Transferring Guantanamo Detainees to the United States for Detention, Trial, and Emergency Medical Treatment under the SASC FY 2014 NDAA (S.1197)

**Why transfer detainees to the United States for trial rather than try them before military commissions?** The SASC Guantanamo language restores authority to transfer detainees to the United States for trial. The D.C. Circuit Court of Appeals has recently overturned two Guantanamo military commission convictions, because the charges of material support and conspiracy were not internationally recognized war crimes at the time of the offense. Brigadier General Mark Martins has said that the rulings mean that some number of detainees who were slated for prosecution before commissions now cannot be tried there, and that the only venue if the U.S. wants to prosecute the detainees is in an Article III court.

**Aren’t military tribunals better able to handle terrorism cases as a general matter?** No. Federal civilian criminal courts have successfully adjudicated nearly 500 terrorism cases since 9/11. Military commissions have produced only seven convictions, and only three of those convicted remain at Guantanamo. Federal courts have more than two hundred years of experience and can try suspects for conspiracy and material support, in addition to countless other offenses not available before military commissions, including fraud, immigration, firearm, and drug charges.

**Will detainees tried and acquitted in federal court be released into the U.S.?** No. In the event that detainees were acquitted, the government claims, and courts have agreed, they could be detained under the administration’s law of war authorities until the end of hostilities or under immigration laws pending deportation. While the Supreme Court ruled in *Zadvydas v. Davis* that individuals cannot be held indefinitely pending deportation, that case dealt with other immigration contexts, and the Supreme Court explicitly declined to extend its holding to the armed conflict context.

**If Guantanamo detainees are moved to the United States, will they be granted additional constitutional rights?** The SASC Guantanamo provisions also restore authority to transfer detainees to the United States for continued detention. The nature and scope of constitutional protections owed to detainees held within the United States will not necessarily differ from the protections owed to foreign nationals held at Guantanamo. The Supreme Court has held that certain aspects of the U.S. Constitution extend to the U.S. naval base at Guantanamo, but the full scope of constitutional coverage to Guantanamo has not been determined. For instance, in the trial of the 9/11 defendants by military commission at Guantanamo, Judge Pohl ruled that the parties must litigate whether the Constitution applies in each particular instance in which the issue arises. Thus, it is not clear that transferring detainees to the United States will substantially alter the scope of constitutional rights that apply. Regardless, evading the Constitution is not a legitimate basis for continuing to detain individuals at Guantanamo and is not reflective of our values. We should not be afraid to apply our constitutional protections to those held in our custody.

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Won't imprisoning terrorists on US soil endanger local communities? According to a report by the Government Accountability Office, existing prison facilities operated by the Departments of Defense and Justice already hold 373 individuals convicted of terrorism in 98 facilities across the country. The lead association for correctional officers notes that “Supervising terrorists is nothing new for our BOP correctional officers.” The Executive Director of the American Correctional Association James Gondles says, “[e]very day, U.S. prisons hold watch over the nation’s most dangerous, most ruthless and most cunning individuals. Some of them have no regard for the law and no respect for human life. Some of the most violent are held in Supermax prisons. None has ever escaped.”

Why is the authority to transfer detainees to the United States for emergency medical treatment necessary? The SASC Guantanamo provisions provide for transfer of detainees to the United States for emergency medical treatment. The Geneva Conventions require that nations provide medical care for those in their custody, and it is prohibitively expensive to provide at Guantanamo the full panoply of medical care needed or to airlift emergency medical providers and equipment to Guantanamo in order to comply with our legal obligations. The proposed provisions allow the Secretary of Defense to comply with these legal obligations in a more fiscally responsible manner. To ensure that such temporary transfers are conducted safely, the SASC provisions require the Department of Defense to adopt appropriate security measures for these temporary medical transfers and the Secretary of Defense must maintain custody and control of the detainee at all times during treatment. The detainee must be returned to Guantanamo as soon as medically cleared to travel and may not avail himself of any legal rights beyond those available to him at Guantanamo.

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