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The Applicability of International and Domestic Immigration Law to Relocated Guantanamo Detainees

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Executive Summary

The physical relocation of detainees from Guantanamo to the United States would not meaningfully alter U.S. obligations under domestic immigration law or international law concerning *refoulement*.

Domestic immigration law would not affect U.S. authority to bring aliens into the United States and to detain those aliens under the laws of war. Detainees would not enter the United States as immigrants, but rather would remain legally "at the border" during their detention.

If a detainee secures his release from law-of-war detention, then the United States would be prohibited from transferring the former detainee to a country where there are substantial grounds for believing that he would be in danger of being subjected to torture. This obligation applies equally to detainees held at Guantanamo and in the United States.

If the United States could not find a suitable country to accept the former detainee, then the United States may have the authority to hold the alien indefinitely in immigration detention, provided that his custody meets statutory requirements. This authority is constitutionally untested and potentially inconsistent with obligations under international law, but these concerns would apply equally to both Guantanamo- and U.S.-located former detainees.

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INTRODUCTION

Shortly after he took office in 2009, President Obama issued an order to close the military prison at Guantanamo Bay, Cuba. Through repatriations and transfers to third-party countries, as of November 28, 2015 the administration has successfully reduced the number of detainees at the prison to 107.[2] Under the President's closure proposal, many detainees would be transferred abroad, but 49 prisoners would remain in law-of-war detention in a facility on U.S. territory.[3] For the moment, however, Congress has prevented the President from relocating detainees to the United States.[4]

Some members of Congress have expressed concern that the physical relocation of detainees may trigger additional immigration-related obligations for the United States under domestic and international law. Some worry about the following scenario: By judicial decree or administrative decision, a detainee that has been relocated to the mainland secures his release from U.S. custody under the laws of war. The United States begins immigration removal proceedings, but officials cannot repatriate the former detainee to his home country because conditions there entitle him to some kind of relief from removal (for example, if his home country would likely torture him).[5] 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 six months, a court, applying *Zadvydas v. Davis*[6] and *Clark v. Martinez*,[7] rules that the detainee cannot be held indefinitely and orders his release into the United States.

This paper addresses whether and how relocation from Guantanamo to the United States would change the rights of detainees and the obligations of the U.S. government under domestic and international immigration law if the detainee can no longer be held as an enemy combatant under the laws of war. Assuming the termination of law-of-war detention, it analyzes domestic and international obligations and concludes that the physical relocation of Guantanamo detainees to the United States for continued law-of-war detention is unlikely to significantly alter former detainees' access to relief under immigration laws.

The paper proceeds in four parts. First, it examines precedent from the treatment of law-of-war detainees during WWII and concludes that relocated detainees would be legally, if not physically, "at the border." WWII practice does not, however, indicate what rights would attach to that status, both because it offers mixed signals and because the WWII immigration regime is now outdated. Second, the paper details modern international and domestic law regarding the

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[2] *A History of the Detainee Population*, N.Y. TIMES: THE GUANTÁNAMO DOCKET (Nov. 17, 2015), http://projects.nytimes.com/guantanamo.
[3] *107 Current Detainees*, N.Y. TIMES: THE GUANTÁNAMO DOCKET (Nov. 17, 2015), http://projects.nytimes.com/guantanamo/detainees/current.
[4] *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.
[5] *See* 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.
[6] 533 U.S. 678 (2001).
[7] 543 U.S. 371 (2005).

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. 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 such an individual to a country where there are substantial grounds for believing that he would be subjected to torture. Third, the paper discusses U.S. authority to hold an un-removable 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; although indefinite detention may raise concerns under both domestic and international law. Fourth, the paper compares the legal treatment of a former detainee located at Guantanamo with a former detainee located in the United States. While the statutory availability of relief from removal differs, this difference is likely inconsequential. Assuming both groups of former detainees enjoy some protections from removal, they would, as a practical matter, be subject to similar immigration detention regimes.

I. WWII PRECEDENTS AND THEIR IMPLICATIONS

The Attorney General's current position is that the laws of war can supplant domestic immigration laws, insofar as they would apply to detainees in U.S. territory. A report submitted by the Department of Justice to Congress, pursuant to Section 1039 of the FY2014 National Defense Authorization Act, argues, "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."[8] Elsewhere, the Report posits that "the immigration framework [would] not apply to [the] detention or subsequent transfer abroad" of relocated detainees.[9]

Historical practice indicates that the transfer of former detainees may be more constrained by immigration law than the 1039 Report contemplates. While immigration law does 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. 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."[10] 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.

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

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.[11] In contrast, enemy aliens, as defined by the Alien Enemies Act of 1798,[12] included all U.S.-dwelling citizens of a country against which the United States had declared war.[13] Of the approximately 900,000 "enemy aliens" living on U.S. soil when the United States entered WWII,[14] several thousand were interned throughout the war.[15] Some of these aliens were not in the United States at the onset of the war, but rather had been forcibly brought into the United States for detention.[16]

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 1890s United States.[17] 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.[18] 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.[19]

To support the conclusion that immigration laws did not apply to POWs, the *Territo* court cited *Kaplan v. Tod*,[20] a 1925 Supreme Court case broadly standing for the proposition that aliens

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[11] Martin Tollefson, *Enemy Prisoners of War*, 32 IOWA L. REV. 51, 51 (1946).
[12] Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21).
[13] J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1406 (1992).
[14] *Id.* at 1416.
[15] *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).
[16] *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 how U.S. authorities "coordinated a deportation program to remove dangerous enemy aliens from Latin American nations and place them in U.S. custody").
[17] *See* Donald S. Dobkin, *Race and the Shaping of U.S. Immigration Policy*, 28 CHICANA/O-LATINA/O L. REV. 19, 30-31 (2009).
[18] Tollefson, *supra* note 11, at 51.
[19] In re Territo, 156 F.2d 142, 145-46 (9th Cir. 1946).
[20] 267 U.S. 228 (1925).

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 WWI.[21] Kaplan was held at Ellis Island for over a year and then released to the Hebrew Society's temporary custody "until she could be deported safely."[22] 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.[23] The Court rejected her claim, holding that she had never entered the United States. It stated:

> [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.[24]

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 Immigration and Naturalization Service had assumed "responsibility from the Army for detention of interned [enemy] aliens" and had established over a dozen detention facilities.[25] 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.[26]

The Second Circuit consistently held that no matter where prisoners were held, aliens brought into the United States involuntarily were not legally "in" the United States.[27] For example, in *United States 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.[28] Again citing *Kaplan*, the court held that Bradley had never entered the United States. It explained:

> 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

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[21] *Id.* at 229.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 230 (citations omitted).
[25] Sidak, *supra* note 13, at 1417.
[26] *Id.* at 1418-19.
[27] *See, e.g.*, United States *ex rel.* Ling Yee Suey v. Spar, 149 F.2d 881, 883 (2d Cir. 1945) ("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.").
[28] United States *ex rel.* Bradley v. Watkins, 163 F.2d 329 (2d Cir. 1947).

