at 690–91) (internal citations omitted). *Demore* came under review in the Court’s October 2016 Term in *Jennings v. Rodriguez*, No. 15-1204. In *Jennings*, aliens detained during their removal proceedings under § 1226 argued that the government must provide bond hearings to individuals who have been detained for more than six months. The Court did not decide *Jennings* in the 2016 Term, however; it instead ordered reargument. See Shoba Sivaprasad Wadhia, *Immigration Symposium: Delays, Detentions and Due Process – Why Jennings Matters*, SCOTUSblog (June 27, 2017, 5:37 PM), <http://www.scotusblog.com/2017/06/immigration-symposium-delays-detentions-due-process-jennings-matters/> [<http://perma.cc/W4TH-4W3T>].

205. Blum, *supra* note 185, at 703.

other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.²⁰⁶

Thus, the Court explained its decision in *Clark* as compelled by statutory precedent, not constitutional avoidance. Second, §§ 1226a and 1537 have received favorable treatment in dicta. The *Clark* Court, echoing *Zadvydas*,²⁰⁷ explained that the § 1231 statutory reasonableness presumption has not been applied to the detention of "alien terrorists" under § 1537.²⁰⁸ Justice O'Connor's concurrence in *Clark* also emphasized that § 1226a allows an alien to be detained "for successive 6-month periods" when statutory requirements are met.²⁰⁹

On the other hand, while *Zadvydas* and *Clark* do not themselves seem to cast doubt on the constitutionality of §§ 1226a and 1537, there are reasons to remain cautious about drawing broader conclusions. First, *Zadvydas* and *Clark* did not establish binding precedent regarding §§ 1226a and 1537, so any future Court will be confronting a question of first impression. It is certainly possible that a future Court could find that excessive six-month extensions raise due process concerns. Second, §§ 1226a and 1537 apply only to aliens who pose statutorily-defined threats related to terrorist activity.²¹⁰ If a former detainee secures his release from law-of-war detention, it is plausible that such an alien would have proven his lack of participation in such activities. Furthermore, after an extended period of immigration detention, a former detainee may be able to prove that the threat he previously posed has dissipated. Simply put, *Zadvydas* and *Clark* do not compel a conclusion in either direction. This means that the constitutionality of indefinite detention of former law-of-war detainees can only be fairly characterized as an open question.

IV. DOES THE MOVE MATTER?: COMPARING LOCATIONS

The preceding discussion describes the domestic and international law that would likely apply to detainees who have been relocated to the United States

206. *Clark*, 543 U.S. at 380.

207. *Zadvydas*, 533 U.S. at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.").

208. *Clark*, 543 U.S. at 379 n.4 ("The Court's interpretation of [the detention statute in *Zadvydas*] did not affect the detention of alien terrorists for the simple reason that sustained detention of alien terrorists is a 'special arrangement' authorized by a different statutory provision, 8 U.S.C. § 1537(b)(2)(C).").

209. *Id.* at 387 (O'Connor, J., concurring).

210. See 8 U.S.C. § 1226a(a) (2012) (authorizing the "[d]etention of terrorist aliens"); 8 U.S.C. § 1537 (2012) (authorizing continued detention of aliens awaiting removal under Alien Terrorist Removal Procedures, 8 U.S.C. §§ 1531–37).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

from Guantanamo. To make a comparative assessment, however, it is necessary to establish a baseline: what immigration obligations does the United States have towards detainees currently located on Guantanamo? This question breaks into two separate lines of inquiry: limitations on post-release transfer and restrictions on indefinite immigration detention.

A. *Protections Against Return for Former Detainees*

The United States, at least under the Obama Administration, has acknowledged that the CAT's *non-refoulement* obligations apply extraterritorially. The statement of policy contained in the FARRA, which implemented the CAT, states that "[i]t shall be the policy of the United States not to . . . effect the involuntary return of any person . . . regardless of whether the person is physically present in the United States."²¹¹ The Obama Administration's November 2014 report to the Committee Against Torture stated that "[t]he clear statement in the FARRA informs U.S. treatment of detainees in its custody, and others subject to transfer by the United States."²¹² Elsewhere in the report, the United States also acknowledged that the CAT's application to areas under a state's "jurisdiction" embraces places over which the United States exercises governmental control, including Guantanamo Bay.²¹³

In contrast to the CAT, historically the United States has taken the position that neither domestic asylum law nor the Refugee Convention apply extraterritorially.²¹⁴ This proposition received judicial approval in *Sale v. Haitian Centers*

