



May 21, 2020

Sent via Facsimile & E-Mail

Hon. Mitch McConnell
Majority Leader
U.S. Senate
S-230, The Capitol
Washington, DC 20515

Hon. Nancy Pelosi
Speaker
U.S. House of Representatives
Rayburn House Office Building
Washington, DC 20515

Re: Converting Guantánamo Bay Military Commissions Into An Article III Court

Dear Majority Leader McConnell and Speaker Pelosi:

The U.S. Military Commissions in Guantánamo Bay, Cuba were created to provide legal proceedings for “enemy combatant” detainees. Their purpose was to bring perpetrators to swift justice within the bounds of due process and provide closure to the victims’ families. However, the Military Commissions have fallen far short of these goals.

The proceedings are slow, ineffective, and lacking in transparency. Pre-trial proceedings alone are approaching two decades without resolution and half of the convictions by Military Commission have been reversed on appeal. Prosecuting detainees in Military Commission proceedings means accepting that victims’ families may never see cases resolved, that defendants will not receive a speedy trial, and that Guantánamo will have another excuse to remain open despite overwhelming justification for its closure. In stark contrast, Article III courts have delivered fast, fair, and effective justice to nearly 700 terrorism cases since 9/11.

The solution to this problem is typically framed as binary: either permit detainees to come to the United States to be tried before Article III courts or continue to hear their cases in Military Commission proceedings. Indeed, the New York City Bar Association has advocated for Guantánamo detainees to be tried before federal courts in the United States. However, Congress has prohibited these detainees from being transferred to the U.S. for trial in Article III courts. We propose a third solution: bringing Article III proceedings to Guantánamo. The enclosed report explains the potential benefits and legal support for this plan, and also considers the logistical issues it presents.

While this approach would restore efficiency and integrity to the Guantánamo proceedings, the plan also presents political and logistical challenges. Congress would have to appropriate funds for infrastructure improvements. Currently, members of the press and legal observers are required to stay in tents when visiting; both the prosecution and defense counsel lack adequate, sanitary office space to build their cases; and habitable housing is in very short supply. Establishing a federal court at Guantánamo also risks legitimizing the continued existence of Guantánamo's detention center.

While these shortcomings require careful consideration, we believe that bringing an Article III court to Guantánamo remains the best available solution to improving the status quo. The expense required to establish efficient Article III proceedings would still be less than the expense to taxpayers of continuing to fund ineffective and slow military commissions for decades to come. Additionally, the risk of legitimizing Guantánamo's existence would be offset by removing the Military Commissions as a pretext for keeping Guantánamo open longer.

With an appreciation for the complexity of the problem, we ask lawmakers to consider this proposal for a possible resolution. We also invite members of the legal and policy community to contribute to the dialogue so that we can one day arrive at a resolution that is consistent with the principles of due process and swift justice that underpin our legal system.

Thank you for your consideration.

Respectfully,

Erik L. Wilson, Chair
Military & Veteran Affairs Committee

Harry Sandick, Chair
Federal Courts Committee

Lauren Melkus, Chair
International Human Rights Committee

Stephen L. Kass, Chair
Task Force on the Rule of Law

Cc:

Hon. Charles Schumer, Democratic Leader, U.S. Senate
Hon. Kevin McCarthy, Republican Leader, U.S. House of Representatives
Hon. James Inhofe, Chair, U.S. Senate Armed Services Committee
Hon. Jack Reed, Ranking Member, U.S. Senate Armed Services Committee
Hon. Adam Smith, Chair, U.S. House of Representatives Armed Services Committee
Hon. Mac Thornberry, Ranking Member, U.S. House of Representatives Armed Services Committee
Hon. Lindsey Graham, Chair, U.S. Senate Judiciary Committee
Hon. Dianne Feinstein, Ranking Member, U.S. Senate Judiciary Committee
Hon. Jerrold Nadler, Chair, U.S. House of Representatives Judiciary Committee
Hon. Jim Jordan, Ranking Member, U.S. House of Representatives Judiciary Committee

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two blue horizontal bars. The top bar is slightly wider than the bottom bar.

**NEW YORK
CITY BAR**

**CONVERTING GUANTÁNAMO BAY
MILITARY COMMISSIONS INTO AN
ARTICLE III COURT**

MILITARY & VETERANS AFFAIRS COMMITTEE

FEDERAL COURTS COMMITTEE

INTERNATIONAL HUMAN RIGHTS COMMITTEE

TASK FORCE ON THE RULE OF LAW

MAY 2020

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ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org**WHITE PAPER ON CONVERTING GUANTÁNAMO BAY MILITARY
COMMISSIONS INTO AN ARTICLE III COURT****EXECUTIVE SUMMARY¹**

It has been nearly 19 years since 9/11, and 14 years since the U.S. Military Commissions at Guantánamo Bay, Cuba (“Guantánamo”) were created. Since then, the military commissions have garnered a mere 8 convictions—half of which have already been overturned and the remainder of which remain on post-trial appeal. Khalid Sheikh Mohammed and the other alleged 9/11 masterminds have been mired in pre-trial proceedings for nearly a decade and are years away from a trial expected to last 3-5 years and be followed by another 10-15 years of appeals. The military commissions have been plagued by scandals that cast serious doubt on whether they can provide fair and impartial justice or secure convictions that can survive appeal. The D.C. Circuit recently vacated nearly 4 years of decisions in the U.S.S. Cole bombing case due to “an intolerable cloud of partiality” and declared there to be a “powerful case” for dissolving the military commission entirely.² By contrast, traditional Article III courts have secured more than 660 terrorism convictions since 9/11, with a more than 90% conviction rate, few reversals, and no notable scandals. In an Article III court, Khalid Sheikh Mohammed and the other alleged 9/11 masterminds could have already been prosecuted and sentenced for capital crimes—with all appeals completed—years ago. The military commissions have cost more than \$6 billion to date and are estimated to cost an additional \$400 million each year going forward. The current situation at Guantánamo is untenable. Something needs to change.