> the status of the relator on arrival was the same, in our opinion, as that of a prisoner of war.[29]

There is good reason to believe that the status of U.S.-located law-of-war detainees today would be analogous to the status of POWs "at the border" during WWII. The Immigration and Nationality Act (INA) provides the Attorney General with the authority to "parole" aliens into the United States without according them formal 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 shall . . . 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.[30]

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.[31] While criminal prosecutions are an imperfect analogue for law-of-war detention, the use of the parole power in this parallel situation indicates that it would likely be available for use in the relocation of Guantanamo detainees.

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

After establishing a former detainee's status as "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. POWs were returned without immigration proceedings, but enemy aliens' removal was governed by domestic immigration law.

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

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[29] *Id.* at 330-31 (citations omitted).
[30] 8 U.S.C. § 1182(d)(5)(A) (2012).
[31] *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. 209-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).

> 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.[32]

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.[33] Many of these Soviet POWs feared repatriation and some "violently resisted returning home."[34] 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."[35]

Unlike POWs, enemy aliens who had been forcibly brought into the United States were subject to U.S. immigration law once their detention ended. As noted above, the Second Circuit held that aliens who had entered the United States against their will never legally "entered" U.S. territory.[36] As such, the alien—legally at the border—retained the right to voluntarily depart before being subjected to detention awaiting deportation. In *United States ex rel. Schirrmeister 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 "immigrant" 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."[37]

Importantly, the court did not state that immigration law *in general* was inapplicable to the enemy alien. Rather, the court explained that 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.[38] In applying this deportation-second logic and

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[32] Tollefson, *supra* note 11, 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.

[33] ANTONIO THOMPSON, MEN IN GERMAN UNIFORM: POWS IN AMERICA DURING WORLD WAR II 69 (2010).

[34] *Id.*

[35] *Id.*

[36] *See supra* notes 27-29 and accompanying text.

[37] United States *ex rel.* Schirrmeister 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).

[38] *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

affording the former detainee the rights of an alien at the border, the court treated him as an alien subject to immigration laws.

The law that applied to former POWs in World War II differed from the law that applied to former enemy alien detainees. This mixed precedent thus offers an ambiguous guide to the present, in which the category of "enemy combatant" does not neatly map onto either category.

C. Significant Changes to Immigration Law Since WWII

Even if WWII practice 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.[39] 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.[40] Until 1928, no international agreement regarding refugees imposed any obligation on the state to the refugee; instead, agreements only specified terms of cooperation between states.[41] The 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees was the first 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.[42] 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."[43] However, the 1933 Convention was ratified by only eight states, "several with major reservations."[44] Its 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.[45]

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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."); United States *ex rel.* Ludwig v. Watkins, 164 F.2d 456, 457 (2d Cir. 1947) ("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.").

[39] 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).

[40] *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*.").

[41] JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 86 (2010).

[42] *Id.* at 86-87.

[43] Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, 159 L.N.T.S. 199 (1935-1936).

[44] HATHAWAY, *supra* note 41, at 88.

[45] RICHARD BREITMAN & ALLAN J. LICHTMAN, FDR AND THE JEWS 81 (2013).

States were wary of agreeing to additional responsibilities towards refugees, especially as economic crisis loomed. Advocates of the Convention went on the defensive,[46] and the principle of *non-refoulement* did not appear in the subsequent 1938 Convention concerning the Status of Refugees Coming from Germany.[47] 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.[48] Partially in reaction to this atrocity, the 1951 Refugee Convention—"the cornerstone of modern international refugee law"[49]—established the modern principle of *non-refoulement*.

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.[50] These quotas prevented the immigration of "tens of thousands" of German Jews requesting entry into the United States in the 1930s and 1940s.[51] 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."[52] Like enemy aliens in internment camps, the refugees 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.[53] The 1952 INA granted the Attorney General the authority to parole refugees into the United States as non-resident immigrants.[54] And the Refugee Relief Act of 1953 created a quota-exempt path for roughly 200,000 additional refugees.[55] None of these statutes, however, obligated the government to

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[46] HATHAWAY, *supra* note 41, 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.").
[47] League of Nations, Convention Concerning the Status of Refugees Coming from Germany, Feb. 10, 1938, 192 L.N.T.S. 59 (1938); Shauna Labman, *Looking Back, Moving Forward: The History and Future of Refugee Protection*, 10 CHI.-KENT J. INT'L & COMP. L. 1, 11 (2010).
[48] *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).
[49] HATHAWAY, *supra* note 41, at 91.
[50] 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; individuals of Asian descent were denied the opportunity to immigrate to the United States until 1946. *Id.*
[51] BREITMAN & LICHTMAN, *supra* note 45, 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.").
[52] Strum, *supra* note 51, at 406 (quoting Attorney General Francis Biddle).
[53] Reimers, *supra* note 50, at 2. Over 400,000 immigrants entered the United States under the new program. *Id.*
[54] *Id.* at 4
[55] *Id.* at 3.

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.[56]

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-war detainees.[57] But this is because "the immigration framework" at the time contained only restrictive quotas, lacking modern-day protections for aliens at the border.

II. LIMITED PROTECTIONS AGAINST REPATRIATION AND THIRD-COUNTRY TRANSFER

Applying U.S. and international law enforcing the *non-refoulement* principle to former law-of-war detainees will be complicated. Most applicable legal regimes specifically except individuals who pose security risks. However, the prohibition on transferring a former detainee to a country where he is likely to be tortured—a possible situation for many Guantanamo detainees—is absolute.

A. The Non-Refoulement *Principle*

While international law largely respects the fundamental principle that sovereign states may control who enters their borders,[58] it also recognizes the limited right of aliens at the border to be safe from return to countries that would cause them harm. 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.[59] While protection 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.[60]

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[56] Jones, *supra* note 48, at 1097.
[57] *1039 Report*, *supra* note 8, at 1, 9.
[58] *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).
[59] 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.
[60] Salinas de Frías, *supra* note 39, 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 40, 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.").

The principal source of international refugee law is the 1951 Convention Relating to the Status of Refugees.[61] The Convention entered into force in 1954 and was followed by an additional Protocol in 1967.[62] One hundred forty-eight countries, including the United States, are currently party to one or both instruments.[63] 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."[64] Notably, the Convention establishes a negative right against return, but does not create a positive right to stay.[65] To fulfil 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."[66]

Similarly, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (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."[67] The CAT applies to all individuals facing torture, even those who would not qualify as refugees under the Refugee Convention.[68] The risk of torture need not be "highly probable," but "it must be personal and present."[69]

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.[70] The International Covenant on Civil and Political Rights (ICCPR) has been interpreted to include a *non-refoulement* protection.[71] Article 7 states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or

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[61] Refugee Convention, *supra* note 59.
[62] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.
[63] *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, U.N. HIGH COMM'R REFUGEES 1 (April 2015), http://www.unhcr.org/3b73b0d63.html. 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).
[64] Refugee Convention, *supra* note 59, art. 33(1).
[65] Salinas de Frías, *supra* note 39, at 115; *see also* GOODWIN-GILL & MCADAM, *supra* note 40, 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.").
[66] Salinas de Frías, *supra* note 39, 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.*
[67] 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.
[68] JULIA WOJNOWSKA-RADZIŃSKA, 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, 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.
[69] *Id.* at 100.
[70] 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 40, at 285.
[71] *Id.* at 93.

punishment."[72] The Human Rights Committee's (HRC) General Comment No. 20 states that parties have an obligation to avoid subjecting individuals to such treatment "by way of their extradition, expulsion, or *refoulement*."[73] Similarly, 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."[74] The *non-refoulement* principle has also been reaffirmed in various binding regional instruments to which the United States is not a party[75] and numerous non-binding declarations and resolutions.[76]

Diplomatic assurances may alleviate a state's *non-refoulement* obligations in some circumstances, but their use is controversial. Diplomatic assurances exact a promise from the destination country not to subject the individual 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.[77] 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 assurance that the refugee will be well-treated upon *refoulement*."[78] The UNHCR looks more favorably on diplomatic assurances in the context of the CAT and ICCPR. 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

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[72] 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].

