# Guantánamo Detention in the Time of COVID-19

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*"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones." —Nelson Mandela*


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## INTRODUCTION

The novel coronavirus ("COVID-19") breathed new life into decades-old calls to close the controversial military prison in Guantánamo Bay as many, including members of Congress, expressed doubts about the prison's ability to protect detainees in the event of a COVID-19 outbreak.[1] Less than two weeks after the World Health Organization ("WHO") declared COVID-19 a global pandemic,[2] the highly contagious and often fatal virus reached the remote military installation in southeastern Cuba that is home to the prison for alleged terrorists responsible for the attacks on September 11, 2001.[3] The COVID-19 pandemic has brought new attention to what many familiar with Guantánamo Bay have known for years: the military prison lacks the infrastructure, expertise, and equipment to manage and address emergent health issues, including a serious viral outbreak. Critics worry that if COVID-19 reaches the military prison, the results will be catastrophic because the medical care available to detainees is inadequate to address the crisis-level situations that COVID-19 presents. This paper will propose three solutions to address the inadequate medical care available to detainees, both during the COVID-19 pandemic and afterward: (1) increased virtual contact between detainees and their lawyers and non-governmental organization ("NGO") representatives; (2) more agile deployment capabilities for specialist personnel and equipment; and ultimately, (3) the development of a transport plan.

With the advent and broad dissemination of the COVID-19 vaccine, it is possible that the Guantánamo detainees will make it through the pandemic without having to confront this inadequacy–at least publicly.[4] However, COVID-19 shined a light on a larger problem of detainee medical care: absent intervention, the military prison is unable to meet its obligation to provide detainees with adequate medical care required by domestic and international law. Recognizing that the COVID-19 pandemic is–hopefully–temporary, it provides an excellent opportunity to address systemic problems with detainee

1. Letter from Elizabeth Warren, Bernard Sanders, Dianne Feinstein, Cory A. Booker, Christopher A. Coons, Ron Wyden, Thomas R. Carper, Jack Reed, Edward J. Markey, Sherrod Brown, Tammy Baldwin, Patrick Leahy, Jeffrey A. Merkley & Benjamin L. Cardin, Senators, U.S. Senate, to Mark T. Esper, Sec'y of Def., Dep't of Def. (May 27, 2020), https://perma.cc/3RWU-99YL (seeking information about the Department of Defense efforts to limit the spread of COVID-19 among detainees) [hereinafter Letter from Senators].

2. *Coronavirus Disease 2019 (COVID-19) Situation Report – 51*, WORLD HEALTH ORG. (Mar. 11, 2020, 11:00 AM), https://perma.cc/LF6F-B49M.

3. Rebecca Kheel, *Navy Sailor at Guantánamo Test Positive for Coronavirus*, HILL (Mar. 24, 2020, 11:24 AM), https://perma.cc/R6QQ-Z4UE.

4. Reis Thebault, Lateshia Beachum, Brittany Shammas, Taylor Telford, Marisa Iati, Antonia Noori Farzan, Erin Cunningham, Siobhán O'Grady & Jacqueline Dupree, *U.S. Surpasses 300,000 Coronavirus Deaths as First Vaccine Shots are Given*, WASH. POST (Dec. 14, 2020), https://perma.cc/LXE8-BKT2; *see also*, Julia Conley, *Pentagon Secrecy Around COVID At Guantánamo Bay Is One More Reason To Shut The Prison,* SALON (Aug. 23, 2020, 2:02 PM), https://perma.cc/M725-M2TD (noting that since mid-March, the Department of Defense has refused to disclose information related to COVID-19 at Guantánamo Bay); Jason Hoffman, *Plan To Vaccinate Guantánamo Bay Detainees Against Covid-19 Has Been Paused*, CNN (Jan. 30, 2021, 4:14 PM), https://perma.cc/W4C8-ZXFS (The Pentagon has paused plans to vaccinate detainees.).

medical care and to propose solutions. This article will look at the adequacy of detainee medical care through the lens of the COVID-19 pandemic, will examine special factors that make atypical health issues a particularly challenging problem for the military prison, and will make recommendations for how to address these challenges both in relation to COVID-19 and future health crises.

Part I of this article will discuss the history of the military prison at Guantánamo Bay, which was established in 2002 as an expeditionary detention center for "unlawful combatants," who were–according to U.S. policy at the time–not entitled to the protections of the Geneva Conventions. Although there has been broad criticism from legal, medical, human rights professionals and even members of the U.S. government, regarding the military prison's capacity with regard to detainee medical care, Part I acknowledges the official U.S. position that detainees have consistently received adequate medical care.

Part II of this article will address the development of domestic and international laws and norms governing detainee medical care, including the Supreme Court's extension of certain constitutional and international protections to the detainees held at Guantánamo Bay. Part II will explore the common rights protected by domestic and international law, including the protection against cruel and unusual punishment, the requirement that detention camps maintain an infirmary and provide detainees with a standard of care similar to those provided to U.S. Armed Forces, and the expectation that detainees will be transported to military or civilian medical units for medical needs that exceed the infirmary's capabilities. Finally, Part II will introduce the seemingly contradictory provision of the National Defense Authorization Act ("NDAA") for Fiscal Year 2020, which while requiring that detainees receive evaluation and treatment at the standard of care acceptable within the medical community–something that is not available at the military prison for COVID-19–also prohibits the transport of detainees for any reason, including medical emergency.[5]

Part III of this article will discuss the state of pre-pandemic medical care. While the adequacy of medical care at the military prison has been the subject of significant criticism since the prison was first opened, Part III of this article will address four specific issues that complicate detainee medical care during the COVID-19 pandemic: (1) the age and health of detainees puts them at greater risk for severe illness should they contract COVID-19; (2) the military prison lacks the necessary equipment and personnel to meet the standard of care established for COVID-19; (3) domestic law prohibits the transfer of detainees to the United States for medical treatment; and (4) the prophylactic isolation required to protect against a COVID-19 outbreak, which includes limited access to legal

5. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019). *But see* National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021). The provisions relevant to Guantánamo Bay remain unchanged in 2021 and 2022.

counsel, will worsen detainees' existing mental health conditions and jeopardize detainees' legal rights.

Part IV of this article will propose solutions. While acknowledging that COVID-19 will hopefully be a temporary danger, it is important to recognize that challenges to providing adequate detainee medical care will continue after an effective COVID-19 vaccine is widely available. The solutions proposed in this article are intended to reduce the delta between detainees' increasing need for complex medical care and the limited resources available at the military prison and aim to do that using the COVID-19 pandemic for context. These solutions will continue to be relevant, and therefore worthy of thoughtful consideration and implementation, to future pandemics and to complex care requirements for aging detainees.[6]

## I. PART I

### *A. Background on Guantánamo Bay*

The infamous Guantánamo Bay detention facility, officially known as "Camp Delta," is a military prison located within Naval Station Guantánamo Bay in southeastern Cuba.[7] Although the name Guantánamo Bay has become synonymous with the detention facility used to house the suspected terrorists responsible for the attacks on September 11, 2001, the prison itself makes up only one part of the U.S. Naval Station.[8] America's oldest overseas base, the Naval Station was built in 1898 during the Spanish-American war and the United States has maintained its control over the base for over a century due to a political conflict with Cuba's former-President, Fidel Castro, and the base's strategic natural harbor.[9] Currently, the base's population is made up of approximately 5,700 Sailors and Marines and their families.[10] The base has been described as "small-town

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6. *See The Best Time to Prevent the Next Pandemic Is Now: Countries Join Voices for Better Emergency Preparedness*, WORLD HEALTH ORG. (Oct. 1, 2020), https://perma.cc/7M6C-X2T4. COVID-19 will not be the world's last health emergency. According to the WHO, "there is an urgent need for sustainable health emergency preparedness to deal with the next one." *Id.* It is worth noting other infectious disease emergencies have occurred since the military prison was opened in 2002, including Severe Acute Respiratory Syndrome (SARS) in 2003, novel influenza A (H1N1) in 2009, and the Middle East Respiratory Syndrome (MERS) in 2014. *See* Zeinab Abdelrahman, Mengyuan Li & Xiaosheng Wang, *Comparative Review of SARS-CoV-2, SARS-CoV, MERS-CoV, and Influenza A Respiratory Viruses*, 11 FRONTIERS IN IMMUNOLOGY 1 (2020), https://perma.cc/9DMF-RNPS.

7. Memorandum from Alberto J. Mora, Gen. Couns., Dep't of the Navy, to Inspector Gen., Dep't of the Navy *Statement for the Record: Office of General Counsel Involvement In Interrogation Issues* (Jul. 7, 2004), https://perma.cc/U82P-HDS8.

8. *See Mission and Vision*, NAVAL STATION GUANTANAMO BAY, https://perma.cc/PE6E-97YE. The official Naval Station Guantánamo Bay webpage provides the installation's mission, which makes no mention of detention operations. *Id.*

9. Since the Cuban Revolution of 1959, the Cuban communist government has consistently protested the U.S. presence on Cuban soil and has, with one purportedly accidental exception, refused to deposit the American's $4,085 annual lease payment. *See, e.g.*, Anthony Boadle, *Castro: Cuba Not Cashing US Guantánamo Rent Checks*, Reuters (Aug. 17, 2007, 3:26 PM), https://perma.cc/D3R5-ZMVW.

10. Carol Rosenberg, *Guantánamo by the Numbers,* MIA. HERALD (Oct. 25, 2016, 12:26 PM), https://perma.cc/YRH5-HUNL [hereinafter *Guantánamo by the Numbers*].