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211. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 224, 112 Stat. 2681-822.
212. U.S. Dep't of State, *Periodic Report of the United States of America to the United Nations Committee Against Torture Convention Against Torture*, U.N. CONVENTION AGAINST TORTURE § 66 (Aug. 12, 2013) [hereinafter 2013 CAT Report], <http://www.state.gov/documents/organization/213267.pdf> [http://perma.cc/W3RN-XPLD].
213. Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SECURITY (Nov. 14, 2014, 11:18 AM), <http://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/> [http://perma.cc/JER3-AWWZ]. Article 3 does not have a "jurisdictional" element, so strictly speaking the current U.S. interpretation does not apply to *non-refoulement*, but the commitment provides useful context for the Obama Administration's overall position. The report also stated that the United States "conducts a thorough, case-by-case analysis of each potential transfer . . . of third country nationals detained in situations of armed conflict [to] ensure[] that any transfers are consistent with the U.S. *non-refoulement* commitment." 2013 CAT Report, *supra* note 212, § 69.
214. Melissa J. Durkee, *Beyond the Guantánamo Bind: Pragmatic Multilateralism in Refugee Resettlement*, 42 COLUM. HUM. RTS. L. REV. 697, 727 (2011) ("Exploiting the legal uncertainty regarding whether Refugee Convention rights attach via international or domestic law, the United States has declined to offer detainees at Guantánamo the opportunity to demonstrate their status as refugees.").

Council, Inc.,²¹⁵ which examined the U.S. program of interdiction of Haitian refugees in international waters. In *Sale*, the Court construed section 243(h) of the INA, which states that the “Attorney General shall not deport or return any alien” who qualifies for asylum protection, to “impl[y] an exclusively territorial application.”²¹⁶ Furthermore, the Court determined that the drafters of the Refugee Convention did not contemplate extraterritorial application and concluded that “a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it.”²¹⁷

But even if the Refugee Convention’s protections do not apply extraterritorially, it must be determined whether Guantanamo Bay counts as “extraterritorial” for purposes of asylum law. The thrust of precedent, although not crystal clear, indicates that the answer is yes. The Eleventh Circuit explicitly held as much in *Cuban American Bar Association, Inc. v. Christopher*.²¹⁸ Rejecting the claim that “leased military bases abroad which continue under the sovereignty of foreign nations . . . are ‘functionally equivalent’ to being land borders or ports of entry of the United States,” the court held that an alien at Guantanamo is neither “physically present” nor “arriv[ing] in the United States,” as required for asylum eligibility.²¹⁹ It thus concluded that “any statutory or constitutional claim made by the . . . migrants [at Guantanamo] must be based upon an extraterritorial application of that statute or constitutional provision.”²²⁰

Some have argued that the Court’s subsequent extension of the writ of habeas corpus to Guantanamo undermines the Eleventh Circuit’s determination of Guantanamo’s extraterritorial status in *Christopher*. Indeed, Professor Robert M. Chesney asks, “If [Guantanamo] is ‘within the territorial jurisdiction of the United States’ for purposes of the habeas statute, is there any ground for concluding that it is not also U.S. territory for purposes of U.S. treaty obligations?”²²¹ However, there is danger in over-reading the Court’s extension of habeas corpus to Guantanamo.²²² In recognizing the reach of the Suspension

215. 509 U.S. 155 (1993).

216. *Id.* at 170, 174.

217. *Id.* at 183.

218. 43 F.3d 1412, 1425 (11th Cir. 1995).

219. *Id.* at 1425; see also 8 U.S.C. § 1158(a)(1) (2012) (allowing “[a]ny alien who is physically present in the United States or who arrives in the United States . . . , irrespective of such alien’s status,” to apply for asylum). For a longer discussion of litigation concerning Haitian refugees’ access to asylum, see GOODWIN-GILL & MCADAM, *supra* note 72, at 246–49.

220. *Christopher*, 43 F.3d at 1425.

221. Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 675 (2006) (quoting *Rasul v. Bush*, 542 U.S. 466, 480 (2004)) (footnotes omitted). Chesney concludes that “[n]othing in CAT suggests a narrower vision of the concept of ‘territory’ for purposes of that treaty.” *Id.*

222. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); *Rasul*, 542 U.S. at 484 (2004).