[73] U.N. Human Rights Comm., General Comment No. 20, ¶ 9, 44th Sess., 1992, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994) (quoted in WOJNOWSKA-RADZIŃSKA, *supra* note 68, 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-RADZIŃSKA, *supra* note 68, at 101-02.

[74] 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].

[75] These include 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 40, at 209-11.

[76] *See* GOODWIN-GILL & MCADAM, *supra* note 40, at 211-15. Whether or not *non-refoulement* has acquired the status of customary international law or *jus cogens* is the subject of much debate. *See, e.g.*, *id.* at 218; Salinas de Frías, *supra* note 39, at 120-21. A survey of state practice indicates that while most affirm the *non-refoulement* principle in theory, many states have also distinguished, limited, or outright violated the norm in practice. For a discussion of state practice, see GOODWIN-GILL & MCADAM, *supra* note 40, at 218-232.

[77] *See* Cornelis (Kees) Wouters, *Reconciling National Security and* Non-Refoulement*: Exceptions, Exclusion, and Diplomatic Assurances*, *in* COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE, *supra* note 39, at 579, 588.

[78] Prot. Operations & Legal Advice Section, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, U.N. HIGH COMM'R REFUGEES, ¶ 30 (Aug. 2006), http://www.unhcr.ch/fileadmin/unhcr_data/UNHCR_Note_on_Diplomatic_Assurances_and_International_Refugee_Protection.pdf.

> 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*.[79]

Some implicitly agree with the UNHCR's position that assurances present a question of fact regarding the likelihood of torture,[80] but they argue that states with a track record of abuse cannot reliably give a sufficient assurance.[81] 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.[82]

B. "National Security" Exceptions to Non-Refoulement

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 from the definition of "refugee," and thus denies protection to, individuals who have previously committed certain offenses. It states:

> [T]his Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He 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) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.[83]

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."[84]

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[79] *Id.* ¶¶ 19-20.

[80] *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 39, 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.").

[81] *See, e.g.*, GOODWIN-GILL & MCADAM, *supra* note 40, at 261-62; WOJNOWSKA-RADZIŃSKA, *supra* note 68, at 111.

[82] *See, e.g.*, Wouters, *supra* note 77, at 590; GOODWIN-GILL & MCADAM, *supra* note 40, at 261.

[83] Refugee Convention, *supra* note 59, art. 1(F).

[84] *Id.* art. 33(2).

There appears to be an emerging international consensus that these exceptions deny the protection of *non-refoulement* to terrorists.[85] 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 . . . fulfil their obligations . . . with respect to combating international terrorism and are urged to . . . take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities . . . ."[86] 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."[87] Similar language can be found in Resolution 1373, adopted on September 28, 2001. Resolution 1373 "calls 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 to] [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 terrorists . . . .[88]

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."[89] The obligation to deny asylum to terrorists also appears in the Inter-American Convention Against Terrorism,[90] to which the United States is party, and in an EU Common Council Position.[91]

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

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[85] *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 (noting "international and regional trends towards the restriction of refugee status for suspected terrorists").

[86] G.A. Res. 49/60, annex, Declaration on Measures to Eliminate International Terrorism, ¶¶ 4-5 (Dec. 9, 1994), *available at* http://www.un.org/documents/ga/res/49/a49r060.htm.

[87] S.C. Res. 1269, ¶ 44 (Oct. 19, 1999), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/303/92/PDF/N9930392.pdf?OpenElement.

[88] S.C. Res. 1373, ¶ 3(f)-(g) (Sept. 28, 2001), *available at* http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf.

[89] Saul, *supra* note 85, at 3.

[90] 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.").

[91] 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.").

has such an obligation to exclude, then states collectively face a Catch-22. If every state excludes the individual, then the only option left is *refoulment* 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-refoulment* 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 terrorism . . . .[92]

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.[93]

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.[94] 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.

In contrast to the Refugee Convention, the CAT and ICCPR—both of which bind the United States as a party—do not contain a security exception; they provide "an absolute prohibition against *refoulement*."[95] Furthermore, 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.[96] 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.[97] 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-

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[92] G.A. Res. 51/210, annex, Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (Dec. 17, 1996), *available at* http://www.un.org/documents/ga/res/51/a51r210.htm.
[93] Saul, *supra* note 85, at 2.
[94] *Id.* at 1.
[95] WOJNOWSKA-RADZIŃSKA, *supra* note 68, at 97.
[96] *See* Agiza v. Sweden, Communication No. 233/2003, ¶ 13.1, U.N. Doc. CAT/C/34/D/233/2003 (Comm. Against Torture May 24, 2005). For a discussion of *Agiza*, see Salinas de Frías, *supra* note 39, at 123-24.
[97] *See* Alzery v. Sweden, Communication No. 1416/2005, ¶¶ 11.3-11.5, U.N. Doc. CCPR/C/88/D/1416/2005 (Human Rights Comm. Nov. 10, 2006). For a discussion of *Alzery*, see WOJNOWSKA-RADZIŃSKA, *supra* note 68, at 111.

derogable obligation with *jus cogens* status.[98] 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.

C. Domestic Immigration 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,"[99] 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,[100] 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.[101]

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.[102] Additionally, asylum is

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[98] *See, e.g.*, WOJNOWSKA-RADZIŃSKA, *supra* note 68, 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 39, 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 . . . .").

[99] 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 ed.) ("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.

[100] ANKER, *supra* note 99, at 2.

[101] 8 U.S.C. § 1101(2)(42)(A) (2012). The Refugee Act's definition of "refugee" includes all individuals that fall under the Convention's. *See* ANKER, *supra* note 99, at 6.

[102] 8 U.S.C. § 1158(a)(2) (2012).