America" and provides all of the necessary amenities to support its residents, including a grocery store, school, hospital, and movie theater.[11]

The military prison, located in Camp Delta and operated by Joint Task Force Guantánamo ("JTF-GTMO"), was established in January 2002 to detain Muslim militants and suspected terrorists who were captured by U.S. forces in Afghanistan, Iraq, and elsewhere.[12] According to then-Secretary of Defense, Donald Rumsfeld, the detention camp was intended to detain "extraordinarily dangerous people, to interrogate detainees in an optimal setting, and to prosecute detainees for war crimes."[13] The idea behind establishing an expeditionary detention unit was to keep detainees away from U.S. soil for legal purposes.[14] This has only been partially successful. Federal courts have held that the Geneva Conventions apply to Guantánamo Bay and have extended certain constitutional protections, including detainees' right to petition for habeas corpus review.[15] The United States has officially acknowledged holding 780 detainees.[16] As of March 2022, 38 detainees remain at the prison.[17]

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11. Knight Ridder, *At Guantánamo, the Feel of Small Town American,* BALT. SUN (Dec. 26, 2003), https://perma.cc/HF9V-8R6T ("With school bake sales and Little League baseball, country music on the radio and an open-air movie theater downtown, the only McDonald's in Cuba and Old Glory everywhere, this community of 6,000 has successfully assumed the look and feel of small-town America.").

12. *Appendix 6, in* THE PHYSICAL AND PSYCHOLOGICAL IMPACT OF INDEFINITE DETENTION ON GUANTANAMO PRISONERS, CTR FOR CONST. RTS. 9 (2012), https://perma.cc/U8R7-GVFF. Camp Delta was built to replace Camp X-Ray, a temporary detention facility comprised of chain-linked open air caged that had previously been used in the mid 1990s to detain "excludable" Cuban refugees before returning them to Cuba. Camp Delta was made up of Camps 1 through 7, with Camp 7 used to house "high-value" detainees previously detained by the CIA.

13. George Allison, *United States Looking To Shut Down Guantánamo Bay*, U.K. DEF. J. (Nov. 12, 2015), https://perma.cc/Y94L-QW39.

14. *See generally, Torturing Democracy – Documents*, GWU NAT. SEC. ARCH., https://perma.cc/8Z4T-NMTA (including the following Office of Legal Counsel Memoranda: Memorandum from Patrick Philbin, Deputy Assistant Att'y Gen., Off. of Legal Couns., to Alberto Gonzalez, White Hous. Couns., Off. of Legal Couns. (Nov. 6, 2001), *Legality of the Use of Military Commissions to Try Terrorists*; Memorandum from John Yoo, Deputy Assistant Att'y Gen., Off. of Legal Couns., to Jim Haynes, Gen. Couns., Dep't of Def. (Dec. 28, 2001), *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay*; Memorandum from John Yoo, Deputy Assistant Att'y Gen., Off. of Legal Couns., to Jim Haynes, Gen. Couns., Dep't of Def. (Jan. 9, 2002), *Application of Treaties and Laws to Al Qaeda and Taliban Detainees*).

15. *See generally* Rasul v. Bush, 542 U.S. 466 (2004) (holding that detainees had a statutory right to petition federal courts for habeas corpus review); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion) (finding that an American citizen detained at Guantánamo Bay had a constitutional right to petition federal courts for habeas corpus review under the Due Process Clause); Hamdan v. Rumsfeld, 548 U.S. 557, 561 (2006) (holding that military commissions set up by the Bush administration to try detainees at Guantánamo Bay lack "the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949"); Boumediene v. Bush, 553 U.S. 723, 724 (2008) (holding that a constitutionally guaranteed right of habeas corpus review applies to persons held in Guantánamo Bay and persons designated as enemy combatants on that territory).

16. Sarah Almukhtar, Carol Rosenberg, Charlie Savage, Andrew Fischer, Rachel Shorey, Andrei Scheinkman, Alan McLean, Jeremy Ashkenas, Archie Tse, Jacob Harris, Derek Willis, Jeremy Bowers & Margot Williams, *The Guantánamo Docket,* N.Y. TIMES (Feb. 10, 2022), https://perma.cc/J6TF-G6YR.

17. *Guantánamo by the Numbers*, *supra* note 10.

The prison operates its own medical group, separate from the hospital that serves military and civilian personnel. Prison staff consists of approximately 1,800 military and civilian personnel, including approximately sixty medical providers.[18] The prison hospital complex is comprised of a $18.2 million-dollar hospital and $2.9 million-dollar psychiatric facility.[19] The most recent numbers available from Fiscal Year 2019 quote the medical group budget at four million dollars, or approximately $100,000 per year per detainee.[20] While that may, at first blush, appear like absurdly generous funding, when the prison was built it was not intended for long-term detention but rather, it was intended to be temporary and was outfitted with expeditionary-type healthcare infrastructure, which shows signs of deterioration and requires frequent repairs.[21] Because the prison hospital was neither intended nor designed to be operational for nearly two decades, its medical capabilities are, perhaps understandably, limited in equipment, diagnostic capabilities, and expertise. For example, the hospital was never outfitted with an MRI unit, kidney dialysis machines, or chemotherapy equipment.[22] Knowing that the hospital was never intended to be permanent is critical to understanding the current short-comings in treating detainees who may contract COVID-19.

Criticism about the adequacy of detainee medical care at Guantánamo Bay is not unique to COVID-19. For years, a variety of detainees' medical needs have outstripped Guantánamo's medical care capabilities including equipment, diagnostic capabilities, and expertise.[23] In 2014, General John F. Kelly, then-SOUTHCOM Commander, testified before the Senate Armed Services Committee ("SASC") to a "major challenge" facing the United States at Guantánamo: "complex issues related to future medical care of detainees."[24] He explained that "the medical issues of the aging detainee population are increasing

18. *Id.*

19. Scott Higham & Peter Fill, *At least $500 million has been spent on Guantánamo Bay renovations*, SEATTLE TIMES (Jun. 7, 2010), https://perma.cc/MX9F-DBSF.

20. Carol Rosenberg, *The Cost of Running Guantánamo Bay: $13 Million Per Prisoner*, Sept. 16, 2019 N.Y. TIMES (Sept. 16, 2019), https://perma.cc/Y9CN-N8JH. This total does not include expenses related to the "trooper clinic," a separate facility that provides basic healthcare for prison guards. *Id*. The trooper clinic recently underwent a $1.5 Million renovation. *Id*. This total also does not include expenses that remain classified.

21. *See id.*; *see also* Carol Rosenberg, *Congress Weighs Whether to Allow Guantánamo Prisoners to Travel to U.S. for Medical Care*, N.Y. TIMES, (Jun. 1, 2019), https://perma.cc/VG8B-KT2U [hereinafter *Congress Weighs*]. In 2019, the Pentagon asked Congress for $88.5 million to build a wheelchair-accessible detention facility with hospice care capacity for 15 detainees. *Id*. According to the Pentagon, without a new prison, "inmates 'bound to wheelchair and/or hospital bed' would 'require guards or medical personnel to carry detainees from cell to cell placing the security and safety of U.S. personnel at risk." *Id.*

22. *See* Carol Rosenberg, *The Pentagon Paid $370,000 To Rent an MRI for Guantánamo. It Doesn't Work.,* MIA. HERALD (Nov. 14, 2017), https://perma.cc/C2AL-ZE7H.

23. Scott Roehm, Ctr. For Victims of Torture, Analysis of DoD Response to Warren Letter (2020) (unpublished working paper) (on file with author).

24. *Department of Defense Authorization for Appropriations for Fiscal Year 2014 and The Future Years Defense Program: Hearing before S. Armed Servs. Comm., 113th Cong*. 336 (2014) (statement of Gen. John F. Kelly, U.S. Marine Corps, Commander U.S. S. Command) https://perma.cc/PU8W-SGEB [hereinafter Kelly Oral Testimony]; *see also* Gen. John F. Kelly, U.S. Marine Corps, Commander U.S.

in scope and complexity," and would "require specialized treatment for issues such as heart attack, stroke, kidney failure, or even cancer."[25] According to General Kelly, Guantánamo does not have the "specialists and equipment" necessary to treat "complex emergencies and various chronic diseases."[26]

There has been little improvement in the state of medical care available at Guantánamo Bay since. In 2019, the Center for Victims of Torture ("CVT") and Physicians for Human Rights ("PHR") released a report referring to the availability and quality of medical care at Guantánamo Bay as a "crisis."[27] According to CVT and PHR, Guantánamo Bay does not have the infrastructure, equipment, or expertise to manage atypical health needs.[28] The COVID-19 pandemic brings with it new urgency to address this long-known problem.

### *B. U.S. Government Position on Detainee Medical Care*

Despite broad criticisms from medical, legal and human rights professionals, as well as U.S. government officials, military spokespersons have routinely asserted that the detainees receive excellent medical care.[29] And perhaps the U.S. government's position that medical care is satisfactory has not been historically unreasonable based on the fact that to date, no U.S. court has held that detainees at Guantánamo Bay lack adequate medical treatment in light of the low bar that courts require to establish adequate care.[30] In any case, even accepting that there have been "successes" with regard to detainee medical care, it is reasonable and prudent to conclude–in light of the complications discussed in Part III–that the

S. Command, Posture Statement Before 113th Cong. S. Armed Servs. Comm., 14-15 (Mar. 13, 2014) https://perma.cc/KG58-NWNW [hereinafter Kelly Written Testimony].

25. Kelly Oral Testimony, *supra* note 24, at 336.

26. Kelly Written Testimony, *supra* note 24, at 14.

27. SCOTT ROEHM, JOHN BRADSHAW, SARAH DOUGHERTY, PHYLLIS KAUFMAN & MICHAEL PAYNE, DEPRIVATION AND DESPAIR THE CRISIS OF MEDICAL CARE AT GUANTANAMO 36 (Physicians for Hum. Rts. ed. 2019), https://perma.cc/UA75-4C4M.

28. *Id* at 4. The authors cite two specific cases. In one a military cardiologist determined that a detainee required testing for coronary artery disease. However, the military prison "did not have the means to test him" so the test was never performed. *Id.* (quoting Reply to Respondent's Memorandum in Opposition to Petitioner's Emergency Motion for Medical Care, Attachment 5 at ¶ 10, Alsawam v. Obama, 942 F. Supp. 2d 6 (D.D.C. 2013)). In another case, a detainee required surgery for a condition in 2007. In 2010, military medical providers diagnosed the same condition and recommend surgery. The surgery was not performed until 2018. *Id.*

29. Roehm, *supra* note 27, at 10 (citing Kathleen T. Rhem, *Guantanamo Detainees Receiving 'First-Rate' Medical Care,* U.S. DEPARTMENT OF DEFENSE NEWS (Feb. 18, 2005)).