The New York City Bar Association (“City Bar”) has long believed that the military commissions are fundamentally flawed, the detention facilities at Guantánamo should be closed, and the prosecution of alleged terrorists should be conducted in Article III courts.³ Congress, however, has prohibited the Guantánamo detainees from being transferred to the U.S. for trial, and appears to have no appetite for changing this policy. Members of both political parties have voiced strong opposition to bringing the Guantánamo detainees to the U.S. for trial, and a substantial majority of the American public would rather see the detainees remain at Guantánamo for trial.⁴ There is a strong possibility that the detention facilities at Guantánamo will remain open and that detainees’ status as enemy combatants (with all the current legal implications thereof) will remain unchanged. Thus, as a practical matter, the legal community should explore alternatives to improving due process and the rule of law at Guantánamo that account for these political realities.

This white paper proposes one alternative solution: to bring an Article III court to the Guantánamo detainees. In short, this paper proposes to create an Article III court on the military base at Guantánamo Bay, where the military commissions are currently being held, and to convert the failing military commissions system into a faster, fairer, and far more successful Article III proceeding.⁵

While we expect this proposal will still face heavy political headwinds, we believe it presents a potentially workable solution that could garner support as a compromise position between those in Congress who want to keep the Guantánamo detention facilities open, and those who want the detainees to be prosecuted by Article III courts. At the very least, we hope this white paper facilitates a serious and thoughtful conversation on how America can finally bring closure and justice to the victims of terror and their surviving family members, while working to reaffirm America’s commitment to the fundamental values of due process, transparency, and the rule of the law.

This white paper analyzes the legal possibilities, practicalities, and implications of converting the military commissions currently in use at Guantánamo into an Article III court. First, we provide general background regarding the history of the Guantánamo military commissions, the issues that have arisen, and the approaches that have previously been explored with respect to these issues. Second, we analyze the legal issues implicated in a proposed conversion of the Guantánamo military commissions into an Article III court. Finally, we set forth the steps to be taken to convert the Guantánamo military commissions into an Article III court and implement its adjudication of cases. We conclude that the Guantánamo military commissions may be converted into an Article III court in a few steps:

1. Congress would amend 28 U.S.C. § 112 (which divides New York State into separate judicial districts) to temporarily expand the jurisdiction of the Southern District of New York to encompass the U.S. Naval Base at Guantánamo and designate Guantánamo as a place of holding court for limited purposes.
2. The cases presently pending before the military commissions would be assigned to judges sitting within the Southern District of New York or, by designation, to judges who sit outside the District.
3. The judges would hold case management hearings and set paths forward for proceeding to trial and final judgment.

I. BACKGROUND

a. Establishment of the Guantánamo Military Commissions

The United States has utilized military commissions since at least the 1860s. Indeed, during the Civil War and World War II, military commissions were utilized in the United States to prosecute thousands domestically and abroad.⁶ The Guantánamo military commissions were authorized by President George W. Bush in 2001, shortly after the terrorist attacks on September 11, 2001, as part of a broad set of actions aimed at expanding Executive power to use military force, gather intelligence, and detain individuals suspected of terrorist activity against the United States.

By Executive Order issued in November 2001 (the “2001 Executive Order”), President Bush authorized then-Defense Secretary Donald Rumsfeld to form military commissions anywhere in the United States or abroad.⁷ These commissions were vested with trial jurisdiction over noncitizen members of al Qaeda and others who had “engaged in, aided or abetted, or conspired to commit acts of international terrorism, or acts in preparation therefore, that have

caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States.”⁸ The 2001 Executive Order further authorized the commissions to try “any and all offenses triable by military commission.”⁹ Since November 13, 2001, the United States has relied on military commissions to try detainees at the naval base at Guantánamo.¹⁰

b. Adjudications in the Guantánamo Military Commissions

Despite diligent efforts by the commissions’ lawyers, judges, and other court personnel, the military commissions have proven inefficient, resulting in only eight convictions since September 11, 2001, all of which were uncontested (pursuant to pleas). Three of these convictions were later overturned or overruled, and one partially vacated.¹¹ No contested trials have proceeded to conclusion.¹² In short, the process by which these complex cases may reach closure is moving at an excruciatingly slow pace.¹³

As of this writing, there are forty detainees being held at Guantánamo, all of whom have been imprisoned for more than ten years.¹⁴ Nine detainees are currently being tried by the military commissions, or have been convicted by the military commissions and are still being held at Guantánamo.¹⁵ Five detainees are approved for release.¹⁶ The remaining twenty-six detainees have not been charged.¹⁷ And the cases that are proceeding through the military commissions have been marked by significant setbacks and procedural delays.