"formally discretionary,"[103] and the Attorney General may promulgate regulations that narrow its scope of availability.[104]

When an individual has met the definition of refugee but has been denied asylum, withholding of removal fills the gap.[105] Unlike asylum, withholding of removal is non-discretionary; an alien who qualifies for withholding of removal must be granted such relief.[106] However, the United States—unlike other Convention signatories—demands a higher burden of proof to establish a right to withholding of removal than to establish a claim to asylum.[107] 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.[108] Thus, an alien who has received a grant of withholding of removal can be removed to any acceptable third-party country.[109]

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.[110] Theoretically, bars under domestic law that deny asylum align with bars under international law that deny refugee status (and thus *non-refoulement* protection).[111] In practice, however, the United States bars more asylum seekers than the Refugee Convention.[112] Most of these bars are found in section 208(b)(2)(A) of the INA.[113] They exclude, *inter alia*, individuals who participated in the persecution of others,[114] who have been convicted of a serious crime,[115] for whom "there are serious reasons" to believe they committed "a serious nonpolitical crime" before entering United States,[116] for whom "there are reasonable grounds" to regard them as a danger to the United States,[117] and who have engaged in broadly defined terrorist activities.[118] Bars to withholding of removal generally mirror these bars to asylum.[119]

Domestic implementation of Article 3 of the CAT provides a different avenue of relief for qualified aliens, totally apart 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.[120] Regulations[121] promulgated under

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[103] ANKER, *supra* note 99, at 6.
[104] *Id.* at 517.
[105] *Id.* at 7.
[106] DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES § 2:1 (2015 ed.).
[107] ANKER, *supra* note 99, at 7.
[108] *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.
[109] 8 C.F.R. §§ 208.16(f) (2015).
[110] ANKER, *supra* note 99, at 443.
[111] *Id.*
[112] *Id.* at 444-45.
[113] 8 U.S.C. § 1158(b)(2)(A) (2012).
[114] 8 U.S.C. § 1158(b)(2)(A)(i) (2012).
[115] 8 U.S.C. § 1158(b)(2)(A)(ii) (2012).
[116] 8 U.S.C. § 1158(b)(2)(A)(iii) (2012).
[117] 8 U.S.C. § 1158(b)(2)(A)(iv) (2012).
[118] 8 U.S.C. § 1158(b)(2)(A)(v) (2012), as defined in 8 U.S.C. § 1182(a)(3)(B)(i) (2012) and 8 U.S.C. § 1227(a)(4)(B) (2012).
[119] ANKER, *supra* note 99, at 447.
[120] 8 C.F.R. §§ 208.16-17 (2015).

authority of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)[122] create two options to prevent *refoulement*: withholding of removal and deferral of removal.[123] Withholding of removal under the CAT is subject to the same eligibility bars as withholding of removal under the Refugee Act.[124] Deferral of removal, on the other hand, is unconditionally available without security exceptions.[125] Unlike asylum and withholding of removal, deferral of removal under the CAT cannot be refused to serious criminals, terrorists, or other security risks.[126] 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.[127] Additionally, the Secretary of State and Secretary of Homeland Security may terminate an individual's protection under the CAT upon receipt of reliable diplomatic assurances.[128]

As shown in Figure 1, there are many statutory obstacles that would make it difficult 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 to the exercise of discretion. If denied asylum, the alien could apply for relief from removal or deferral of removal during removal proceedings.[129] Withholding of removal is non-discretionary, but subject to the same statutory bars as asylum.[130] Deferral of removal is available only in the case of torture, but it is non-discretionary and, unlike asylum and withholding of removal, not subject to any statutory bars.[131] Thus, if a former detainee can establish that his repatriation would result in torture, the U.S. government cannot return him absent a sufficient diplomatic assurance from the alien's home country.[132] If such assurances are not forthcoming, then officials may look for a suitable third-party country for resettlement.[133]

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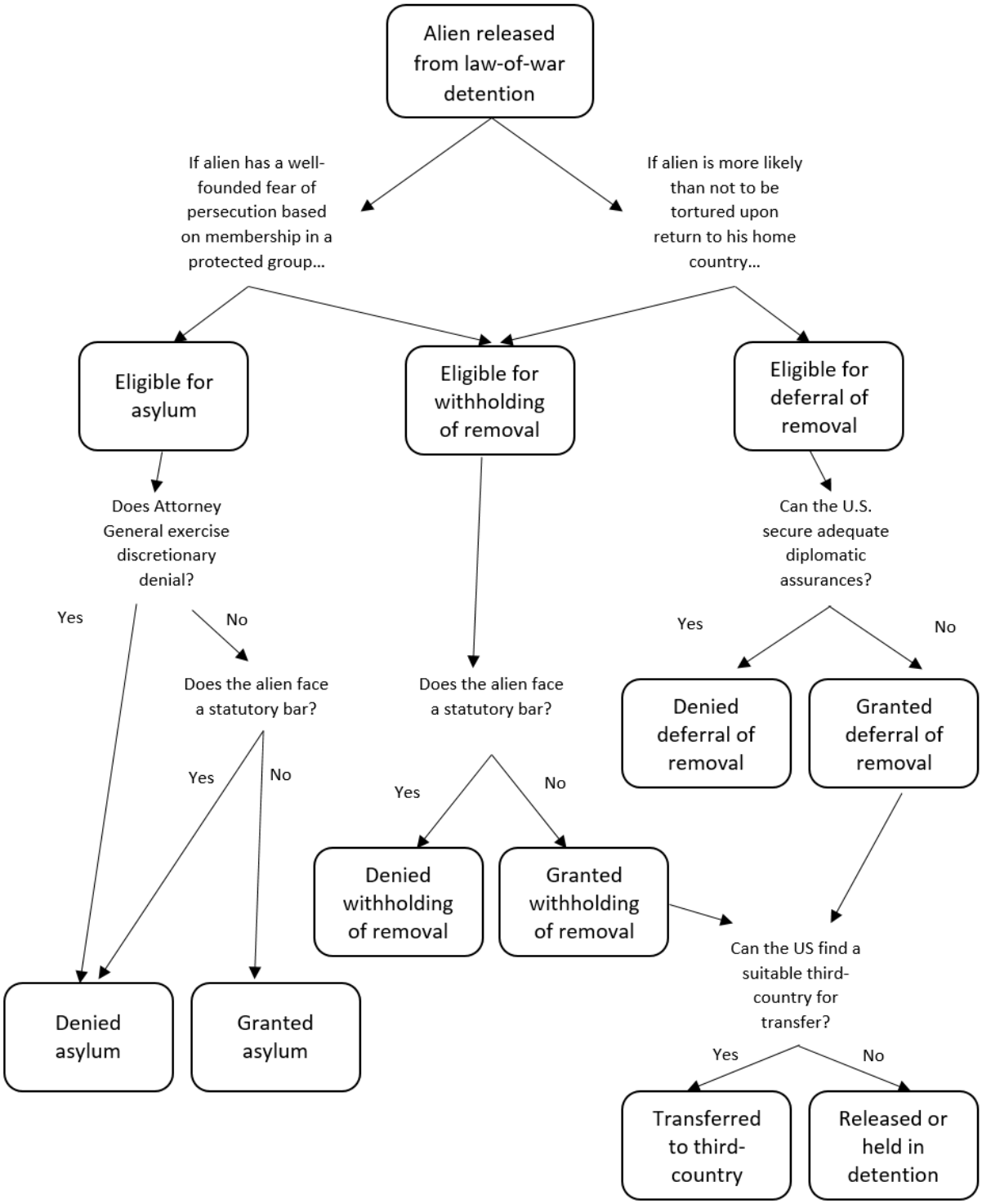
[121] Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478-01 (Feb. 19, 1999) (codified at 8 C.F.R. §§ 208.16-18).
[122] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681.
[123] ANKER, *supra* note 99, at 537.
[124] *See id.* The CAT implementing regulations simply made the pre-existing withholding provisions of the INA available to CAT applicants. *See* 8 C.F.R. §§ 208.16 (2015). 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).
[125] ANKER, *supra* note 99, at 539.
[126] *Id.* at 542.
[127] *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.
[128] 8 C.F.R. § 208.18(c) (2015); *see also* DIZON & WETTSTEIN, *supra* note 124, § 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").
[129] *See* ANKER, *supra* note 106, at app. A § A1:1.
[130] *See* ANKER, *supra* note 106, § 2:1.
[131] ANKER, *supra* note 99, at 539.
[132] *See supra* note 128 and accompanying text.
[133] 8 U.S.C. § 1231(b) (2012).