30. *See e.g.*, Nashwan Al-Ramer Abdulrazzaq v. Trump, 422 F.Supp. 3d 281, 286 (D.D.C. 2019) (finding no evidence of medical neglect where military prison officials knew of detainee's need for back surgery and did not accommodate surgery for over a decade, resulting in detainee being confined to his wheelchair and/or hospital bed); *Cf.*, Al-Qahtani v. Trump, 443 F. Supp. 3d 116 (D.D.C. 2020) (granting Mohammed al-Quahtani's motion to convene a panel of three neutral medical experts ("Mixed Medical Commission") to evaluate whether his psychiatric conditions entitle him to repatriation). This order follows an independent psychiatric evaluation of Mr. al-Quahtani that diagnosed Mr. al-Qahtani with schizophrenia, and more significantly, torture-related post-traumatic stress disorder ("PTSD"). *Id.* at 120. This decision is the first judicial recognition that detainees may be entitled to evaluation or care beyond what is available at the military hospital.

existing medical resources are inadequate to address the time-sensitive and crisis-level care required to manage COVID-19.

## II. PART II

### A. *Domestic and International Obligations to Provide Adequate Medical Care*

Perhaps one of the first questions that must be asked is: why do we care if alleged terrorists at Guantánamo Bay get adequate medical treatment? The answer is that domestic and international law, as well as our fundamental sense of justice and humanity, require it. And despite the U.S. government's intentional strategy to put detainees outside the reach of these protections, the Supreme Court has held that certain provisions of the Constitution, if not its entirety, as well as the protections of the Geneva Conventions apply to Guantánamo detainees. Specifically, in *Hamdan v. Rumsfeld*, the Court held that military commissions set up by the Bush administration to try detainees at Guantánamo Bay lacked "the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions."[31] And in *Boumediene v. Bush*, the Court held that a constitutionally guaranteed right of habeas corpus review applies to persons held in Guantánamo Bay.[32] Additionally, the D.C. Circuit has examined allegations of Eighth Amendment violations by detainees at Guantánamo Bay on a number of occasions and extended–if not via relief, at least via analysis–the protections provided.[33] As for what constitutes "adequate" care, it is necessary to explore the root of the domestic and international obligation to provide medical care to detainees in custody.

Domestically, the root of the obligation is found primarily in the Eighth Amendment.[34] The Supreme Court long ago settled that the government is required to provide adequate medical care to those in its custody, holding that the failure to do so and/or the "wanton infliction of pain" would constitute a violation of the Eighth Amendment.[35]

However, the bar for an Eighth Amendment violation is high. Or, said another way, the standard for what constitutes adequate medical care is low. It is not the case "that every claim by a [detainee] that he has not received adequate medical care treatment states a violation of the Eighth Amendment."[36] To state a claim for

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31. Hamdan v. Rumsfeld, 548 U.S. 557, 561 (2006).
32. Boumediene v. Bush, 553 U.S. 723, 724 (2008).
33. *See e.g.* Nashwan, 422 F. Supp. 3d at 286-288.
34. U.S. CONST. amend. VIII.
35. See Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical 'torture or a lingering death,' (citation omitted), the evils of most immediate concern to the drafters of the [Eighth] Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. (citation omitted) We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' (citation omitted) proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.).
36. *Id.* at 105.

an Eighth Amendment violation, a detainee must allege that prison officials: (1) knew that prisoner "face[d] a substantial risk of serious harm"; and (2) "disregard [ed] that risk by failing to take reasonable measures to abate it."[37] Because courts have elected to treat Eighth Amendment violations as fact-specific, there is no consensus on what "reasonable" means in this context. Courts have held that while a detainee may disagree with medical decisions that may have been made, a detainee does not have a constitutional right to choose their own medical providers nor to obtain treatment of his own choosing.[38]

Domestic and international humanitarian law provide specific requirements for detainee care.[39] Domestically, detainee medical care is governed by statute and military regulation. Specifically, § 1046 of the NDAA for Fiscal Year 2020 ("FY20 NDAA") states that all detainees must receive "evaluation and treatment that is accepted by medical experts and reflected in peer-reviewed medical literature as the appropriate medical approach for a condition, symptoms, illness, or disease and that is widely used by healthcare professions."[40] Additionally, Department of Defense Instruction ("DoDI") 2310.08 echoes the prohibitions of the Eighth Amendment and requires that the treatment of detainees held under the law of war should "be guided by professional judgments and standards similar to those applied to personnel of the U.S. Armed Forces."[41] Notably, other sections of the NDAA complicate compliance with § 1046 and DoDI 2310.08. Because Guantánamo Bay lacks the specialists and equipment to treat emergent medical conditions, either at the military prison or the base hospital, U.S. military and civilian personnel are evacuated to the United States for medical care. However, § 1032 of the NDAA, which has been renewed every year since its adoption in Fiscal Year 2011, prohibits the transfer of detainees to the United States for any reason, limiting detainees' medical care to the services available at the military prison and/or specialists and equipment that can be sent to Guantánamo.[42]

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37. Nashwan, 422 F. Supp. 3d at 288 (citing Farmer v. Brennan, 511 U.S. 825, 847 (1994)).

38. *See* Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir. 1986) ("A prison inmate has no independent constitutional right to outside medical care additional and supplemental to the medical care provided by the prison staff within the institution."); *see also* United States v. Rovetuso, 768 F.2d 809, 825 (7th Cir. 1985) ("The Eighth Amendment provides a prisoner treatment of his serious medical needs, not a doctor of his own choosing."); Rabbani v. Trump, 05-cv-1607 (RCL), Mem. Op., ECF No 379 at 19 (noting that a Guantánamo detainee is not entitled to the medical treatment of his choice).

39. *See* Letter from Kevin K. Sullivan, Interim Permanent Representative, U.S. Dep't of State, to Paulo Abrao, Exec. Sec'y, the Inter-Am. Comm'n H.R (Dec. 23, 2016), https://perma.cc/6J3R-SWLY. The United States has publicly stated that detainee operations at Guantánamo Bay meet the requirements of international humanitarian law. *Id* at 5.

40. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1046, 133 Stat. 1198, 1588 (2019).

41. U.S. DEP'T OF DEF., INSTR. 2310.08, MEDICAL PROGRAM SUPPORT FOR DETAINEE OPERATIONS § 3.1(b) (Sept. 5, 2019) https://perma.cc/Y66N-N588. This DoDI was the DoD's attempt to clarify the roles of healthcare professionals in detainee treatment based on criticism of healthcare professionals' complicity in detainee torture. *Id.*

42. National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 [hereinafter *FY11 NDAA*].

International law pertaining to detainee medical care mandates the transfer of detainees for medical needs that cannot be addressed by the military prison. The Third 1949 Geneva Convention, to which the United States is a party, requires, "[t]he Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health."[43] Article 30 of the Convention mandates that "[e]very camp have an infirmary" and requires transfer to military or civilian hospitals for detainees who need specialized treatment beyond what the infirmary can provide.[44]

U.S. military regulations have formally implemented this provision of the Geneva Conventions.[45] The Army's detention regulation dealing with Enemy Prisoners of War, Retained Persons, Civilian Internees, and Other Detainees prohibits inhumane treatment and requires "appropriate medical attention."[46] § 3-4 (i)(2) requires "that every camp has an infirmary" and requires, contrary to §1032 of the NDAA, that detainees "suffering from serious disease, or whose condition necessitates special treatment, surgery, or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given."[47]

A number of United Nations' instruments also guide detainee medical care, including, The Standard Minimum Rules ("SMR") for Treatment of Prisoners. [48] In 2015, these Rules were updated and renamed the "Nelson Mandela Rules" or "The Mandela Rules."[49] While these Rules are not binding on States, they represent a powerful global consensus on minimum standards. At least publicly, if not in practice, the United States has strongly supported the Mandela Rules.[50] The Mandela Rules require, *inter alia,* the provision of health care, at "the same standards of health care that are available in the community"..."without discrimination on the grounds of their legal status[;]" require "sufficient qualified personnel acting in full clinical independence[;]" and require "prompt access to medical

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43. Geneva Convention Relative to the Treatment of Prisoners of War, art. 15, Aug. 12, 1949, 6 U.S. T. 3316, 75 U.N.T.S. 135.

44. *Id.* at art. 30.

45. *See* U.S. DEPARTMENT OF THE ARMY, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINEES: ARMY REGULATION 190-8 (2011), https://perma.cc/B3W8-QBFB.

46. *Id.* §§ 1–5, 2–2, 3–3.

47. *Id.* § 3–4(i)(2).

48. Economic and Social Council Res. 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (May 13, 1977).

49. G.A. Res. 70/175, annex, Standard Minimum Rules for the Treatment of Prisoners (Dec. 17, 2015). As per the recommendation of the Expert Group at the Commission on Crime Prevention and Criminal Justice, also held in 2015, the revised rules were renamed the "Nelson Mandela Rules" to honor the legacy of the late President of South Africa, Nelson Rolihlahla Mandela, who spent 27 years in prison in the course of his struggle for global human rights, equality, democracy and the promotion of a culture of peace. *Nelson Mandela Rules*, U.N., https://perma.cc/DZ3J-MW4Y.

50. *See* Dan Sicorsky, *The Nelson Mandela Rules: Honoring a Prisoner Turned World Leader*, U.S. EMBASSY & CONSULATES IN TURK. (July 18, 2017), https://perma.cc/WLR2-D3SS (showing that as recently as 2017, the United States has stated that the United States Department of State is working to incorporate the revised Nelson Mandela Rules into its own penal reform programs worldwide);; *but see* Serra v. Lappin, 600 F.3d 1191, 1197 (9th Cir. 2010) (holding that the Mandela Rules is not a treaty binding on the United States, or even a source of private rights, if considered a self-executing treaty).

attention in urgent cases[.]"[51] Rule 25 recognizes the importance of a detainee's mental health, requiring a full interdisciplinary team of psychologist and psychiatrists with "sufficient qualified personnel acting in full clinical independence."[52] Rule 27 gives prisoners requiring specialized treatment the right to be transferred to special facilities or civilian hospitals.[53]

## III. PART III

### A. *Challenges Associated with COVID-19*

The military prison at Guantánamo Bay is two things at once: a secretive military prison, where even mundane details of everyday life are classified,[54] and a nursing home for aging alleged terrorists, that costs the American public approximately $380 million a year to operate.[55] These two things make it a tinderbox should any detainees or staff contract COVID-19.[56] Between March and December 2020, more than 249,883 people in U.S. prisons or jails were infected with COVID-19.[57] During that same time, and 1,657 prisoners died.[58] The rate of COVID-19 among prisoners was five and a half times higher than in the U.S. population.[59] Thirty-five percent of deaths from the virus were linked to nursing homes.[60] It's a simple fact that prisons and nursing homes have been ravaged by the COVID-19 outbreak and there is little reason to believe that the military prison at Guantánamo Bay would be any different. In addition to the military prison being a virtual tinderbox, four factors further complicate a COVID-19 outbreak.