For example, in April 2019, in the case against Abd Al-Rahim Al-Nashiri, the alleged mastermind of the 2000 bombing of the U.S.S. Cole and other al Qaeda bomb plots, the U.S. Court of Appeals for the District of Columbia Circuit vacated more than two years of commission orders issued by former military judge Colonel Vance Spath—totaling more than 460 orders—as a result of Spath’s application to the U.S. Department of Justice for a position as an immigration judge while also overseeing the case.¹⁸ The Court held that Spath’s job application “cast an intolerable cloud of partiality over his subsequent judicial conduct.”¹⁹ More broadly, the Court rebuked the Al-Nashiri military commission, stating: “[C]riminal justice is a shared responsibility. Yet in this case, . . . all elements of the military commission system . . . failed to live up to that responsibility.”²⁰ Further, the Court noted that “Spath’s lapse [was not] a one-time aberration, as Al-Nashiri’s is not the first meritorious request for recusal that our court has considered with respect to military commission proceedings.”²¹ Notably, the Court also indicated that there was a “powerful case for dissolving the current military commission [in Al-Nashiri’s case] entirely.”²²

The trial for Khalid Sheikh Mohammed and the other 9/11 detainees is currently set for 2021—20 years after 9/11. That trial is expected to take three to five years,²³ but many with knowledge of the military commissions doubt that timeline is realistic.²⁴ And even if the trial results in convictions, the ensuing appeals could take another 15 years to resolve.²⁵

By contrast, Article III courts have, since 9/11, successfully adjudicated more than 660 terrorism-related cases to conclusion²⁶ in sixty-three district courts across the country.²⁷ Indeed, Article III courts have been used to prosecute not only terrorism-related offenses committed within the United States, but also terrorism-related offenses committed outside the United States by enemy combatants. Notable enemy combatants convicted in Article III courts include: Osama bin Laden’s son-in-law and al Qaeda spokesman Sulaiman Abu Ghaith, who was convicted of multiple terrorism offenses and sentenced to life imprisonment; Ahmed Khalfan Ghailani, an al Qaeda operative who was convicted for his role in the 1998 bombings of the U.S. embassies in East Africa

and sentenced to life imprisonment; Ibrahim Suleiman Adnan Adam Harun, an al Qaeda operative who was convicted for his participation in attacks on U.S. and coalition troops in Afghanistan and for conspiring to bomb the U.S. embassy in Nigeria; Ahmed Abdulkadir Warsame, an al Shabaab operative who pleaded guilty to multiple terrorism offenses; and Saddiq Al-Abbadi and Ali Alvi Al-Hamidi, al Qaeda members who engaged in attacks against U.S. military forces in Afghanistan.²⁸

Contrary to the slow pace of the Guantánamo military commission proceedings, the Article III terrorism proceedings have resolved expeditiously. For instance, Abu Ghaith was convicted around one year after he was transferred to U.S. custody; Ghailani was convicted a year and a half after his transfer to New York from Guantánamo; and Warsame pleaded guilty within eight months of his capture.²⁹

Although the Obama Administration vowed (albeit unsuccessfully) to close the detention facilities at Guantánamo,³⁰ the Trump Administration has made clear that it plans to keep the facilities open.³¹ Thus, improving the effectiveness of the legal proceedings for Guantánamo detainees remains critical.

c. Evolution of the Procedures for the Guantánamo Military Commissions

Procedures for the Guantánamo military commissions were issued in March 2002, and the first charges were brought in February 2004.³² In June 2006, the legality of the Guantánamo military commissions came under scrutiny when Salim Hamdan sought *habeas corpus* in federal court.

In *Hamdan v. Rumsfeld*, the Supreme Court struck down the military commission convened to try Hamdan, holding that it lacked the power to proceed “because its structure and procedures violate both the UCMJ [the “Uniform Code of Military Justice”] and the four Geneva Conventions signed in 1949.”³³ Several months later, Congress established new legislative authority for the commissions through the Military Commissions Act (“MCA”) of 2006.³⁴ In 2009, Congress significantly updated and amended the MCA, providing new procedural rules to govern the military commissions.³⁵

In 2019, the Secretary of Defense published an updated Manual for Military Commissions (the “2019 Revised Edition”), which sets forth the rules that govern the procedures and punishments in all trials by military commissions (the “Rules for Military Commissions,” or “RMC”).³⁶ The Department of Defense’s website provides a chart comparing the rules of procedure that govern military commissions, courts-martial, and Article III courts.³⁷ The most significant differences between the RMC and the rules that govern criminal proceedings in Article III courts are outlined in the following table.

Issue	Military Commissions ³⁸	Article III Courts ³⁹
What charges may be brought	Violations of the laws of war and other crimes prosecutable by military commission. ⁴⁰	Violations of federal law, including terrorism charges and certain violations of the laws of war; certain conspiracy charges not pursuable by military commission. ⁴¹