Figure 1: Domestic Immigration Law Applicable to a Former Law-of-War Detainee[134]



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

III. INDEFINITE IMMIGRATION DETENTION OF ALIENS AWAITING REMOVAL

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 lawfully be held in immigration detention if he cannot be timely removed. Current case law indicates that indefinite detention of former law-of-war detainees may be lawful, 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. However, because the U.S. government has not yet held former Guantanamo detainees on U.S. soil in immigration detention, the legality of such a practice under both the U.S. Constitution and international law remains untested and unresolved.

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),[135] and she is required to detain the alien during this 90-day removal period under § 1231(a)(2).[136] If an alien cannot be removed within 90 days, § 1231(a)(6) gives the Attorney General discretionary authority to continue detention.[137] The Supreme Court, however, has read a reasonableness requirement into this discretionary authority. In *Zadvydas v. Davis*,[138] the Court examined immigration detention in the context of *admitted* aliens. Noting that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem,"[139] the Court chose to interpret the INA so as "to avoid [this] serious constitutional threat"[140] 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."[141] The Court thus established a rebuttable presumption that an "alien not removed must be released after six months."[142]

In *Clark v. Martinez*,[143] the Court 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 answer."[144] Thus, the Court applied the six-month presumption to both admitted and unadmitted aliens,[145] functionally prohibiting indefinite immigration detention under § 1231.

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[135] 8 U.S.C. § 1231(a)(1) (2012).
[136] 8 U.S.C. § 1231(a)(2) (2012).
[137] 8 U.S.C. § 1231(a)(6) (2012); *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).").
[138] 533 U.S. 678 (2001).
[139] *Id.* at 690.
[140] *Id.* at 699.
[141] *Id.* at 689.
[142] *Id.* at 701.
[143] 543 U.S. 371 (2005).
[144] *Id.* at 379. The *Zadvydas* Court had not foreshadowed this outcome. In fact, in *Zadvydas* the Court explained, "We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question." *Zadvydas*, 533 U.S. at 683.
[145] *Clark*, 543 U.S. at 386.

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,[146] codified at 8 U.S.C. § 1226a, applies to the detention of "terrorist aliens."[147] Under § 1226a, the Attorney General may certify an alien to be a terrorist threat, as broadly defined by other provisions of the INA.[148] In most cases, the statute requires that the alien be charged with a crime or placed into removal proceedings within seven days.[149] 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."[150] The statute provides for judicial review of the initial dangerousness determination and requires the Attorney General to provide a report to Congress on her use of this detention authority every six months.[151]

Similarly, the Alien Terrorist Removal Procedures (ATRP), created by The Antiterrorism and Effective Death Penalty Act of 1996[152] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[153] create a separate special procedure for removal of terrorist aliens.[154] 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 . . . [and] provide[s] to the attorney representing the alien . . . a written report on the Attorney General's efforts."[155]

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

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[146] 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).

[147] For a longer discussion of § 1226a, see generally Stephen I. Vladeck, *Detention After the AUMF*, 82 FORDHAM L. REV. 2189 (2014).

[148] 8 U.S.C. § 1226a(a)(3) (2012); *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).

[149] *See* Vladeck, *supra* note 147, at 2196-97.

[150] 8 U.S.C. § 1226a(a)(5)-(6) (2012); *see also* Vladeck, *supra* note 147, 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.").

[151] *See* Vladeck, *supra* note 147, at 2197-98.

[152] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[153] 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 the U.S. Code).

[154] 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) (2012). 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.

[155] 8 U.S.C. § 1537(b)(2)(C) (2012).

these terrorist-specific statutory provisions,[156] so any prediction about future judicial review is necessarily speculative. At 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, implying that the canon of constitutional avoidance was unnecessary to apply in the case of unadmitted aliens. 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 other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.[157]

Thus, the Court explained its decision in *Clark* as compelled by statutory precedent, not constitutional strictures. Second, §§ 1226a and 1537 have received favorable treatment in dicta. The *Clark* Court, echoing *Zadvydas*,[158] explained that the § 1231 statutory reasonableness presumption has not been applied to the detention of "alien terrorists" under § 1537.[159] 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.[160]

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, the *Zadvydas* and *Clark* courts 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. 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.

Finally, holding an alien in indefinite immigration detention may be in tension with various U.S. obligations under international law. Article 31(2) of the Refugee Convention requires that "Contracting States shall not apply to the movements of such refugees restrictions

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[156] Blum, *supra* note 148, at 703.
[157] Clark v. Martinez, 543 U.S. 371, 380 (2005).
[158] Zadvydas v. Davis, 533 U.S. 678, 696 (2001) ("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.").
[159] *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).").
[160] *Id.* at 387 (O'Connor, J., concurring).

other than those which are necessary."[161] More broadly, both Article 9 of the ICCPR and the Universal Declaration of Human Rights prohibit arbitrary detention.[162] Furthermore, the ICCPR requires that a detainee have access to judicial review of his detention.[163] Finally, the Geneva Conventions' Common Article 3 requires that a civilian detained under the laws of war must be "treated humanely."[164] Article 75(3) of Protocol I to the Geneva Conventions, which enjoys the status of customary international law,[165] includes within the 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."[166]

IV. LEGAL IMPLICATIONS OF RELOCATION FOR GUANTANAMO DETAINEES

The preceding discussion describes the domestic and international law that would likely apply to detainees who have been relocated to the United States from Guantanamo. To make a comparative assessment, however, it is necessary to understand current U.S. obligations to detainees located on Guantanamo. This question breaks into three separate lines of inquiry: legal standards governing judicial review of law-of-war detention, limitations on post-release transfer (*refoulement*), and restrictions on indefinite immigration detention.

A. The Legal Standard for Review of Law-of-War Detention

The vast majority of this paper addresses the legal standards that would govern the removal of a former law-of-war detainee. This section, by contrast, briefly explores how the legal standards applicable to current law-of-war detainees may change as a result of their physical relocation from Guantanamo Bay to the United States. Detainees in the United States would likely acquire constitutional due process rights that do not apply to individuals at Guantanamo. However, the habeas rights currently available to Guantanamo-based detainees already guarantee protections similar to due process rights.