#### 1. The Age and Health of Detainees Put Them at Greater Risk for Severe Illness

The detainee population is particularly vulnerable should they contract COVID-19 and require intervention.[61] The Center for Disease Control and Prevention ("CDC") defines people at risk for severe illness as older adults[62] and

51. *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 49, at 12.

52. *Id.*

53. *Id.* at 13.

54. Sheri Fink, *Where Even Nightmares Are Classified: Psychiatric Care at Guantánamo*, N.Y. TIMES (Nov. 12, 2016), https://perma.cc/C9YE-DMUJ.

55. Carol Rosenberg, *Guantánamo Bay as a Nursing Home: Military Envisions Hospice Care as Terrorism Suspects Age,* N.Y. TIMES (Apr. 27, 2019), https://perma.cc/RB72-F4TW [hereinafter *Guantánamo Bay as Nursing Home*].

56. *See* Zepeda-Rivas v. Jennings, 465 F.Supp.3d 1028, 1030 (N.D. Cal. 2020) (referencing the "well known 'tinderbox' risk of jail epidemics").

57. *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (Dec. 15, 2020), https://perma.cc/3ZR5-4GRC.

58. *Id.*

59. *Id.*

60. *Covid in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://perma.cc/TQZ8-SD5N.

61. *COVID-19 Information for Specific Groups of People*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 20, 2021), https://perma.cc/5RS2-DLJG [hereinafter *People at Increased Risk*].

62. *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 16, 2021), https://perma.cc/VJE4-U2SC.

people with certain medical conditions, including, but not limited to, cancer, chronic obstructive pulmonary disease, chronic kidney disease, heart conditions, obesity, and diabetes.[63] According to the CDC, the risk of death from COVID-19 for adults over age fifty is thirty times greater; for adults over age seventy, that risk is ninety times greater.[64]

Of the 38 men in detention, most are in their fifties.[65] The oldest, Mr. Saifullah Paracha, is seventy-three.[66] Mr. Paracha has been detained without charges since 2004.[67] He has had two heart attacks–one while in U.S. custody awaiting transfer to Guantánamo and another since arriving–and suffers from "chronic chest pains . . . diabetes, coronary artery disease, diverticulosis, gout, psoriasis and arthritis."[68] Should Mr. Paracha contract COVID-19, his age coupled with several known comorbidities, put him at high risk for severe illness and death.

Mr. Paracha is not the only detainee with a complex medical history. Mr. Nashwan al-Tamir has had four spinal surgeries.[69] To accommodate Mr. al-Tamir's cascading health crises, the Pentagon authorized shipping a "jumbo cell," a handicapped-accessible cell big enough to accommodate a hospital bed and wheelchair, to allow Mr. Tamir to participate in his commission from his hospital bed.[70] Sharqawi Al Hajj, a Yemeni detained without charges since 2004, suffers from "profound weakness and fatigue," was diagnosed with Hepatitis B prior to his transfer to Guantánamo Bay and has been described by his attorney as being on the "precipice of total bodily collapse."[71] And the list goes on. In some cases, detainees simply do not trust military-affiliated medical professionals—a consequence of prior medical complicity in torture.[72] While that is not the fault of current front-line medical personnel, it is reality and it impacts the military prison's capacity to provide care during the COVID-19 pandemic.[73]

Many, if not most, of the detainees suffer from the types of preexisting conditions that put them at risk for severe illness from COVID-19. As General Kelly

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63. *Id.*

64. *People at Increased Risk*, *supra* note 61 (comparing the risk of death among each age group to a comparison group aged 18-29 years old).

65. *The Guantánamo Docket*, *supra* note 16 (listing the detainees currently held at Guantánamo Bay).

66. *Id.*

67. *Id.*

68. Scott Roehm, *Guantánamo's COVID-19 Precautions Must Safeguard Detainees' Rights,* JUST SEC. (Mar. 31, 2020), https://perma.cc/8MSC-G9M.

69. Carol Rosenberg, *Pentagon Shipping Jumbo Cell to Guantánamo Court for Al-Qaida Trial from Hospital Bed,* PULITZER CTR. (Jan. 14, 2019), https://perma.cc/VUV5-28YG.

70. *Id.*

71. Roehm, *supra* note 27, at 38.

72. *Id.* at 16*; see also* Helen Mooney, *U.S. Doctors Were Complicit in Guantánamo Bay Torture,* BMJ (Apr. 27, 2011); Vincent Iacopina & Stephen Xenakis, *Neglect of Medical Evidence in Torture in Guantánamo Bay; A Case Study,* 8 PLOS MEDICINE 1 (2011).

73. *See* Roehm, *supra* note 27, at 16. Examples of detainee distrust of medical providers has resulted in a number of detainees refusing to meet with medical staff or follow treatment protocol because "it's impossible to form a clinician-patient relationship" with members of JTF-GTMO because of medical providers' prior involvement in interrogations. *Id.* at 4.

noted, they already require treatment for "heart attack, stroke, kidney failure, or even cancer."[74] Many are diabetic or prediabetic and some suffer from sleep apnea.[75] These preexisting conditions, combined with the detainees' physical and psychological aftereffects of torture,[76] make their health especially precarious in the face of a deadly pandemic.

### 2. The Military Prison Lacks the Necessary Equipment And Personnel to Meet the Standard of Care Established for COVID-19

As General Kelly's testimony highlights, it is well-documented that the military prison lacks the equipment and staff required to provide detainees with specialty medical care under normal circumstances, let alone during a deadly, global pandemic. It would be naïve to assume that the military prison will be spared from the impact of COVID-19, particularly when there were two positive cases of COVID-19 within the first few weeks of the pandemic.[77] However, because of the Pentagon's classification of information, what impact, if any, the pandemic has had is unclear. Between late-March 2020 and December 2021, the Department of Defense ("DoD") declined to say whether there were any positive COVID-19 tests at Guantánamo Bay, citing "operational security."[78]

In early 2020, Democrats in Congress, citing "the serious and deteriorating health conditions of detainees, the deficient infrastructure to care for complex medical needs at the prison facility, and the strict prohibition on detainee transfers to the United States[,]pressed the DoD about the military's ability to handle a "significant outbreak" of COVID-19 at the prison.[79] Secretary Matthew Donovan, the Under Secretary of Defense for Personnel and Readiness, responded to the Senators in just four paragraphs–without details–assuring them that JTF-GTMO "has been following a detailed COVID-19 contingency and mitigation plan."[80] This includes temperature checks for anyone who enters buildings and six ventilators at the prison, only four of which can operate simultaneously and only two ICU rooms.[81] According to Secretary Donovan, "[a]ll detainees have 24/7 access to Government-provided, board-certified medical professionals."[82] Under

74. Kelly Oral Testimony, *supra* note 24.

75. *Guantánamo Bay as Nursing Home*, *supra* note 55.

76. S. REP. NO. 113-288 (2014), https://perma.cc/BE47-CSQN*; Obama: "We Tortured Some Folks" after 9/11*, CBSNEWS (Aug. 1, 2014), https://perma.cc/42KR-7RKW.

77. Sacha Pfeiffer, *As Pandemic Halts the Military Court at Guantánamo, Critics Call for its Closure,* WPRL (May 22, 2020, 4:07 AM), https://perma.cc/T5VA-NFPB.

78. Carol Rosenberg, *Senators Criticize Guantánamo Prison Coronavirus*, N.Y. TIMES (Aug. 14, 2020), https://perma.cc/8C5X-MKN5 [hereinafter *Senators Criticize Guantánamo Prison Coronavirus*]; Carol Rosenberg, *Covid Cases Reach a Pandemic High at Guantánamo Bay*, N.Y. TIMES (Jan. 7, 2022), https://perma.cc/EP7L-DQQ4.

79. Letter from Senators, *supra* note 1.

80. Letter from Matthew P. Donovan, Under Sec'y, U.S. Air Force, to fifteen United States Senators about the Department of Defense efforts to limit the spread of COVID-19 among detainees (Jul. 9, 2020) (on file with author).

81. *Id.*

82. *Id.*

Secretary Donovan neglected to mention that none of the "board-certified medical professionals" are board certified cardiopulmonary specialists[83] or that the military does not employ any palliative care physicians.[84]

According to the Senators, the Pentagon's response "leaves doubts about the Guantánamo prison's capacity to protect military personnel and detainees from COVID-19."[85] While Pentagon leadership asserts that testing is available at the military prison, there is no publicly available information about how many detainees have been tested.[86] There is no information about Guantánamo's COVID-19 testing protocol, including what triggers testing and how often it is occurring[87] There is no information about whether detainees are being regularly screened for symptoms or if the prison has access to sufficient personal protective equipment or current medications being used to treat COVID-19. The Pentagon's response also did not disclose whether the prison had specialists available who were appropriately qualified to provide critical care, such as renal dialysis or cardiopulmonary care, both of which are required to address common complications of COVID-19. Nor did it provide a plan to mobilize personnel in the event of an outbreak. Finally, there was no information about any effort or capacity to treat the severe mental health impacts of COVID-19 on an already deeply traumatized population.[88] It is reasonable to assume that, absent information from the DoD about these precautions or preparations, they are not underway because the deficiencies noted corroborate the serious deficiencies in medical care that General Kelly testified to in 2014 and that have been long observed by independent medical experts.[89]

What the Pentagon has made public falls short of the standard of care that has been established for COVID-19. Specifically, the standard of care for COVID-19 requires, at a minimum, one ICU nurse per ventilator around the clock and at least

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83. *Senators Criticize Guantánamo Prison Coronavirus*, *supra* note 78.