Issue	Military Commissions ³⁸	Article III Courts ³⁹
Whether charges may be brought without a pretrial legal review	Charges are reviewed by the Convening Authority and legal staff to determine whether sufficient evidence exists to refer the charges to a military commission for trial.	A grand jury of 16-23 members convenes secretly and issues an indictment.
Composition of the court	Military judge and panel of members.	Judge/jury, unless defendant waives jury trial.
Votes required for conviction	2/3 of the members. If fewer than 2/3 vote for conviction, then the accused is acquitted and may not be retried.	Unanimous vote of the jury. If the jury cannot come to unanimous agreement, then the court may declare a mistrial, which allows the prosecution to try the case again.
Votes required for sentencing	2/3 of the members.	The judge imposes a sentence guided by the U.S. Federal Sentencing Guidelines.
Appellate review	3 levels. Every guilty verdict is referred to the U.S. Court of Military Commission Review. Either party may then appeal further to the U.S. Court of Appeals for the District of Columbia Circuit, and then to the U.S. Supreme Court.	2 levels.
Admissibility of hearsay evidence	Hearsay evidence is inadmissible, unless the witness is unavailable—and then only if it is material, probative, reliable, and admission will serve the interests of justice.	Hearsay evidence is inadmissible, unless the witness is unavailable—and then only if it falls within one of approximately 25 exceptions and meets other Constitutional requirements.
Exclusion of certain evidence	Exclusion ⁴² of statements obtained by torture or cruel, inhuman, or degrading treatment; but <i>Miranda</i> -type warnings and search warrants are not required.	Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment. <i>Miranda</i> warnings and search warrants are required.

d. Congressional Ban on Transferring Detainees from Guantánamo to the United States

Guantánamo Bay detainees presently cannot be tried in Article III courts. This is because no Article III court exists at Guantánamo and detainees by law may not be transferred to the United States for trial. Since 2010, the National Defense Authorization Act (“NDAA”) has prohibited the use of funds to transfer or release individuals detained at Guantánamo to the United States and its territories.⁴³ But the NDAA does not prohibit detainees from being tried at Guantánamo in an Article III court.

The simplest and best available option for converting the Guantánamo military commissions proceedings into Article III court proceedings would be to permit the transfer of the

accused detainees to the United States for trial in federal court—as we have proposed multiple times. As set forth above, however, the purpose of this white paper is to explore solutions that assume the Guantánamo detention facilities will remain open and detainees continue to be statutorily prohibited from being brought to the U.S. for trial. Some commentators have also floated the option of establishing videoconferencing between the detention facility and Article III courts for various trial proceedings.⁴⁴

II. LEGAL ANALYSIS

Article III courts have proven capable of adjudicating complex terrorism (and other national security) cases involving Top Secret and higher information while balancing all relevant equities and privileges, including protecting attorney-client privilege.⁴⁵ An Article III court established at Guantánamo would allow the government to utilize the existing court infrastructure (including already-funded upgrades⁴⁶) in place at Guantánamo, with its unique technical features designed to ensure the secrecy of highly classified information.⁴⁷ Moreover, an Article III court, unlike the military commissions, could rely on settled law and established procedure.⁴⁸ As discussed below, there is no legal impediment to establishing an Article III court at Guantánamo.

a. Congress Has Legal Authority to Establish an Article III Court at Guantánamo

The U.S. Constitution permits Congress to establish Article III courts outside of the United States.⁴⁹ Specifically, Section 2, Clause 3 of Article III provides:

The Trial of all Crimes, except in Case of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, *the Trial shall be at such Place or Places as the Congress may by Law have directed.*⁵⁰

Likewise, Congress has exercised its Article III authority by providing in 18 U.S.C. § 3238 that “the trial of all offenses begun or committed . . . outside of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought.”⁵¹ Federal courts have been held to have criminal jurisdiction over defendants whose conduct occurred outside of the territorial jurisdiction of the United States,⁵² including enemy combatants who committed terrorism-related offenses outside the United States.⁵³ In fact, approximately 17 percent of the terrorism-related cases tried in federal courts have involved a defendant who was arrested or captured overseas.⁵⁴

The detainees at Guantánamo were declared enemy combatants and were brought to Guantánamo for long-term detention and trial.⁵⁵ Thus, prosecution of the detainees at Guantánamo through Article III courts would be consistent with: (i) Article III of the Constitution, which permits Congress to designate locations for trials outside the 50 states; and (ii) Section 3238, which implements Article III and permits defendants to be tried in locations where they are first brought.

Congress undisputedly has the authority to establish Article III courts outside of the fifty states. In 1966, Congress created a new Article III court in Puerto Rico⁵⁶—an unincorporated territory of the United States.⁵⁷ The creation of Puerto Rico’s Article III court was the result of

repeated recommendations before Congress by the Judicial Conference of the United States (the national policymaking body for the federal courts) in 1961, 1963, and 1965, as well as endorsements by the U.S. Departments of Justice and the Interior.⁵⁸

The ability of the U.S. to establish an Article III court at Guantánamo also has precedent. Indeed, in the Supreme Court’s 2008 decision in *Boumediene v. Bush*—in which the Court held that detainees at Guantánamo are entitled to the privilege of *habeas corpus* to challenge the legality of their detention—the Court took notice of “the obvious and uncontested fact that the United States, by virtue of its *complete jurisdiction and control over the base*, maintains *de facto sovereignty* over this territory.”⁵⁹ The Court further stated that Guantánamo detainees “are held in a territory that, while technically not part of the United States, is *under the complete and total control of our Government*.”⁶⁰ In support of this conclusion, the Court emphasized the political history of Guantánamo Bay, noting that “[t]he United States has maintained complete and uninterrupted control of the bay for over 100 years.”⁶¹ The Court also relied on the terms of the 1903 lease between the United States and Cuba, which states explicitly that “*the United States shall exercise complete jurisdiction and control over and within said areas*.”⁶² On this basis, the Court concluded that although Cuba retained “ultimate sovereignty”⁶³ over Guantánamo, the United States had “total military and civil control”⁶⁴ and “continued to maintain the same plenary control it had enjoyed since 1898.”⁶⁵ The Court held that the “basic charter” of the United States, including the restraints set forth in the Constitution, “cannot be contracted away.”⁶⁶ Importantly, the Court also concluded that no law other than U.S. law applies to the Guantánamo naval base.⁶⁷