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

Clause to Guantanamo in *Boumediene*, the Court rejected the claim that “*de jure* sovereignty is the touchstone of habeas corpus jurisdiction” and took “notice of the . . . fact that the United States . . . maintains *de facto* sovereignty” over Guantanamo.²²³ However, the Court was careful to cabin the reach of its holding, citing the government’s position in *Sale* that “Guantanamo is not within [U.S.] sovereign control”²²⁴ and emphasizing that “[w]e . . . do not question the Government’s position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay.”²²⁵ Thus, *Boumediene*’s application of habeas protections to Guantanamo does not necessarily implicate the *Sale* Court’s statutory interpretation of the INA’s scope nor the Eleventh Circuit’s determination that Guantanamo counts as “extraterritorial” for purposes of *non-refoulement* obligations. The constitutional question posed by habeas corpus is fundamentally different from the statutory question posed by asylum law.

However, many believe that U.S. obligations under the Refugee Convention cannot be altered by a legal fiction that distinguishes admitted from unadmitted aliens.²²⁶ Professors Goodwin-Gill and McAdam argue that *non-refoulement* obligations apply to any alien over which a country exercises jurisdiction:

The principle of *non-refoulement* can thus be seen to have crystallized into a rule of customary international law, the core element of which is the prohibition of *return in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction.²²⁷

The U.S. refusal to apply its domestic and international asylum obligations to aliens at Guantanamo has drawn considerable criticism.²²⁸ Many have argued that the former U.S. interdiction program, which intercepted Haitians in inter-

223. *Boumediene*, 553 U.S. at 755.

224. *Id.* at 753.

225. *Id.* at 754.

226. See, e.g., GOODWIN-GILL & MCADAM, *supra* note 72, at 207 (“[I]t is fruitless to pay too much attention to moments of entry or presence, legal or physical. As a matter of fact, anyone presenting themselves at a frontier post, port, or airport will already be within the State territory and jurisdiction; for this reason, and the better to retain sovereign control, States have devised fictions to keep even the physically present alien technically, legally, unadmitted.”).

227. *Id.* at 248.

228. See, e.g., ANKER, *supra* note 134, at 9 n.3 (collecting sources).

national waters and repatriated them without regard to *non-refoulement*, violated international law.²²⁹

To an extent, the Obama Administration responded to these criticisms and sidestepped asylum's difficult extraterritorially question by following the Refugee Convention's *non-refoulement* principles in Guantanamo Bay as a matter of executive grace. As noted in *Kiyemba I*, the Administration established a broad "policy . . . not to transfer individuals to countries where they will be subject to mistreatment."²³⁰ Similarly, while denying the applicability of the Refugee Convention's *non-refoulement* obligations to Guantanamo detainees, the 1039 Report described an "inter-agency process . . . for addressing torture and other humane treatment concerns with respect to detainees" who may be transferred.²³¹ Thus, under the policies of the Obama Administration, the relocation of Guantanamo detainees to the United States would have resulted in a set of legal obligations largely indistinguishable from those that applied at Guantanamo.

However, much of that is likely to change under the Trump Administration. President Trump has not yet articulated a clear position on the application of the CAT and Refugee Convention to detainees held at Guantanamo, so any predictions are necessarily speculative. Nevertheless, President Trump's campaign statements and early executive actions on torture and refugee policy indicate that his Administration is very likely to adopt a narrow interpretation of these human rights treaties.²³² For example, the Trump Administration may, like the Bush Administration, argue that CAT Article 3 does not apply extraterritorially.²³³ And it seems safe to assume that President Trump will not expand upon the Obama Administration's limited interpretation of the Refugee Convention's geographic reach. An in-depth analysis of the legality of these poten-

229. See, e.g., Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 627 (2009) (noting that "a number of international human rights bodies . . . have issued inconsistent rulings on the legality of the United States' interception and forced repatriation efforts").

230. *Kiyemba v. Obama (Kiyemba I)*, 555 F.3d 1022, 1024 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010), *and judgment reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010).

231. 1039 Report, *supra* note 32, at 3 n.10, 4 n.15.

232. See, e.g., James Masters, *Donald Trump Says Torture 'Absolutely Works'—But Does It?*, CNN (Jan. 26, 2017, 11:37 AM), <http://www.cnn.com/2017/01/26/politics/donald-trump-torture-waterboarding> [<http://perma.cc/6AN7-VQXH>]; Madison Park, *What To Know About Trump's Visa and Refugee Restrictions*, CNN (Jan. 30, 2017, 11:22 AM), <http://www.cnn.com/2017/01/28/politics/trump-immigration-refugees-visa-policy> [<http://perma.cc/5V23-YHFA>].

233. See MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., R40139, CLOSING THE GUANTANAMO DETENTION CENTER: LEGAL ISSUES 26 (2013), <http://fas.org/sgp/crs/natsec/R40139.pdf> [<http://perma.cc/7ZR8-XR77>] (stating that "the Bush Administration took the position that CAT Article 3 and its implementing legislation do not govern the transfer of detainees held outside the United States").