84. *Guantánamo Bay as Nursing Home, supra* note 55.

85. *Senators Criticize Guantánamo Prison Coronavirus*, *supra* note 78.

86. *See* Joint Task Force Guantánamo Bay (JTF-GTMO) COVID-19 Preventative Measures, U.S. SOUTHERN COMMAND GUIDANCE (Feb. 16, 2022), https://perma.cc/6REH-VYXJ. In addition to the information provided by Secretary Donovan on behalf of the DoD, U.S. Southern Command has made its COVID-19 preventative measures available online.

87. According to Secretary Donovan's response, rapid testing is available. Letter from Matthew P. Donovan, *supra* note 80; however, military prosecutors assigned to the prosecutors have disclosed that Guantánamo has no capacity for widespread testing and must send samples to labs in the United States for testing. Carol Rosenberg, *Prosecutors Struggle to Resume Guantánamo Trials,* N.Y. TIMES (Jul. 27, 2020), https://perma.cc/8YBJ-Q4TS.; *Cf.,* Carol Rosenberg, *Guantánamo Bay Navy Base Raises Health Alert and Closes Facilities*, N.Y. TIMES (Oct. 10, 2020), https://perma.cc/FY98-Y89J. A strict lockdown was imposed on the Naval Station in October while COVID-19 samples were sent to the United States for testing. *Id.*

88. Thomas Hewson, Andrew Shepherd, Jake Hard & Jennifer Shaw, *Effects of the COVID-19 Pandemic On The Mental Health Of Prisoners,* 7 LANCET PSYCH. 568, 568-70 (2020) (expressing concern over the mental health of prisoners during COVID-19 because of high rates of pre-existing mental disorders, suicide and self-harm. Isolation, delayed legal proceedings, and unpredictability of COVID-19 heighten risk of suicide and self-harm).

89. Kelly Oral Testimony, *supra* note 24; Iacopina & Xenakis, *supra* note 72.

one physician trained to manage patients on a ventilator.[90] Additionally, the National Institute of Health Treatment Guidelines for Care of Critically Ill with COVID-19 requires at least one health provider with "extensive airway management experience" in a "controlled setting," hemodynamic support ("shock-reversal therapy"), acute kidney injury and renal support therapy, and pharmacologic intervention, including dexamethasone and remdesivir.[91] Domestic law pertaining to medical care for detainees incorporates this standard by reference. Specifically, §1046 of the NDAA states that all detainees must receive "evaluation and treatment that is accepted by medical experts and reflected in peer-reviewed medical literature as the appropriate medical approach for a condition, symptoms, illness, or disease and that is widely used by healthcare professionals."[92]

An independent medical expert, Dr. Stephen Xenakis,[93] has reviewed the DoD's COVID-19 capabilities.[94] According to Dr. Xenakis the plan is incomplete; the DoD has "identified equipment and rooms that they need . . . but staff is not filled in."[95] The prison clinic possesses just six ventilators, only four of which may be operated simultaneously, a capacity that will be quickly exhausted during an outbreak among detainees or prison staff.[96] Dr. Xenakis further notes the prison's COVID-19 care team only lists four ICU nurses, and although three doctors are assigned to the COVID-19 care team, none have been trained to manage patients on a ventilator.[97] As is, the military prison lacks the equipment, including an adequate number of ventilators, hemodynamic and dialysis capabilities, and staff, including ICU nurses and physicians who are board certified to manage patients on a ventilator. Put bluntly, the military prison cannot meet the standard of care for COVID-19.

#### 3. Domestic Law Prohibits the Transfer of Detainees to the United States for Medical Care

Since 2011, the NDAA has prohibited the use of funds to transfer detainees to the United States for any reason, including medical care.[98] When the ban was

90. Emily Williams, Opinion, *Ventilators Can Save People with Serious Covid-19. The People Behind Them are Even More Important.*, STAT (May 19, 2020), https://perma.cc/T57E-A94Z.

91. *Care of Critically Ill Adult Patients With COVID-19*, NAT'L INST. HEALTH (Dec. 16, 2021), https://perma.cc/2LGL-SMRK.

92. *FY11 NDAA*, *supra* note 42, § 1046.

93. Dr. Stephen Xenakis is a retired brigadier general and Army medical corps officer with 28 years of active service. He has been a senior adviser to the Department of Defense on neurobehavioral conditions and medical management. Dr. Xenakis serves as an anti-torture advisor to Physicians for Human Rights and belongs to the group of retired generals and admirals convened by Human Rights First. *Stephen Xenakis, M.D.*, GEO. WASH. UNIV., https://perma.cc/5WLL-3MBX.

94. *Senators Criticize Guantánamo Prison Coronavirus*, *supra* note 78.

95. *Id.*

96. *Id.*

97. *Id.* There is one sailor who has been trained as a respiratory therapist assigned to the Naval Station hospital. It is unknown if that sailor is cleared to augment prison medical staff. *See id.*

98. *See Congress Weighs*, *supra* note 21. No Guantánamo detainee has been brought to the United States since the military prison was opened in 2002. Only two Guantánamo prisoners have been transferred to the United States. One was Yaser Esam Hamdi, who was born in the United States and

imposed, the intent was to prohibit President Obama from transferring detainees to the United States for trial in order to close the military prison.[99] However, the consequence is that detainees cannot be transported to the United States for medical treatment, even if that treatment is necessary for saving the detainee's life. Given the hospitalization and mortality rates associated with COVID-19, this is not an insignificant possibility.

Detainee medical treatment is different than the medical treatment for prison staff or other military and civilian personnel. Broadly speaking, when compared to the detainee population, U.S. military personnel are younger and less likely to experience complicated medical issues associated with aging and preexisting poor health. In terms of COVID-19, because of the health requirements for military service, U.S. military personnel are less likely to suffer from the types of preexisting conditions that would put them at risk for severe illness if they contract COVID-19.[100] In the event of severe illness related to COVID-19, military or civilian personnel would be medically evacuated to the U.S. military hospital in Jacksonville, Florida because of the limited medical equipment and expertise available in Guantánamo Bay.[101] It is worth noting that the threshold for what constitutes a medical emergency in Guantánamo Bay is low. For example, in early 2019, the military judge overseeing the military commission of the five masterminds behind the attack on September 11, 2001 detached his retina.[102] Because of lack of medical care available, the military judge had to be medically evacuated.[103] And, to further highlight the remote nature of Guantánamo Bay, a lack of aircraft availability resulted in a nearly 24-hour delay in the military judge's evacuation.[104]

As is, if a detainee experiences a medical emergency that exceeds the military prison's capabilities, specialty care has to come to the military prison. This is problematic for two reasons. First, the time required for specialty personnel and equipment to travel to the military prison may negatively affect medical outcomes. Second, even with specialists and equipment, the military prison lacks the infrastructure to manage the complex health needs associated with COVID-19,

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challenged his military detention to the Supreme Court, and who was sent to Saudi Arabia, where he grew up, in 2004. The other was Ahmed Khalfan Ghailani, 45, of Tanzania, who was sent to New York in 2009, tried and convicted over his role in Al Qaeda's bombings of two United States Embassies in East Africa in 1998. He is serving a life sentence. *Id.*

99. *See* Connie Bruck, *Why Obama Has Failed to Close Guantánamo,* NEW YORKER (Aug. 1, 2016), https://perma.cc/8XSP-2SGK.

100. *See generally* DEP'T OF DEF., DOD INSTRUCTION 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INSTRUCTIONS INTO THE MILITARY SERVICES (2021) (noting that in relevant part, military service has certain age and physical health requirements and certain preexisting medical conditions are bars to or disqualifying for military service).

101. Email from Hon. Kathleen H. Hicks to Gen. John F. Kelly (Feb. 25, 2013), https://perma.cc/69YT-JH7V.

102. Carol Rosenberg, *Sept. 11 Trial Judge Cancels Guantánamo Hearing, Is Airlifted To U.S. For Emergency Eye Surgery*, MCCLATCHY WASH. BUREAU (Feb. 1, 2019), https://perma.cc/H8VC-ZZWM.

103. *Id.*

104. *Id.*

including sufficient ICU space and a surgical theater with the capacity to handle neurological, cardiac, or renal emergencies.[105]

Even if the right specialists or equipment are brought in, the prison hospital itself is not outfitted for complicated procedures and/or intensive post-operative care. In 2017, a member of Guantánamo Bay's own medical team wrote an email to the military prison's Commander, to explain that performing an emergency neuro-surgical operation on Mr. al-Tamir,[106] at the prison hospital, "scare[d] the hell out of" him.[107] Instead, the medical provider advocated for transferring Mr. al-Tamir to a military hospital in the United States that was equipped to handle both the complicated surgery and the post-operative care.[108] That request was denied. Although the surgery was "a success," it resulted in Mr. al-Tamir losing feeling in his legs, becoming incontinent, and being confined to a hospital bed.[109]

In 2013, Dr. Sondra Crosby,[110] an internationally recognized expert in human rights violations and one of the first physicians allowed to travel to Guantánamo Bay to independently examine detainees, and Dr. Xenakis, in their role as independent medical experts, wrote to Congress to express grave concerns about the military prison's inability to transport detainees to the United States for emergent health concerns.[111] In April of 2021, Dr. Xenakis wrote to several members of Congress, including members of both the House Armed Services Committee ("HASC") and SASC, imploring them to create an exception to the transfer ban for medical emergencies.[112] According to Dr. Xenakis, the DoD requires this authority in the face of the COVID-19 pandemic to protect both detainees' health and the health of all residents of the Guantánamo Bay Naval Station.[113]

105. Michael O'Riordan, *Heart, Kidneys, Brain and More: COVID-19's Wide-ranging Effects*, TCTMD (Jul. 13, 2020), https://perma.cc/XKD5-YBNR.

106. Roehm, *supra* note 27, at 37.

107. *Id*.

108. *Id*.

109. *Id*. at 7.

110. *Sondra S. Crosby, MD*, BOS. UNIV. SCH. PUB. HEALTH, https://perma.cc/69F4-4TYW (showing Dr. Crosby's biography).