In sum, under Article III, 18 U.S.C. § 3238, and applicable case law, Congress has authority to establish a federal court at Guantánamo.

b. Establishment of an Article III Court at Guantánamo Is Consistent with the Sixth Amendment

Transfer of the Guantánamo military commission proceedings to an Article III court is consistent with the Sixth Amendment,⁶⁸ which provides that the accused shall enjoy, among other things, (1) “the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law”; and (2) the right to have compulsory process for obtaining witnesses in his favor.⁶⁹

i. Venue and Jury Trial Provisions of the Sixth Amendment

The Sixth Amendment, in guaranteeing individuals the right to a jury trial in criminal prosecutions, provides that a jury shall be selected from a pool of individuals “of the State and district wherein the crime shall have been committed.”⁷⁰ However, pursuant to Article III, Section 2, Clause 3, where a crime is committed outside of the United States, the jury may consist of individuals from the jurisdiction in which Congress has designated the trial court to sit. In *United States v. Williams*,⁷¹ the Eleventh Circuit affirmed the criminal prosecution in a United States district court of a foreign national who engaged in sexual abuse outside the territorial jurisdiction of the United States and subsequently was arrested in the United States. The Court reasoned that, although “[t]he Sixth Amendment provides that crimes which have been committed within a state and district shall be tried there,” “Article III contemplates that offenses against the laws of the United States may be committed somewhere other than in a state and that in such cases ‘the Trial shall be at such Place or Places as the Congress may by Law have directed.’”⁷² Because “Congress

has exercised the authority granted to it by Article III by providing in 18 U.S.C. § 3238 that “[t]he trial of all offenses begun or committed upon the high seas, or elsewhere outside of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought,” and because “[i]t [was] undisputed that Williams was arrested in the Middle District of Georgia,” “his prosecution in that district therefore was consistent with the dictates of both § 3238 and the Sixth Amendment’s venue provision.”⁷³ Likewise, jury trials have regularly been used to try enemy combatants in federal district courts for crimes committed outside of the United States.⁷⁴ Because Congress has authority under Article III and 18 U.S.C. § 3238 to establish a federal court at Guantánamo, it is consistent with the Sixth Amendment to try Guantánamo detainees by a jury selected from a pool of individuals from the jurisdiction in which Congress designates the Guantánamo federal court to sit.⁷⁵

ii. Compulsory Process Provision of the Sixth Amendment

The Sixth Amendment also provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.”⁷⁶ Trying Guantánamo detainees in an Article III court would not interfere with this right.

To be sure, the compulsory process right in federal district court is circumscribed “by the ability of the district court to obtain the presence of a witness through service of process.”⁷⁷ The district court lacks process power, for instance, to compel the appearance of a foreign national located abroad.⁷⁸ But the bar for compulsory process challenges in such circumstances is high, and the defendant’s Sixth Amendment “right to present evidence is not absolute.”⁷⁹ Rather, “[b]oth state and federal cases [require] that evidence for which compulsory process is sought must be material and favorable before a constitutional problem is presented.”⁸⁰ And “[i]t is well established . . . that convictions are not unconstitutional under the Sixth Amendment even though the United States courts lack power to subpoena witnesses, (other than American citizens) from foreign countries.”⁸¹

Moreover, a Guantánamo detainee tried in an Article III court would enjoy the right to have compulsory process for obtaining the appearance of witnesses who reside in the United States or are U.S. citizens located abroad. An Article III court could compel the testimony even of other enemy combatants held at Guantánamo. Where witnesses are in the custody of the U.S. government, courts have found that a testimonial writ (*i.e.*, a writ of habeas corpus *ad testificandum*) may be issued to the witness’s custodian to obtain the witness’s testimony.⁸²

iii. Potential Impacts of Trying Guantánamo Detainees with Sixth Amendment Protections

As noted *supra* § I.C., trying Guantánamo detainees in an Article III court with Sixth Amendment protections would result in some additional protections for the detainees, such as a requirement for a unanimous verdict and the exclusion of certain hearsay evidence, among other things.⁸³ As former Attorney General Eric Holder made clear in 2011—after Congress prohibited the transfer of Guantánamo detainees to the U.S. to stand trial in mainland Article III courts—these additional protections would present no obstacle to their successful prosecution.⁸⁴

The number of years that have passed since the detainees were initially apprehended, however, raise a variety of concerns related to the Sixth Amendment’s guarantee of a right to a

speedy trial.⁸⁵ Under the MCA, the Guantánamo detainees do not have a right to a speedy trial. If detainees gained the Sixth Amendment's right to a speedy trial, however, it may not provide them with any practical benefit: other Article III terrorism prosecutions with similar delays were found to not violate the Sixth Amendment's speedy trial protections.⁸⁶

III. STEPS TO CONVERT THE MILITARY COMMISSIONS INTO AN ARTICLE III COURT

As discussed below, to convert the military commissions into an Article III court, the following steps would be taken:

1. Congress would amend 28 U.S.C. § 112 to expand the jurisdiction of the Southern District of New York to encompass the U.S. Naval Base at Guantánamo and designate Guantánamo as a place of holding court for limited purposes.
2. The cases presently pending before the military commissions would be assigned to judges sitting within the Southern District of New York or, by designation, to judges who sit outside the District.
3. The judges would hold case management hearings and set paths forward for proceeding to trial and sentencing.