U.S. authority to detain enemy combatants will not change as a result of relocation. Under *Hamdi v. Rumsfeld*, which reviewed the detention of a U.S. citizen on U.S. soil, individuals detained under authority of the AUMF may be held "for the duration of the . . . conflict."[167] Nothing about detainees' relocation would compel the United States to release individuals who are properly detained under the AUMF.

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[161] Refugee Convention, *supra* note 59, art. 31(2). The "necessity" of such detention may turn on whether the alien poses a threat to national security. *See* Alexandra Olsen, Note, *Over-Detention: Asylum-Seekers, International Law, and Path Dependency*, 38 BROOK. J. INT'L L. 451, 465 (2012). Although the United States is not a signatory of the 1951 Convention, it has signed the 1967 Protocol, which incorporates the Convention by reference.
[162] Olsen, *supra* note 161, at 464-65.
[163] ICCPR, *supra* note 72, art. 9(4).
[164] Fourth Geneva Convention, *supra* note 74, art. 3.
[165] Hamdan v. Rumsfeld, 548 U.S. 557, 634 (2006) (explaining that Article 75 is "indisputably part of the customary international law"). Notably, however, the Obama Administration has stated that Article 75 only applies in international armed conflicts, while the *Hamdan* Court stated that the United States' conflict with Al Qaeda constitutes a non-international armed conflict. *See* John Bellinger, *Obama's Announcements on International Law*, LAWFARE (Mar. 8, 2011, 8:33 PM), https://www.lawfareblog.com/obamas-announcements-international-law.
[166] 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.
[167] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

The legal standard that courts would use to determine whether an individual is properly detained, however, may differ based on that detainee's physical location. Under *Boumediene v. Bush*,[168] the Court recognized the applicability of the Constitution's Suspension Clause to Guantanamo Bay, thereby making the writ of habeas corpus available to Guantanamo detainees.[169] *Boumediene* did not speak to constitutional due process rights, however, and the circuits have split on this question. The Second Circuit has—albeit in a decision vacated as moot—identified the applicability of constitutional due process at least with regards to "to non-accused, non-hostile aliens held incommunicado on . . . Guantánamo Bay."[170] However, the D.C. Circuit has held that there is no constitutional due process right on Guantanamo,[171] and this is likely the more authoritative interpretation.[172]

By contrast, it is likely that an alien enemy combatant held in the United States would enjoy some limited due process rights. In *Hamdi v. Rumsfeld*, the Court held that a U.S. citizen detained on U.S. soil "must receive notice of the factual basis for his classification, and a fair

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[168] 553 U.S. 723 (2008).

[169] *Id.* at 771. While detainees on Guantanamo enjoy the right to habeas corpus under *Boumediene*, their relocation to the United States may change which court exercises jurisdiction to hear their habeas claims. Currently, the D.C. Circuit hears all habeas claims originating out of Guantanamo, but this is an arrangement born of convenience, not jurisdictional mandate. The Supreme Court subtly established this practical arrangement with its grant, vacate, remand (GVR) order in *Bush v. Gherebi*, 542 U.S. 952 (2004) (mem.). The GVR sent the *Gherebi* habeas case back to the Ninth Circuit for reconsideration in light of *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), which had held that the Southern District of New York lacked jurisdiction to hear the habeas petition of a prisoner held in a naval brig in South Carolina. Stephen Vladeck explains:

> [T]he *Gherebi* GVR order implicitly hinted that, even though the federal courts in general had jurisdiction over the Guantánamo habeas cases, the Supreme Court believed that there was only one appropriate venue for such suits—the federal courts in and for the District of Columbia. The Ninth Circuit got the hint, transferring *Gherebi* to the D.C. District Court. As a result, and ever since the summer of 2004, the D.C. District Court and D.C. Circuit have exercised a de facto form of exclusive jurisdiction over any and all claims arising out of Guantánamo.

Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1452 (2011) (footnotes omitted). *Padilla* reaffirmed the "immediate custodian rule," which requires that "in habeas challenges to *present* physical confinement, . . . the district of confinement is *synonymous* with the district court that has territorial jurisdiction over the proper respondent." *Padilla*, 542 U.S. at 444. The Court observed, "[A] simple rule . . . has been consistently applied in the lower courts, including in the context of military detentions: Whenever a [28 U.S.C.] § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement." *Id.* at 447. The Court further explained that the rule granting exclusive jurisdiction to the district of confinement prevented a prisoner from "nam[ing] a high-level supervisory official as respondent," which would otherwise result in "rampant forum shopping" and "district courts with overlapping jurisdiction." *Id.* Given the strong language in *Padilla*, it is likely that a relocated detainee—absent a change in statutory habeas jurisdiction under § 2241—would be required to bring his habeas petition in the district court with jurisdiction over his place of detention.

[170] Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326, 1343 (2d Cir. 1992) *cert. granted, judgment vacated sub nom.* Sale v. Haitian Centers Council, Inc., 509 U.S. 918 (1993).

[171] *See* Al Bahlul v. United States, 767 F.3d 1, 33 (D.C. Cir. 2014) ("Indeed, it remains the law of this circuit that, after *Boumediene*, aliens detained at Guantanamo may not invoke the protections of the Due Process Clause of the Fifth Amendment.").

[172] For a discussion of the circuit split, see *Gherebi v. Bush*, 374 F.3d 727, 737 n.14 (9th Cir. 2004).

opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[173] While it is possible that *Hamdi* could be distinguished from a future case involving a non-U.S. citizen, it seems unlikely that the Court would deny all due process protections to an enemy combatant within U.S. territory simply because of his non-citizen status. While U.S. courts have denied due process protections to unadmitted aliens legally "at the border," this denial has been limited to immigration decisions.[174] In other words, while an unadmitted alien may not have due process rights in immigration proceedings and detention,[175] he does enjoy due process protections in non-immigration contexts.

Under Supreme Court and D.C. Circuit case law, a Guantanamo-located detainee enjoys habeas rights but no constitutional due process rights, while a U.S.-located alien detainee probably enjoys both habeas rights and minimal constitutional due process rights.[176] That said, the functional rights that habeas affords to Guantanamo detainees are likely largely redundant with the rights that constitutional due process would afford to U.S.-located detainees.[177] In *Aamer v. Obama*,[178] the D.C. Circuit clarified that the types of habeas claims that may be raised under 28 U.S.C. § 2241 include not only challenges to the fact and duration of detention[179] but also to the "conditions of [the detainee's] confinement."[180] Given this expansive interpretation, there may not be much daylight left between "habeas" review and "due process" review. Furthermore, it is not at all clear that, given the chance, the Supreme Court would affirm the D.C. Circuit's interpretation that constitutional due process does not extend to Guantanamo. Were the Court to extend *Boumediene*'s Suspension Clause analysis to the Due Process Clause, the difference between Guantanamo- and U.S.-located detainees would be erased.