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

tial interpretations is beyond the scope of this Note. It is enough for now to underscore that the immigration consequences of relocating Guantanamo detainees will hinge, in large part, on any administration's interpretation of its *current* obligations to detainees located at Guantanamo.

B. Indefinite Immigration Detention of Former Detainees

Despite coming close, the Supreme Court has not offered a definitive statement on the lawfulness of indefinite immigration detention for former law-of-war detainees at Guantanamo. In *Kiyemba v. Obama*,²³⁴ the Supreme Court reviewed the D.C. Circuit's holding in *Kiyemba I* that refused a request for release into the United States by Guantanamo detainees who were no longer detained as enemy combatants but still indefinitely detained as aliens without a suitable option for transfer.²³⁵ As the Court phrased it, it granted certiorari "on the question whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners held at Guantanamo Bay where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy."²³⁶ This presented the Guantanamo-based version of the issue in *Clark and Zadvydas*—namely, whether individuals have a right to release from indefinite immigration detention. The Court never reached this question, however. During litigation, the United States secured offers of resettlement for the detainees, which they declined.²³⁷ Noting that a "change in the underlying facts may affect the legal issues presented," the Court vacated and remanded the case to the D.C. Circuit in a per curiam opinion.²³⁸ On remand, the D.C. Circuit denied the detainees' habeas petition for release from immigration detention, affirming its original holding that Guantanamo detainees have no constitutional due process rights.²³⁹ The Supreme Court declined to review this decision.²⁴⁰

It is difficult to discern from *Kiyemba I* exactly when and where the D.C. Circuit believes an unadmitted alien gains due process rights,²⁴¹ but it is reason-

234. 559 U.S. 131 (2010).

235. *Kiyemba I*, 555 F.3d at 1026.

236. *Kiyemba*, 559 U.S. at 131 (internal quotation marks omitted).

237. *Id.*

238. *Id.* at 131–32.

239. *Kiyemba v. Obama (Kiyemba II)*, 605 F.3d 1046, 1048 (D.C. Cir. 2010).

240. *Kiyemba v. Obama*, 131 S. Ct. 1631, 1631 (2011).

241. The court determined that the immigration detainees held at Guantanamo had no due process-based right to release because "the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States." *Kiyemba I*, 555 F.3d at 1026. This would seem to imply that the touchstone of due process is physical, not legal, presence inside the borders. But elsewhere in *Kiyemba I*, the court seemed to rely on legal, not geographic, presence. Citing

able to infer that as long as a constitutional right to release from indefinite immigration detention does not extend to Guantanamo-located detainees, it would not extend to U.S.-located detainees either. That is the lesson of *Clark*, in which the Court declined to apply constitutional due process analysis to the immigration detention of unadmitted aliens who had been physically present in the United States for decades.²⁴² And despite somewhat contradictory references to *Zadvydas*, the D.C. Circuit clearly signaled its reliance on *Clark* in *Kiyemba I*. The *Kiyemba I* court emphasized that the result in *Clark* was compelled only by statutory interpretation of § 1231, not constitutional due process rights.²⁴³ This means that as long as the D.C. Circuit believes that the United States has statutory authority to hold an alien in indefinite immigration detention, it does not matter for constitutional purposes whether that alien is located at Guantanamo or in the United States as an unadmitted alien.

In contrast to the constitutional question, an alien in immigration detention on Guantanamo currently enjoys fewer statutory protections against indefinite detention than an alien in immigration detention at the physical U.S. border. This is because a non-terrorist U.S.-located detainee possesses a statutory right to release under § 1231 after six months of detention (per *Clark*), while a Guantanamo-located detainee can be held indefinitely (per *Kiyemba I*).

That said, the divergence between *Clark* and *Kiyemba I* is unlikely to matter for a former *law-of-war* detainee. Such a relocated detainee is much more likely to be held under §§ 1226a or 1537 than § 1231. And under §§ 1226a or 1537, physical location does not matter. Of course, the Supreme Court has not reviewed the constitutionality of §§ 1226a or 1537; nor has it affirmed *Kiyemba I*. A future Court certainly could change the status quo, but as the law currently stands, a former *law-of-war* detainee may be held indefinitely at Guantanamo under *Kiyemba I* or in the United States under §§ 1226a or 1537. As a result, although judicial precedent is sparse and tenuous, it appears that the relocation from Guantanamo to the United States would not provide former detainees any additional protection against indefinite immigration detention.