111. Letter from Drs. Sondra Crosby, Bos. Univ. & Stephen Xenakis, U.S. Army, to Congress (Nov. 19, 2013), https://perma.cc/8BXG-42JL (expressing concerns to Congress about the transport ban). The doctors' letter highlighted the cases of Tarek El Sawah, an Egyptian who arrived in Guantánamo in May 2002, and Adnan Farhan Abdul Latif, a Yemeni who arrived in Guantánamo in January 2002. At the time, Mr. Sawah weighed over 400 pounds, 230 more pounds than he had weighed upon arrival. Mr. Sawah's obesity was due to the fact that his interrogators had enticed his compliance with food. As a result of his physical and mental health conditions, Mr. Sawah's functionality was extremely limited; he could barely walk. Mr. Sawah was released from Guantánamo Bay and relocated to Bosnia and Herzegovina in 2016, three years after it was determined he was "too innocent to charge." Mr. Latif died by suicide at Guantánamo Bay, years after being cleared for release. Mr. Latif was seriously mentally ill and suffered from traumatic brain injury. A report by U.S. Southern Command cited lapses in procedures, including the inability of the military prison to provide tertiary neuropsychiatric care, as contributory to his death, and depicts woefully substandard medical care.

112. Letter from Dr. Stephen N. Xenakis, Brig. Gen., Ret., U.S. Army, to Senators James Inhofe, Jack Reed, Mitch McConnell, Charles Schumer and Representatives Adam Smith, Mac Thornberry, Nancy Pelosi, and Kevin McCarthy, U.S. Congress (Apr. 16, 2020) (regarding Medical Transfer Authorization during COVID-19) (on file with author).

113. *Id*.

#### 4. Even If the Virus Does Not Reach the Detainees, the Pandemic Will Have Serious Implications for the Detainees' Health and Legal Rights

As a result of the torture that they suffered in Central Intelligence Agency ("CIA") custody, many detainees have mental health conditions that will be aggravated by the stress and increased isolation associated with COVID-19.[114] Specifically, limited access to legal counsel and medical experts, increased uncertainty surrounding legal proceedings, and anxiety associated with the COVID-19 pandemic, which in part stems from a general distrust of medical providers, will worsen existing mental health conditions for many detainees.[115] According to Dr. Crosby, the military prison has proven either unable or unwilling to treat mental health conditions, many of which resulted from the torture detainees experienced in CIA custody.[116] Detainees have never received any medical treatment, including mental health treatment, for their torture because medical providers are–either by policy or practice–prohibited from discussing detainee treatment prior to the detainees' arrival at Guantánamo Bay.[117] Consequently, any treatment a detainee has received is inadequate because it is based on an incomplete and inaccurate medical and trauma history.[118] While this has always been a problem with medical care at the prison, it will be exacerbated by the pandemic. Despite interest from Congress, oversight of this aspect of detainee medical care is lacking. Even if the virus does not result in an outbreak in the military prison, the pandemic will have serious implications for the detainees' mental health and legal rights.

One prime example of impact to detainees' legal rights is access to legal counsel, which has been restricted due to the pandemic. In-person visits are nearly impossible and also unwise given the risks to both the detainees' and the attorneys' health. The first legal visit during the pandemic was attempted in December 2020.[119] However, according to the attorney involved, the distance and barrier made conversation about complicated issues "impossible" and attorneys were prevented from giving or even showing documents to detainees.[120] Even with the emergence of a vaccine, in-person legal meetings remain severely restricted.

No direct and confidential video or phone links are available between detainees and their attorneys.[121] Communication is limited to attorney-client mail that is required to be translated, reviewed for security concerns, and uploaded to a secure

114. Interview with Dr. Sondra Crosby, Professor of Med., Bos. Univ. (Oct. 13, 2020) (notes on file with author) [hereinafter Interview with Dr. Crosby];; *see also* Declaration of Dr. Sondra Crosby, Professor of Med., Bos. Univ. ¶ 12 (Oct. 24, 2015), https://perma.cc/WNN5-YP3X [hereinafter Declaration of Dr. Sondra Crosby]. Although the executive summary of the SSCI study describes the torture of one particular detainee in great detail, no medical profession has recorded a trauma history in any of the detainees' records spanning nearly a decade; Fink, *supra* note 54.

115. Declaration of Dr. Sondra Crosby, *supra* note 114.

116. *Id.*

117. *Id.*

118. *Id.*

119. Carol Rosenberg, *Red Cross Visit to Guantánamo Limited by Virus Measures,* N.Y. TIMES (Dec. 9, 2020), https://perma.cc/N3G2-X6A9 [hereinafter *Red Cross Visit*].

120. *Id.*

121. According to one defense attorney, "the defense can only communicate with [client] in writing using attorney-client mail, which is a cumbersome and slow process reminiscent of the pony express."

point-to-point system. Restricting access to counsel may have negative consequences for detainee's health, further exacerbating pre-existing mental health issues. Restricting access to counsel also eliminates detainees' access to independent medical experts, whose services and periodic visits must be secured through litigation in the all-but-shuttered war courts.[122] Secretary Donovan discussed the role of independent medical experts in his response to Congress, noting that detainees have access to independent medical experts, but that access must be secured through litigation and these experts are appointed, not to treat the detainees, but rather to advise defense teams on matters in litigation.[123] Independent medical experts do not supplement inadequate medical care provided by the military prison. They are hired to ensure that the detainees' legal rights–as those rights relate to medical care–are protected.[124]

Pandemic health concerns have forced the International Committee of the Red Cross ("ICRC") to cancel two quarterly visits, a first since visits began in August 2003.[125] These visits typically include a medical officer and deliver mail, relaying messages from detainees' families.[126] The ICRC visits are essential for monitoring conditions of internment and also contribute significantly to detainees' mental health and well-being by connecting detainees with family members abroad.

A third visit, scheduled for December 2020, was limited by COVID-19 measures.[127] Delegates were prevented from meeting with detainees because restrictions imposed by the U.S. military made it impossible for the two sides to converse.[128] Like restrictions on detainees' access to counsel, the cancellation of ICRC visits risks negative mental health consequences. More troublingly, without defense attorneys and the ICRC there is no one to monitor whether the United States is complying with its legal obligations to provide adequate medical care to the 38 detainees.

## IV. PART IV

### *A. Solutions*

Following the most recent Presidential election, advocates are calling on the Biden administration to close the military prison once and for all.[129] President

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see United States v. United States, 296 F. Supp. 853, 877 n.25 (D.D.C. 1968) ("The pony express carried the mail from St. Joseph to Sacramento.").

122. Letter from Secretary Donovan, *supra* note 80.

123. *Id.*

124. *Id.* Few experts have met with detainees outside the presence of attorneys, most do not have access to medical equipment, and none is permitted to confer with Guantánamo clinicians to discuss treatment plans and the like. In effect, no detainee gets access to independent, civilian medical experts for the primary and obvious purpose for which they are needed: medical care. *Id.*

125. Carol Rosenberg, *Red Cross Cancels Coronavirus Visit Over Coronavirus Cases,* N.Y. TIMES (Aug. 7, 2020), https://perma.cc/9LHG-6CZP.

126. *Respect for the life and dignity of the detainees,* INT'L COMM. FOR RED CROSS (Oct. 29, 2010), https://perma.cc/6P8B-ETK7.

127. *Red Cross Visit*, *supra* note 119.

128. *Id.*

129. Carol Rosenberg, *Biden Still Wants to Close Guantánamo Bay*, N.Y. TIMES (Jun. 27, 2020), https://perma.cc/7NGU-DAB3. Calls for closure have come from many prominent anti-war, faith based, and activist groups on the left. *Id.*

Biden has largely remained quiet on the issue–a contrast to former-President Obama who campaigned on closing the prison–however, President Biden appears to support closure.[130] Unfortunately, because closing the military prison at Guantánamo Bay will require Congressional consent and will rely on complicated diplomatic negotiations to secure arrangements for detainees who are approved for transfer, it is far from guaranteed that the Biden administration will be successful in closing the prison.[131]

More realistically, while some detainees may be transferred in the relatively near future, several will not be released. For example, as of March 2022, nineteen detainees have been recommended for transfer.[132] It is possible that some of the seven "forever prisoners," who have been detained without charges for nearly two decades, may also be released.[133] However, it is unlikely that the ten detainees, who are currently facing charges before the military commissions, will be transferred unless Congress revokes § 1032 of the NDAA and approves these detainees for transfer for trial in the United States.[134] Additionally, the Pentagon has taken steps to keep the detention center operational for another twenty-five years, through 2043.[135] In other words, because the military prison is unlikely to close in the immediate future, it is prudent to address issues related to detainee medical care now.

As mentioned above, while the solutions proposed are intended to address the COVID-19 pandemic, they can be applied more generally to address the deficiencies noted by General Kelly, namely the lack of available "specialists and equipment" necessary to treat "complex emergencies and various chronic diseases" that will continue to plague the aging detainee population.[136]

Three possible solutions are discussed in this section: (1) increased virtual contact between detainees and their defense teams, NGO representatives, and families; (2) immediate deployment of specialist and equipment; and ultimately (3) the development of a transport plan.

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130. Dustin Jones, *Biden Administration Aims To Close Guantánamo Bay Prison,* NPR (Feb. 12, 2021), https://perma.cc/BHX6-S44N.

131. Charlie Savage & Eric Schmitt, *Biden Will Have to Make Difficult Decisions About the Guantánamo Bay Prison,* NY TIMES (Dec. 15, 2020), https://perma.cc/N4CP-QRSD.

132. *The Guantánamo Docket*, *supra* note 16; *see also* Sacha Pfeiffer, *U.S. Clears for Release Longterm Guantánamo Inmate Never Charged with a Crime*, NPR (Dec. 11, 2020, 7:50 PM ET), https://perma.cc/W2Q5-JTG9. Two additional detainees were approved for transfer during the Trump administration. *Id*. Four detainees were approved for transfer during the Obama Administration; however, transfer arrangements have not been made. Matt Spetalnick & Idrees Ali, *U.S. Transfers Four Guantánamo Inmates in Waning Hours of Obama Tenure*, REUTERS (Jan. 19, 2017, 2:24 PM ET), https://perma.cc/K3ZL-H59Y.