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[173] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

[174] *See, e.g.*, Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (5th Cir. 2006) ("The 'entry fiction' that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States determines the aliens' rights with regard to immigration and deportation proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment." (quoting Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987))); Borrero v. Aljets, 325 F.3d 1003, 1008 (8th Cir. 2003) ("Borrero refers us to cases supporting the proposition that even aliens unlawfully present in the United States are guaranteed due process of law. Those cases may support extending certain constitutional protections to inadmissible aliens accused of crimes, but they do not call into question the power of the government to detain an alien who is stopped at the border. . . . Inadmissible aliens are of course not entirely without Fifth Amendment protection." (citations omitted)); *see also* Eliot Walker, Note, *Safe Harbor: Is* Clark v. Martinez *the End of the Voyage of the Mariel?*, 39 CORNELL INT'L L.J. 121, 128 (2006) (explaining that "[i]n any context other than immigration . . . courts generally have applied constitutional protections to parolees").

[175] *See infra* Part IV.C.

[176] For a discussion of *Boumediene's* potential impact on both habeas and due process rights on Guantanamo, see generally Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719 (2012).

[177] *See* Mary Van Houten, Note, *The Post-Boumediene Paradox: Habeas Corpus or Due Process?*, 67 STAN. L. REV. ONLINE 9, 10 (2014) (arguing that "despite the D.C. Circuit's decisions ruling otherwise, noncitizen detainees at Guantanamo are effectively allowed to bring due process challenges, but under the auspices of habeas corpus").

[178] 742 F.3d 1023 (D.C. Cir. 2014).

[179] *Id.* at 1030.

[180] *Id.* at 1032. In that case, petitioners challenged the force-feeding protocol used at Guantanamo in response to petitioners' hunger strike.

B. Protections Against Return for Former Law-of-War Detainees

Domestic immigration law would treat former law-of-war detainees held at Guantanamo Bay differently than former law-of-war detainees held on U.S. soil, but this may be a distinction without a meaningful difference. While the United States has acknowledged the extraterritorial application of its CAT Article 3 obligations, it has limited its interpretation of the Refugee Convention to U.S. territory. However, this difference is likely practically inconsequential and may be out of step with U.S. *non-refoulement* obligations under international law.

The United States acknowledges that the CAT's *non-refoulement* obligations apply extraterritorially. The statement of policy contained in the FARRA, which implemented the CAT, states, "It 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."[181] Despite this statutory statement of purpose, the Bush Administration insisted that CAT Article 3 did not apply extraterritorially.[182] In November 2014, the Obama Administration relaxed this position. The administration's 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."[183] 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.[184] 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."[185]

Historically, the U.S. has indicated that neither domestic asylum law nor the Refugee Convention apply extraterritorially.[186] Assuming this distinction remains, U.S.-located detainees would be able to apply for asylum, while Guantanamo-based detainees could not. This proposition received judicial approval in a string of cases arising out of U.S. interdiction of Haitian refugees in international waters and the subsequent detention of some of those aliens at Guantanamo Bay. In *Sale v. Haitian Centers Council, Inc.*,[187] the Court construed section 243(h) of the INA, which states that the "Attorney General shall not deport or return any alien" who

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[181] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 224, 112 Stat. 2681, 822.
[182] Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 673-75, 683 (2006).
[183] U.S. DEP'T STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE CONVENTION AGAINST TORTURE, ¶ 66 (Aug. 5, 2013), *available at* http://www.state.gov/documents/organization/213267.pdf [hereafter 2013 CAT Report].
[184] Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SECURITY (Nov. 14, 2014, 11:18 AM), https://www.justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/.
[185] 2013 CAT Report, *supra* note 183, ¶ 69.
[186] 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.").
[187] 509 U.S. 155 (1993).

qualifies for asylum protection, to "impl[y] an exclusively territorial application."[188] Furthermore, the Court determined that the drafters of the Refugee Convention did not contemplate extraterritorial application and concluded that "a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it."[189]

Furthermore, the Eleventh Circuit explicitly held that Guantanamo is outside the territory of the United States, at least insofar as immigration obligations are concerned. In *Cuban American Bar Association, Inc. v. Christopher*, the Court explained that an alien at Guantanamo is not "physically present" nor "arriv[ing] in the United States," as required for asylum eligibility.[190]

> [W]e again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are 'functionally equivalent' to being land borders or ports of entry of the United States or otherwise within the United States. Therefore, any statutory or constitutional claim made by the individual Cuban plaintiffs and the individual Haitian migrants must be based upon an extraterritorial application of that statute or constitutional provision.[191]

Applying this metric, the Court reaffirmed that domestic and international laws that "govern repatriation of refugees . . . bind the government only when the refugees are at or within the borders of the United States."[192] Aliens at Guantanamo are, in short, ineligible for domestic or international protections against repatriation under the Refugee Convention and asylum law.[193]

Many believe that U.S. obligations under the Refugee Convention cannot be altered by a legal fiction that distinguishes admitted from unadmitted aliens.[194] Guy S. Goodwin-Gill and Jane McAdam argue that *non-refoulement* obligations apply to any alien over which a country exercises jurisdiction:

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[188] *Id.* at 170, 174.
[189] *Id.* at 183.
[190] Cuban Am. Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995); *see also* 8 U.S.C. § 1158(a)(1) (2012).
[191] *Christopher*, 43 F.3d at 1425.
[192] *Id.* at 1426.
[193] For a longer discussion of litigation concerning Haitian refugees' access to asylum, see GOODWIN-GILL & MCADAM, *supra* note 40, at 246-49. It is unlikely that *Boumediene* complicates this logic. *Boumediene's* application of habeas protections to Guantanamo does not necessarily implicate the *Sale* Court's statutory interpretation of the scope of the INA nor the *Christopher* Court's determination that Guantanamo counts as "extraterritorial." In fact, after citing the government's position in *Sale* that "Guantanamo is not within its sovereign control," the *Boumediene* Court emphasized 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." *Boumediene v. Bush*, 553 U.S. 723, 754 (2008).
[194] *See, e.g.*, GOODWIN-GILL & MCADAM, *supra* note 40, 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.").

> 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.[195]

Specifically, the U.S. refusal to apply its domestic and international asylum obligations to aliens at Guantanamo has drawn considerable criticism.[196] Many have argued that the previous U.S. interdiction program, which intercepted Haitians in international waters and repatriated them without regard to *non-refoulement*, violated international law.[197]

To an extent, the United States seems to have responded to these criticisms by complying with *non-refoulement* norms, without acknowledging their binding legal status. The *Kiyemba* litigation arose out of the U.S. decision to indefinitely detain Chinese Uighurs, formerly held as enemy combatants on Guantanamo, in lieu of repatriating them to China, where they would have "face[d] arrest, torture or execution."[198] The D.C. Circuit explained that "[U.S.] policy is not to transfer individuals to countries where they will be subject to mistreatment."[199] The United States reaffirmed this policy in its 1039 Report. While denying the applicability of Refugee Convention *non-refoulement* obligations to Guantanamo detainees, the Report described an "inter-agency process . . . for addressing torture and other humane treatment concerns with respect to detainees" that may be transferred.[200]

All told, the relocation of Guantanamo detainees to the United States would result in a set of legal obligations largely indistinguishable from those that apply to the current arrangement. Regarding protection from torture, the United States owes a *non-refoulement* obligation under the CAT to detainees wherever they may be located.[201] Deferral of removal under the CAT is likely the best—and potentially only—route to relief from removal for any former detainee, regardless of his physical location. Regarding the Refugee Convention and asylum law, the United States has historically interpreted its legal obligations differently based on the detainee's geographic location. However, this stance has been highly criticized, and the U.S. response to this criticism with respect to Guantanamo detainees—to follow the *non-refoulement* principle as a matter of executive grace—has produced an administrative policy that seems to mirror the protections that domestic asylum law would afford to detainees on U.S. soil.