a. **Incorporate Guantánamo Into the S.D.N.Y. (or Other Appropriate District)**

Congress may convert the military commissions at Guantánamo into an Article III court by expanding the jurisdiction of an existing district court to encompass the U.S. Naval Base at Guantánamo. The Southern District of New York could be an ideal choice for prosecuting Khalid Sheikh Mohammed and the other 9/11 detainees because it is the site of World Trade Center 9/11 attacks, it has the deepest and most diverse jury pool, it has secured more terrorism-related convictions over the past two decades than nearly all other districts, and had already been preparing to hold the 9/11-related trial before Congress prohibited such trials in 2011.⁸⁷ Other districts that also warrant special consideration are the District of D.C. (the D.C. Circuit already adjudicates appeals from the Guantánamo military commissions and thus has experience handling these cases), the Eastern District of New York, and the Eastern District of Virginia (both of which have prosecuted significant numbers of high-profile terrorism cases; the Eastern District of Virginia was also preparing to bring the 9/11 detainees to trial before Congress blocked such trials in 2011⁸⁸).

Specifically, to incorporate Guantánamo into the Southern District of New York, Congress would amend as follows the statute that sets forth the Southern District of New York's jurisdiction—namely, 28 U.S.C. § 112(b) (proposed amendments in bold and underlined):

(b) The Southern District comprises the counties of Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester and concurrently with the Eastern District, the waters within the Eastern District, **and the United States Naval Base, Guantánamo Bay, Cuba.**

Court for the Southern District shall be held at New York, White Plains, and in the Middletown-Wallkill area of Orange County or such nearby location as may be deemed appropriate, **and at the United States Naval Base, Guantánamo Bay, Cuba, provided that the Guantánamo location shall hold court for the Southern District solely for the purposes of any proceeding that was brought or otherwise would have been brought under the Military Commissions Act of 2006, as amended by the Military Commissions Act of 2009.**

Alternatively, Congress could create an entirely new Article III court at Guantánamo and incorporate that court into an existing judicial district and circuit, by (a) amending 28 U.S.C. §§ 81-144 to incorporate the new court into an existing judicial district; and (b) amending 28 U.S.C. §§ 41-49 to incorporate the court into the corresponding judicial circuit.⁸⁹

Importantly, incorporating Guantánamo into the Southern District of New York (or other appropriate district) would preserve U.S. national security interests. Article III judges automatically have security clearance that allows them access to classified information, enabling them to hear sensitive terrorism cases without concerns of a security breach.⁹⁰ The Litigation Security Group of the federal judiciary facilitates security clearances for court staff, and prosecutors commonly have security clearances as well.⁹¹ Judges also have the ability to dictate special security precautions to ensure limited access to classified materials, ensuring there are no security breaches.⁹² Further, the Southern District of New York, the District of D.C., the Eastern District of New York, and the Eastern District of Virginia have decades of experience implementing the precautions associated with ensuring that classified information is not exposed.

Additionally, incorporating Guantánamo into an existing judicial district would streamline the jury selection process. Pursuant to the Jury Selection and Service Act of 1968, juries must be “selected at random from a fair cross section of the community in the district or division wherein the court convenes.”⁹³ There are many more jury-eligible individuals residing in New York City, for example, than in Guantánamo Bay. Thus, a jury in the Southern District of New York would be drawn from a sizable pool and would be a representative cross-section of the community.

Flying the jury to Guantánamo for jury selection and trial is similar to what already occurs in the existing military commissions—attorneys, non-governmental observers, victims’ family members, and others are regularly flown to Guantánamo on chartered commercial flights for judicial proceedings and housed on base.⁹⁴ Thus, from a purely logistical perspective, flying a jury to Guantánamo for jury selection and trial does not appear to present new barriers to creating an Article III court in place of the existing military commissions, particularly in light of the potential time (and thus cost) savings that using an Article III court could provide.⁹⁵ Moreover, hearings at which the defendant has no right to be present could take place on the mainland—for instance, in the Southern District of New York—or by videoconference.⁹⁶ We would expect Congress to appropriate funds to address these logistical improvements in any bill incorporating this proposal.

A jury trial at Guantánamo, however, would place unique burdens on the jurors themselves. As a result, we propose that Congress include in the law establishing the Guantánamo court certain provisions designed to compensate jurors for these burdens. For example, Congress could grant

all jury members serving on Guantánamo trials a hardship stipend to compensate them for their time away from home. Congress could also authorize the use of federal funds to cover the cost of visits between jury members and their families, and other diversions the Court deems proper.⁹⁷ These expenses (and any aforementioned logistical expenses) would more than offset by the cost savings achieved by using an Article III court—which could shave a decade or more off the time to reach a final verdict, at a savings of approximately \$400 million per year.

b. Assign Pending Cases to Federal District Court Judges

Once the Guantánamo court is established, pending cases will then be assigned to district court judges under the relevant court’s assignment process. Generally, each district court has its own written plan or system for assigning cases, and the court’s rules and orders regarding case assignments are enforced by the chief judge.⁹⁸ Most district courts assign cases randomly, but cases are sometimes assigned based on case-specific considerations, such as a judge’s special expertise on a certain issue.⁹⁹ It may also be preferable for a smaller number of judges with appropriate clearances and expertise, to volunteer for these cases.

c. Hold Case Management Hearings

Once a case is assigned to judges on the relevant district court, the judges would hold case management hearings and set paths forward for proceeding to trial and final judgment. Article III judges routinely hold case management conferences. We would anticipate that the first step in handling a case presently heard by the military commissions would be for the court to hold such a conference.