133. *The Guantánamo Docket*, *supra* note 16.

134. Carol Rosenberg, *Pentagon Official Approves Guantanamo Trial of 3 Men for Indonesia Bombings,* N.Y. TIMES (Jan. 21, 2021), https://perma.cc/7YMH-ZZ9P (explaining that three additional detainees have been charged, but they have not yet been arraigned).

135. *Guantánamo Bay as Nursing Home*, *supra* note 55.

136. Kelly Written Testimony, *supra* note 24, at 15.

### 1. Increase Virtual Contact with Lawyers, NGOs and Families

In some ways, the mental health aspect of COVID-19 is the most distressing. While becoming infected with COVID-19 is a frightening scenario for the detainees; the isolation that detainees are experiencing during the pandemic is nearly certain to result in the worsening of already improperly managed mental health issues.[137] Additionally, because in-person visits have proven nearly impossible, either because traveling to Guantánamo Bay has been impossible or because the military prison's COVID-19 restrictions have rendered attempted meetings useless, detainees are unable to engage with their attorneys and prepare their defense in any meaningful way.

To address the mental health issues associated with COVID-19 and to protect detainees' legal rights, at least in some small part, the prison could implement confidential Video Teleconference Capabilities ("VTC") and Secure VTC ("SVTC") protocols. To date, remote access between detainees and the outside world is incredibly limited and completely unavailable for "high value detainees." There are no secure phone or video links between the military prison and the defense attorneys' offices in the United States. This is not because the technology is unavailable, but rather because the DoD has prohibited remote access due to concerns over classification of information. However, VTC protocols for international detention centers exist. Specifically, the International Criminal Court ("ICC") Detention Centre, located within the Dutch prison in Scheveningen at The Hague, has protocols for detainee access to secure computer systems to communicate directly with their defense team and for remote contact with family members and spiritual advisors of their own religion.[138] The ICRC also has unrestricted access to the facility and detainees.[139] Given that both Guantánamo Bay and the ICC Detention Centre are thought to house "the worst of the worst,"[140] the ICC protocols provide a good starting point for establishing protocols for remote contact.

Adopting the use of VTC and SVTC would also address the lack of specialist personnel at the military prison. VTC and/or SVTC would provide telehealth capabilities, allowing detainees to consult with specialists outside of Guantánamo Bay. After a consult and if necessary, a specialist could travel to Guantánamo Bay to provide treatment or could recommend specific medical equipment for the facility. This would expand the military prison's available specialty personnel and equipment, while reducing costs by limiting the number of specialty services that would require permanent staffing and ensuring the medical equipment procured for detainee care is narrowly tailored to actual detainee needs.

Finally, VTC and SVTC could provide a way for detainees to continue to meet with delegates from the ICRC. It is unclear if, and for how long, COVID-19

137. Interview with Dr. Crosby, *supra* note 114.

138. Int'l Crim. Ct., *ICC Detention Centre (Factsheet)*, ICC Doc ICC-PIDS-PRI-02/07_En, https://perma.cc/2FWY-45XJ.

139. *Id.*

140. *Guantánamo Bay Files: 'The worst of the worst '- in Pictures*, GUARDIAN (Apr. 25, 2011, 10:00 AM EDT), https://perma.cc/WMN7-BNVW.

restrictions will continue to disrupt meaningful in-person meetings with ICRC staff. However, allowing visits to continue remotely would serve two important purposes: first, the United States would ensure that it is meeting its obligations to allow ICRC access, which, in turn, allows the ICRC to ensure that the conditions of detention comply with international law; and, second, ICRC staff would be able to relay messages between detainees' and their families. Increasing detainee contact with their families–in any meaningful way–would help to combat some of the mental health impact of COVID-19.

However, this solution is not without challenges. First, there are serious concerns about the integrity of attorney-client communications. For years, there have been questions about the confidentiality of attorney-client communications and at least one military commission was derailed over allegations of unlawful government intrusions into protected attorney-client communications.[141] If remote access is granted, there is a substantial likelihood that defense teams will require a guarantee of confidentiality for attorney-client communication. Given that the allegations about unlawful intrusions into the protected attorney-client relationship are still being litigated, it is unclear what such a guarantee would look like.

Telehealth may not be responsive enough for the emergent complications associated with COVID-19. According to Dr. Xenakis, COVID-19 patients can deteriorate rapidly, sometimes in less than 24 hours.[142] Additionally, because all communication with "high value detainees" is presumptively classified, meetings would likely require the use of SVTC technology, which is currently limited to a handful of locations in the Washington, D.C. area. This would limit the number of available medical providers to only those providers in and around Washington, D.C. who have the requisite security clearance.[143]

Finally, this proposal will face opposition from government attorneys. Prosecutors assigned to the Military Commissions have already publicly opposed the use of SVTC and have refused to make SVTC technology available to defense attorneys stationed outside of Washington, D.C., including learned counsel in capital cases.[144] However, it is within the discretion of the Military Commission and the federal courts to grant relief for these of issues and therefore, this may be a ripe issue for litigation.[145]

141. Lorelei Laird, *A Military Justice*, ABA J., November 2018, at 37; *see also* Katherine Hawkins, *The Secret Ruling That Broke the Guantánamo Military Commissions*, JUST SEC. (Nov. 30, 2017), https://perma.cc/SB95-X8BA; In re al-Nashiri, 921 F.3d 224, 227 (D.C. Cir. 2019) (showing facts and circumstances leading to the retroactive disqualification of the military judge due to bias, which include allegations of unauthorized intrusions into attorney-client communications).

142. Drs. Crosby & Xenakis, *supra* note 111.

143. *See High Value Detainees,* RENDITION PROJECT, https://perma.cc/H4W9-QSTD. The term "high-value detainee" refers to detainees that the U.S. believes to be of the highest intelligence value, given their alleged involvement at the top of al-Qaeda. *Id.*

144. Order, *United States v. al-Nashiri,* AE 420P (Military Comm'ns Trial Judiciary Guantánamo Bay Sep. 3, 2020).

145. *See e.g. Al-Qahtani*, 443 F. Supp. At 116 (granting relief because the military prison lacked the necessary specialist to address detainee's mental health issues); *see also* Order, *United States v. al-Nashiri,* AE 420N (Military Comm'ns Trial Judiciary Guantánamo Bay Aug. 14, 2020).

### 2. Immediate Deployment of Specialists and Equipment

Currently the military prison is unable to fulfill its mandate under DoDI 2310.08 and § 1046 of FY20 NDAA, or meet the minimum standards established by the Mandela Rules, which each require, in relevant part, that detainees must promptly receive evaluation and care consistent with the standard of care applied to the U.S. Armed Forces. This is because current U.S. law prohibits the evacuation of detainees to the United States, the detainees are limited to the care available at the military prison, even where life-saving treatment is unavailable in Guantánamo Bay.

One way to address this during an emergent situation like COVID-19 is to establish procedures for rapid deployment of personnel and equipment. There are two ways to accomplish this: deploy necessary troops and equipment directly to the military prison or deploy a medical ship to Guantánamo Bay to support both the military prison and the base hospital. In either case, bringing specialists and equipment to Guantánamo Bay makes sense. It would allow for constant monitoring of detainees, ensuring that if a detainee requires intervention, those medical capabilities are available without delay. This will ensure the best possible medical outcome.

According to Dr. Crosby, in order to meet the standard of care for COVID-19, the prison would–at a minimum–need sufficient PPE, sufficient ICU beds, a medical team with enough ICU nurses to operate ventilators around the clock, cardiopulmonary specialists, and renal dialysis machines.[146] Knowing this, it makes sense to preemptively send additional ventilators and renal dialysis machines to the military prison. Given what is known about detainees' preexisting conditions, even if these resources are not required during the pendency of the COVID-19 crisis, they will be necessary as detainees' medical needs progress and the military prison is forced to transition towards end-of-life care.[147]

Additionally, the Pentagon–if it has not already–should develop a plan for sending critical medical staff, either by permanent staffing or rapid deployment. In order to do this successfully, the DoD would need to identify a COVID-19 response team dedicated to Guantánamo Bay, staffed with the necessary medical specialists, including board certified providers with extensive airway management experience, as well as ICU nurses, cardiologists and renal specialists. Basically, this plan would "fill in the staff and equipment" that Dr. Xenakis noted was missing from Secretary Donovan's response.[148]

If this is accomplished via rapid deployment of personnel, colloquially known as a "go-team," then logistically, it would require a plan for contract flights to transport medical staff to the remote Naval Station on short notice.[149] This would also require a plan for medical staff's restriction on movement ("ROM") prior to

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146. Interview with Dr. Crosby, *supra* note 114.

147. *Guantánamo Bay as Nursing Home*, *supra* note 55.

148. *Senators Criticize Guantánamo Prison Coronavirus*, *supra* note 78.

149. Traveling to Guantánamo Bay requires either a chartered flight from JB Andrews NAF, Maryland or an approximately twice-weekly Air Mobility Command ("AMC") rotator flight from Norfolk, VA and/or Jacksonville, FL. (Legacy flight plans on file with author).

travel. Any personnel that arrive at Guantánamo Bay are required to quarantine consistent with current local guidance prior to entering military prison facilities.[150] Unless there is a plan to rapid test medical personnel or otherwise reduce this quarantine period, a delay may frustrate the purpose of deploying critical medical care.

Again, this option is not without problems. Specifically, deploying equipment and staff will be expensive. However, whatever the cost, it represents just a fraction of what has been spent on the military prison to date. By some estimates, the prison has already cost American taxpayers in excess of $6 billion.[151] And the Pentagon has acknowledged that keeping the military prison operational will incur additional significant expenses. In 2019, the Pentagon asked Congress for $88.5 million to modernize the detention facility due to the increasingly complex medical needs of the detainee population.[152] In other words, these expenses are not unanticipated.