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[195] *Id.* at 248.
[196] *See, e.g.*, ANKER, *supra* note 99, at 9 n.3 (collecting sources).
[197] *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").
[198] 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).
[199] *Id.*
[200] *1039 Report*, *supra* note 8, at 3 n.10, 4 n.15.
[201] *See supra* notes 181-84 and accompanying text.

C. The Possible Indefinite Immigration Detention of Former Law-of-War Detainees

After an assessment of the transfer restrictions applicable to Guantanamo- and U.S.-located detainees, a third question arises: What happens to the alien when transfer is prohibited? Although judicial precedent is sparse and tenuous, it appears that relocation from Guantanamo to the United States would provide former detainees minimal, if any, additional protection against indefinite immigration detention.

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. In *Kiyemba v. Obama*,[202] 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.[203] 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."[204] 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.[205] 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.[206] 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.[207] The Supreme Court declined to review this decision.[208]

Kiyemba I indicates that the D.C. Circuit is disinclined to find a constitutional right to release from indefinite immigration detention for unadmitted aliens—regardless of their physical location. In *Kiyemba I*, 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."[209] 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. It cited *Shaughnessy v. United States ex rel. Mezei*,[210] a case in which the United States denied entry to an alien at Ellis Island and subsequently detained him when no transfer country could be established.[211] Ellis Island is, quite obviously, inside U.S. sovereign territory. Grounding *Clark*'s holding entirely in its statutory interpretation, the court explained:

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[202] 559 U.S. 131 (2010).
[203] *Kiyemba I*, 555 F.3d at 1026.
[204] *Kiyemba*, 559 U.S. at 131 (quotation marks omitted).
[205] *Id.*
[206] *Id.* at 131-32.
[207] Kiyemba v. Obama (*Kiyemba II*), 605 F.3d 1046, 1048 (D.C. Cir. 2010).
[208] Kiyemba v. Obama, 131 S. Ct. 1631, 1631 (2011).
[209] *Kiyemba I*, 555 F.3d at 1026.
[210] 345 U.S. 206 (1953).
[211] *Kiyemba I*, 555 F.3d at 1027.

> The Court ruled that [Mezei], who petitioned for a writ of habeas corpus, had not been deprived of any constitutional rights. In so ruling the Court necessarily rejected the proposition that because no other country would take Mezei, the prospect of indefinite detention entitled him to a court order requiring the Attorney General to release him into the United States. . . . 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.[212]

But, again, the court's discussion of due process was confusing. Distinguishing *Clark* from *Zadvydas*, the Court explained that aliens at the border have no constitutional due process rights:

> It is true that *Zadvydas* spoke of an alien's due process rights, but the Court was careful to restrict its statement to aliens who had already entered the United States. It was on that ground that the Court distinguished *Mezei*. The distinction is one that "runs throughout immigration law." The Court stated: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[213]

The court's two references to *Zadvydas* in this passage cut in opposite directions. The referenced "distinction . . . that runs throughout immigration law" is the fiction that an unadmitted alien, despite geographic presence, is legally at the border.[214] But the reference to "geographic borders" in the *Zadvydas* opinion is followed by the admonition that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[215]

Although it is difficult to discern from *Kiyemba I* exactly when the D.C. Circuit believes an unadmitted alien gains due process rights, it is reasonable to infer that as long as the right to release from indefinite immigration detention does not extend to Guantanamo-located detainees, it would not extend to U.S.-located detainees. 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.[216] 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.[217] This means that as long as the D.C. Circuit believes that the United States has statutory authority

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[212] *Id.* at 1027-28 (citations omitted).
[213] *Id.*
[214] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
[215] *Id.*
[216] 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).
[217] The *Kiyemba I* court did not discuss § 1226a or § 1537, which have not been interpreted to contain a reasonableness requirement like § 1231.

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.

Although the D.C. Circuit's precedent has thus far gone un-reviewed, as the law stands now, an alien in immigration detention on Guantanamo enjoys fewer rights than an alien in immigration detention at the physical U.S. border. However, this difference is unlikely to matter to a former law-of-war detainee. Under *Clark*, a non-terrorist U.S.-located detainee possesses a statutory right under § 1231 to release after six months of detention. In contrast, under *Kiyemba I*, a Guantanamo-located detainee can be held indefinitely because § 1231 does not extend to Guantanamo. However, a U.S.-located former law-of-war detainee is much more likely to be held under §§ 1226a or 1537 than § 1231. In this circumstance, physical location does not matter. The former law-of-war detainee could potentially be held indefinitely at Guantanamo under *Kiyemba I* or in the United States under §§ 1226a or 1537 (assuming those provisions apply).

To the extent that both of these arrangements would raise constitutional due process questions, these concerns would apply to both physical locations. Under D.C. Circuit precedent, as applying *Clark*, neither the alien at Guantanamo nor the unadmitted alien in the territorial United States enjoys due process protections against indefinite immigration detention. To be sure, there is no guarantee that the Supreme Court would affirm the D.C. Circuit's holding in *Kiyemba I* if given the chance to review it. But, if the Court were to extend due process protections to individuals in Guantanamo-based indefinite immigration detention, it seems highly likely that the result would be to extend the same protections to unadmitted aliens in U.S.-based indefinite immigration detention as well. Thus, despite the uncertain constitutionality of indefinite immigration detention, it is unlikely that the answers will diverge depending on the geographic location of former law-of-war detainees.

CONCLUSION

The physical relocation of detainees from Guantanamo to the United States would not meaningfully alter U.S. obligations under domestic immigration law or international law concerning *refoulement*. Domestic law would not significantly affect U.S. authority to bring aliens into the United States and to detain those aliens under the laws of war. Detainees would not enter the United States as immigrants, but rather would remain legally "at the border" during their detention. If a detainee secures his release from law-of-war detention, then the United States would be obliged under both domestic and international law to refrain from transferring the former detainee to his home country if there are substantial grounds for believing that he would be in danger of being subjected to torture. This obligation applies equally to detainees held at Guantanamo and in the United States. If the United States could not find a suitable third-party country to accept the former detainee, then it may have the authority to hold the alien indefinitely in immigration detention, subject to statutory restrictions. This authority is constitutionally untested and potentially inconsistent with international law, but these concerns would apply equally to both Guantanamo- and U.S.-located former detainees.