Most likely, the record would be transferred to the Article III court in the same way records are typically transferred on appeal from lower courts to the Circuit Courts and Supreme Court. In fact, the current process for appeal from the military commissions to the United States Court of Military Commission Review already contemplates transfer and consideration of the record below.¹⁰⁰

IV. CONCLUSION

In sum, as a legal matter, the military commissions at Guantánamo can be converted into an Article III proceeding. Such a conversion could be groundbreaking in resolving the delays that have plagued—and will continue to plague—the military commissions. We respectfully urge Congress, and the legal community, to seriously consider this proposal as way to bring closure to these cases in a far more expedient and fair manner.

Military and Veterans Affairs Committee
Erik L. Wilson, Chair

Federal Courts Committee
Harry Sandick, Chair

International Human Rights Committee
Lauren Melkus, Chair

Task Force on the Rule of Law
Stephen L. Kass, Chair

¹ The New York City Bar Association, Military and Veterans Affairs Committee, Task Force on the Rule of Law, International Human Rights Committee and Federal Courts Committee express deep gratitude to Simpson Thacher & Bartlett LLP, particularly Elisa Alcabes, Reena Mittelman, Stephanie Hon, and summer associates Lauren Maxfield and Emily Rosenthal (2018 summer class), who performed the initial research and drafting for this paper.

² *In re Al-Nashiri*, 921 F.3d 224, 237, 240 (D.C. Cir. 2019).

³ In 2002, the City Bar’s Committee on Military Affairs and Justice (now the Military and Veteran Affairs Committee) published a report in which it argued that, “[w]ith respect to those persons captured abroad in combat or for otherwise violating the traditional laws of war, the [2001 Executive Order’s] reliance on military commissions is not the preferred choice.” In its report, the Committee suggested that “[t]he better approach is to use an alternative means of prosecution,” such as “trials in federal District Courts,” among other options. See *Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? A Report on The President’s Military Order of November 13, 2001, Regarding “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,”* 57 THE RECORD OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK 40, 74 (Winter/Spring 2002); see City Bar Report (Federal Courts Committee), *The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror* (Mar. 18, 2004), available at https://www.nycbar.org/pdf/1C_WL06!.pdf; City Bar Letter to Senators Reid and McConnell regarding 2012 NDAA (June 14, 2011), available at <https://www2.nycbar.org/pdf/report/uploads/20072146-LettertoCongressregardingNationalDefenseAuthorizationAct.pdf>; City Bar Statement, *Closing Guantanamo: The National Security, Fiscal and Human Rights Implications* (July 24, 2013), available at <https://www2.nycbar.org/pdf/report/uploads/20072550-ClosingGuantanamo--TheNationalSecurityFiscalHumanRightsImplications.pdf>; City Bar Statement, *2017 Policy Recommendations for the Trump Administration, National Security Policies* (Apr. 28, 2017), available at https://s3.amazonaws.com/documents.nycbar.org/files/20073228_NatlSecurityTrumpTransition_FINAL_1.30.17.pdf. (All links in this report were last visited on May 14, 2020).

⁴ Tom LoBianco, *CNN/ORC poll: Americans oppose plan to close Guantanamo Bay prison*, CNN (Mar. 4, 2016), <https://www.cnn.com/2016/03/04/politics/guantanamo-bay-poll-north-korea/index.html> & CNN/ORC, *Poll* (Mar. 4, 2016) at 8 (56% of Americans oppose the closing of the detention center at Guantánamo and moving detainees to other facilities; this includes 83% of Republicans, 55% of independents, and 33% of Democrats).

⁵ See *id.* We believe resolving the terror trials through the faster, and repeatedly proven, Article III system would facilitate a faster closure of Guantánamo than would be possible if the military commissions system continues to be used. The opposite could also prove true, however: an effectively functioning, legitimate Article III court at Guantánamo could also provide legitimacy to use the detention facilities and thereby foment their continued use. But the reality is that Guantánamo is open and there is no current plan to close it. Replacing the military commissions system with an Article III court would be a monumental improvement, even if it falls short of accomplishing the broader goal of closing the detention facilities. Moreover, a political decision to *replace* the military commissions system with an Article III court evinces an acknowledgement that Guantánamo is not working and unprecedented reforms are needed. Ideally, this proposal would be adopted as part of a package of other much-needed reforms, but even if it is not, it has the ability to inspire other reforms to be adopted in the future, even if the detention facilities remain open.

⁶ Randy James, *Military Commissions*, TIME (May 18, 2009), <http://content.time.com/time/nation/article/0,8599,1899131,00.html>.

⁷ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2001), superseded by Exec. Order No. 13,425, 72 Fed. Reg. 7377 (Feb. 14, 2007). The 2001 Executive Order was enacted into law under the Military Commissions Act of 2006, which was amended by the Military Commissions Act of 2009.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *Dropped Charges, Overturned Convictions, and Delayed Trials in Guantánamo Military Commissions*, HUMAN RIGHTS FIRST (Feb. 16, 2018), <https://www.humanrightsfirst.org/resource/dropped-charges-overturned-convictions-and-delayed-trials-Guantánamo-military-commissions>.