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), a case involving an immigration detainee at Ellis Island, the court explained:

The Court ruled that [Mezei] . . . had not been deprived of any constitutional rights. . . . Neither *Zadvydas* . . . nor *Clark* . . . are to the contrary. . . . Both cases rested on the Supreme Court's interpretation not of the Constitution, but of a provision in the immigration laws—a provision, the Court acknowledged, Congress had the prerogative of altering.

Kiyemba I, 555 F.3d at 1027–28.

242. *Clark v. Martinez*, 543 U.S. 371, 374 (2005) (explaining that petitioners had been paroled into the United States in 1980 through the Mariel boatlift).
243. The *Kiyemba I* court did not discuss §§ 1226a or 1537, which have not been interpreted to contain a reasonableness requirement like § 1231.

THE IMMIGRATION CONSEQUENCES OF RELOCATING GUANTANAMO DETAINEES

CONCLUSION

The 1039 Report gets the law right in many instances. This Note confirms the Report's conclusion that former detainees would not have access to immigration relief through asylum or withholding of removal. And an analysis of international law, although largely omitted from the 1039 Report, confirms that the *non-refoulement* principle embodied in the Refugee Convention contains exceptions that would likely exclude former detainees from its protection.

By contrast, however, the 1039 Report contains two important inaccuracies. First, in contrast to the Report's claim that "the immigration framework does not apply to [relocated detainees'] detention or subsequent transfer abroad," the weight of history and legal precedent leads to the opposite conclusion. Second, the Report is overconfident in its argument in the alternative that, even if the immigration law framework does cover former law-of-war detainees, the laws ultimately would deny relief on the merits. The 1039 Report fails to acknowledge the concrete possibility that a relocated detainee could secure withholding of removal under the CAT and, potentially, subsequent release from detention based on a constitutional challenge.

This Note concludes that the immigration law framework definitively applies to former law-of-war detainees, the CAT affords them an avenue for relief that Congress cannot statutorily restrict, and the United States' ability to indefinitely detain unremovable aliens remains ambiguous. That does not, however, necessarily mean that relocation presents a *unique risk*—much turns on the immigration rights that a sitting president chooses to recognize at Guantanamo Bay. If the Trump Administration were to maintain the Obama Administration's position on the extraterritorial application of the CAT, for example, then physical relocation of detainees from Guantanamo to the United States would not meaningfully alter U.S. *non-refoulement* obligations. Regardless of how the Trump Administration chooses to shape its Guantanamo policy, the bottom line is that the legal status quo sets the baseline against which relocation must be measured—and the current administration has some flexibility in shifting that baseline.

The Guantanamo Bay detention facility has now seen three presidencies: that of President George W. Bush, who opened it; President Barack Obama, who tried unsuccessfully to close it; and President Donald Trump, who has vowed to "load it up with some bad dudes."²⁴⁴ The 1039 Report—and, by extension, this Note—do not exist in a political vacuum. Determining the immigration relief available to relocated detainees matters immensely to the debate over closing the Guantanamo detention facility. The greater the chances a former detainee could secure release into the United States, the less amenable the Administration and Congress will be to a relocation plan. The immigration question is not a hypothetical problem for the future, but rather a crucial and under-analyzed present issue in closure debates.

244. Associated Press, *supra* note 16.

A fuller understanding of the immigration consequences of relocation will aid both sides of the Guantanamo closure debate. Those in favor of closure should not rely on the argument that immigration law simply would not apply to relocated detainees; that argument is suspect as both a matter of historical precedent and modern immigration law. Closure proponents can argue, however, that statutory exclusions in the immigration framework will prevent release in most circumstances, and that the difference between a U.S.-located detainee and a Guantanamo-located detainee may be minimal. On the other hand, those against closure will emphasize the places where the 1039 Report paints too rosy a picture. This Note expresses more skepticism than the 1039 Report about the availability of deferral of removal under the CAT; the risk that a relocated Guantanamo detainee could be released into the United States is small, but not non-existent.

Finally, on either side of the closure debate, it is worth noting that the 1039 Report advances a distinctly pro-executive argument. The contention that the President can set aside immigration law aggrandizes the President's control over relocated Guantanamo detainees at the expense of Congress. To the extent the 1039 Report informs debates over Guantanamo—an issue historically fraught with interbranch power struggles—it is important not to miss its subtle preference for executive control. Given early indications that the Trump Administration intends to push the boundaries of executive power, especially in areas such as immigration, a clear-eyed account of the immigration consequences of relocating Guantanamo detainees is all the more important.