However, a more cost-effective measure may be to deploy a hospital ship to Guantánamo Bay such as the USNS *Comfort*. Early in the pandemic, the DoD identified the USNS *Comfort* as bringing unique surge capabilities to the fight against COVID-19.[153] In April, the ship was deployed from its home port in Norfolk, VA to provide support to hospitals in New York City and New Jersey that were overwhelmed by the COVID-19 pandemic.[154] This hospital ship is staffed by medical professionals with medical equipment and supplies to address a spectrum of critical and non-critical care.[155] Staff is trained to work closely with health officials to monitor patient status and determine which cases should be sent to the USNS *Comfort* for management.[156] In terms of capacity, the USNS *Comfort* has an ICU with space for eighty patients, twelve operating rooms, and radiological services – all things in short supply in Guantánamo Bay.[157] While the hospital ship may be less capable than a traditional hospital in the United States, it is more advanced than the current medical facilities at the military prison, which charitably can be described as a field hospital.[158]

150. Carol Rosenberg, *Retired Colonel Criticizes 'Solitary Confinement' of Quarantined Soldiers at Guantánamo,* N.Y. TIMES (Sept. 13, 2020), https://perma.cc/XL2W-ZSZQ (describing the rigorous quarantine requirements for deployed prison guard staff prior to departure and upon arrival at Guantánamo Bay).

151. Christopher Brennan, *Keeping Guantánamo Open Will Add To The $6 Billion Already Spent On The Infamous Prison,* N.Y. DAILY NEWS (Feb. 2, 2018, 6:35 AM ET), https://perma.cc/97Z7-BY8Q.

152. *Congress Weighs*, *supra* note 21.

153. DEP'T OF DEF., *USNS COMFORT COVID-19: FREQUENTLY ASKED QUESTIONS,* at 1 (2020).

154. *Id.*

155. *Id.*

156. *Id.* at 3.

157. NORMAN POLMAR, THE NAVAL INSTITUTE GUIDE TO THE SHIPS AND THE AIRCRAFT IN THE U.S. FLEET 264-66 (18th ed. 2005).

158. Robert Little, *Comfort's Ability To Help Stretched To Limit,* BALT. SUN (Jan. 25, 2010), https://perma.cc/E9GU-AVMN. Addressing the USNS *Comfort's* limits in terms of supporting the humanitarian crisis following the 2010 earthquake in Haiti. *Id.*

This option is beneficial for a number of reasons. First, rather than creating a new and inevitably costly, solution to address detainee medical care, the DoD could utilize an asset specifically designed for this purpose. Between December 2020 and March 2022, the USNS *Comfort* was in port in Norfolk, Virginia, meaning that it is ostensibly available to respond to a COVID-19 crisis in Guantánamo Bay.[159] Second, the ship is already outfitted to manage critical care and has proven capable of addressing the complex medical issues associated with COVID-19. This means that no additional personnel or equipment would have be assigned or deploy to Guantánamo Bay. Third, the ship would benefit more than just the detainees. Specifically, the ship would provide COVID-19 support to the entire 5,700-person Naval Station in addition to supporting detainee medical care. Finally, this solution is both consistent with existing law and also eliminates the issue of inadequate infrastructure that still exists when just sending personnel and equipment. While the NDAA prohibits transporting detainees to the United States for care, there does not appear to be any prohibition on transporting detainees across the Naval Station for care. On the contrary, detainees are frequently transported to other areas of the base to meet with their legal counsel, NGOs, and to participate in their commissions.[160]

There are two obstacles to implementing this solution. First, the USNS *Comfort* is designed to respond to large-scale humanitarian crisis. The ship is capable of treating approximately 1,000 patients.[161] Even assuming the hospital ship is sent to Guantánamo Bay to support the entire Naval Station, it is unclear what appetite, if any, exists within Naval Command channels to provide the hospital ship to such a small population. Second, transporting detainees from the high-security prison to the ship would require significant security considerations. Security plans would need to be implemented to transport detainees to the ship and to safeguard detainees admitted for care. This would require all staff, including medical personnel, to be properly trained on these protocols. Security plans would also need to consider how the ship would safely segregate detainees from military and civilian personnel.

#### 3. Transport Plan

One universal characteristic of legal instruments dealing with detainee medical care, even the Army detention regulation, is their requirement to transport detainees who require specialty medical care. Unfortunately, because of the NDAA transport ban, this is not currently an option. According to CVT, the statutory ban on detainee transfers to the United States has led to repeated and ongoing violations of the United States' obligation to provide adequate medical care.[162] The most rational, safe, and comparatively resource-light solution to addressing detainees' emergent care needs is to lift the legal ban on transporting detainees to the United States for the limited purpose of emergency

159. *See USNS Comfort,* VESSEL FINDER, https://perma.cc/SG3T-9GDJ.

160. Commissions proceedings are held at the Expeditionary Legal Center, a crumbling national-security court built on an abandoned airstrip.

161. POLMAR, *supra* note 157.

162. *See* Roehm, *supra* note 23, at 10.

medical treatment. If this cannot occur during the COVID-19 pandemic due to the time required for Congress to act, this solution should continue to receive thoughtful consideration as a way to address detainees' cascading health and long-term medical needs.

One solution is to seek Congressional approval for a carve out provision on the prohibition on funding the transport of detainees to the United States. Since 2014, there has been a growing support for a carve-out provision for emergency medical treatment when care cannot be provided at the prison hospital. Shortly after Gen. Kelly's remarks to SASC, the SASC released its version of the NDAA for Fiscal Year 2015 ("FY15 NDAA"). § 1032 of the bill provided the DoD with authority to temporarily transfer Guantánamo Bay detainees to a DoD medical facility in the U.S. when necessary to address serious medical conditions that could not be managed at the military hospital without incurring excessive and unreasonable costs.[163]

Between FY 2014 and FY 2020, regardless of which party controlled the chamber, the Senate-version NDAA has included emergency medical transfer authority, but the final bill has not. During the summer of 2019, members of both the House and Senate Armed Services Committee expressed concern about the ability of the United States Government to provide adequate medical care for the aging population and advocated for an exception to the transfer ban. Unfortunately, this provision did not make it into the final versions of the FY20 NDAA or FY21 NDAA.[164]

Hoping to amend the NDAA for Fiscal Year 2022 ("FY22 NDAA"), CVT drafted language for a carve out provision, which was identical to the repeatedly-Senate-passed version, save for revisions necessary to reflect the COVID-19 context.[165] In light of the COVID-19 pandemic and with a Democratic Congress and

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163. National Defense Authorization Act for Fiscal Year 2015, § 1032, Pub. L. No. 113-291, 128 Stat. 3292 (2014).

164. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198, 1588 (2019); National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (2021).

165. CVT proposes the following language for the provision:

*A transfer is authorized when:*

- The medical treatment is necessary to prevent death or imminent significant injury or harm to a detainee's health, or to minimize the risk of further exposing DoD staff, other residents of U.S. Naval Station Guantánamo Bay, or other detainees to COVID-19;
- *The necessary medical treatment is not available, or not available in sufficient quantity, to be provided at Guantánamo without incurring excessive and unreasonable costs or risks; and*
- *DoD has provided for appropriate security measures for any temporarily transferred detainee.*

*A detainee who is temporarily transferred to the U.S. shall:*

- *Remain in the custody and control of DoD at all times;*
- *Be returned to Guantánamo as soon as feasible after a DoD physician determines that necessary follow-up medical care may reasonably be provided there without excessive and unreasonable costs, and without further exposing DoD staff, other base residents, or other detainees to COVID-19; and*
- *Maintain the same legal status, rights, and privileges as if he remained at Guantánamo.*

a new administration, it was hopeful that a narrowly tailored exception would pass. However, it did not.

In light of this, it is necessary to consider solutions that circumvent the existing transport ban. One solution is to transfer detainees to third-party countries. This solution has been previously explored. In 2007, the State Department secretly sought to negotiate standby agreements with four Latin American Countries–Costa Rica, the Dominican Republic, Panama, and Mexico–to transport sick detainees to hospitals in those countries.[166] Although the four countries declined in 2007, this attempted negotiation is an admission by former U.S. officials that the United States' ability to dispatch specialists and equipment is not unlimited and a recognition that care outside of the military prison will be required. More importantly, it shows that plans were drawn up to transport, guard, and pay for medical procedures for any detainee the DoD could not treat at the military prison.[167]

Like utilizing the USNS *Comfort,* revisiting these plans and re-initiating negotiations would allow the DoD to use resources that already exist. A protocol to transport detainees to third-party countries could be done through diplomatic channels, would likely avoid Congressional approval, and would be consistent with existing domestic law. Transporting detainees to third party countries would likely satisfy the requirements of DoDI 2310.08 and § 1046 of FY20 NDAA, and meet the minimum standards established by the Mandela Rules.

But, like each proposed solution, there are obstacles. Diplomatic negotiations can be protracted and therefore, this solution, like passing a carve out position in § 1032, will be time consuming, particularly during a new administration when diplomatic relationships are in flux. State Department officials would also have to be intimately familiar with medical care standards in third-party countries to ensure that any detainee who was transferred would receive care consistent with that provided to U.S. Armed Forces personnel.

## CONCLUSION

The COVID-19 pandemic has highlighted the fact that the military prison at Guantánamo Bay lacks the expertise, the equipment, and the infrastructure to manage emergent health concerns, such as a deadly global pandemic. It has also brought renewed attention to the fact that the detainees' medical needs have exceeded the capabilities of the military prison and also to the fact that these needs will only become more complex. The reality is that Guantánamo Bay detention is here to stay for some period of time. But it is no secret that the

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*The authority expires 90 days after Presidential Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020) is rescinded.*

166. Carol Rosenberg, *Cable Casts Doubt On Guantánamo Medical Care*, MIA. HERALD (Mar. 30, 2011), https://perma.cc/7W57-AZXX. (discussing the Bush administration's attempt to negotiate deals with Latin American countries to provide "life-saving" medical procedures rather than fly ill detainees to the United States for treatment).

167. *Id.*

military prison is not suited to long-term end of life care. Until Guantánamo Bay can be permanently closed and in light of the vulnerabilities exposed during the COVID-19 pandemic, solutions must be implemented to make the best of a bad situation, or, to use a phrase common to Guantánamo Bay, make the best of "the least worst place."[168]

168. Ari Shapiro, *Guantánamo Bay: "The Least Worst Place,"* NPR (Apr. 8, 2009, 6:00 AM ET), https://perma.cc/78MY-4RVS.