¹² Christopher Fonzone & Joshua Geltzer, *For Quick and Strong Justice, Look to the Courts – Not Guantánamo*, JUST SECURITY (Nov. 1, 2017), <https://www.justsecurity.org/46610/quick-strong-justice-courts-not-Guantánamo/>.

¹³ *Id.*; see also The U.S. Military Commissions: Looking Forward, Law and Policy Workshop, American Bar Association Standing Committee on Law and National Security and The George Washington University Law School (May 2018), <https://www.justsecurity.org/wp-content/uploads/2018/05/ABA-Military-Commissions-Workshop-FINAL.pdf> (hereinafter, “ABA Report”), at 7.

¹⁴ See *Guantánamo by the Numbers*, HUMAN RIGHTS FIRST (Oct. 10, 2018), <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019).

¹⁹ *Id.* at 237.

²⁰ *Id.* at 240.

²¹ *Id.*

²² *Id.*

²³ See *Why Haven't the 9/11 Defendants in Guantánamo Been Put on Trial?*, NBC News (Sept. 11, 2017), <https://www.nbcnews.com/news/us-news/why-has-no-one-ever-been-put-trial-9-11-n800351>.

²⁴ See *Whistleblower Cites 'Waste Of Funds' At Guantánamo Court And Prison*, NPR (Sept. 11, 2019), <https://www.npr.org/2019/09/11/759699196/whistleblower-cites-waste-of-funds-at-Guantánamo-court-and-prison>. Additionally, the judge in that case has announced his retirement, but no replacement has been identified.

²⁵ *Id.*

²⁶ *The Guantánamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/Guantánamo/detainees/current>; *Guantánamo by the Numbers*, HUMAN RIGHTS FIRST (Oct. 10, 2018), <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf>; see also *National Security Division Chart of Public/Unsealed Terrorism and Terrorism-Related Convictions 9/11/01 – 12/31/16*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/sites/default/files/NSD-Terrorism-Related-Convictions.pdf>; *United States v. Damrah*, No. 1:03CR484, 2004 WL 5010196 (N.D.O.H June 7, 2004); *United States v. Biheiri*, 293 F. Supp. 2d 656 (E.D.V.A. 2003); *United States v. Schnewer*, No. 07-459 (RBK), 2008 WL 4411841, at *1 (Sept. 26, 2008); Christopher Fonzone & Joshua Geltzer, *For Quick and Strong Justice, Look to the Courts – Not Guantánamo*, JUST SECURITY (Nov. 1, 2017), <https://www.justsecurity.org/46610/quick-strong-justice-courts-not-Guantánamo/> (“Our federal courts have been used extensively and successfully to convict hundreds of individuals on terrorism-related charges since 9/11 . . .”).

²⁷ See *Terrorism-Related Convictions Have Been Secured in Federal Court Across the United States*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/sites/default/files/Terrorism-Convictions-Map.pdf>.

²⁸ See Mary B. McCord, *Federal Prosecution is a Viable Option for Enemy Combatants*, LAWFARE (July 24, 2017), <https://www.lawfareblog.com/federal-prosecution-viable-option-enemy-combatants>.

²⁹ *Id.*

³⁰ See Melanie Garunay, *President Obama Presents the Plan to Close Guantánamo: “This Is About Closing a Chapter in History,”* WHITE HOUSE (Feb. 23, 2016, 12:11 PM), available at <https://obamawhitehouse.archives.gov/blog/2016/02/23/president-obamas-plan-close-Guantánamo-about-closing-chapter-history>.

³¹ See Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Jan. 30, 2018).

³² U.S. Dep't of Def., Military Comm'n Order No. 1 § 1 (Mar. 21, 2002), *available at* <https://www.mc.mil/Portals/0/milcomord1.pdf>; *see* Neil A. Lewis, *Threats and Responses: The Tribunals; First War-Crimes Case Opens at Guantánamo Base*, N.Y. TIMES (Aug. 25, 2004), <https://www.nytimes.com/2004/08/25/world/threats-responses-tribunals-first-war-crimes-case-opens-Guantánamo-base.html>.

³³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 560 (2006) (holding, *inter alia*, that the Geneva Convention required that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” *id.* at 630).

³⁴ *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in sections of 10, 18, 28, and 42 U.S.C. (Supp. IV 2010)).

³⁵ *See* Military Commissions Act of 2009, Pub. L. No. 118-84, tit. XVIII, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a-950t (Supp. IV 2010)).

³⁶ *See* U.S. Dep't of Defense, Manual for Military Commissions (2019), *available at* <https://www.mc.mil/Portals/0/pdfs/Manual%20for%20Military%20Commissions%202019%20Edition.pdf>.

³⁷ The chart is available at <https://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx>.

³⁸ *See generally supra* notes 22 and 23.

³⁹ *See generally* FED. R. CRIM. P.; FED. R. EVID.

⁴⁰ 10 U.S.C. §§ 950(p)-(t).

⁴¹ *E.g.*, 18 U.S.C. §§ 2331-39D (terrorism and material support for terrorism); 18 U.S.C. § 2441-42 (war crimes).

⁴² Legal practitioners have expressed concern that this prohibition may not be effective due to the ability for such statements come in, for example, through hearsay exceptions.

⁴³ *See* National Defense Authorization Act of 2018, Pub. L. No. 115-91, 131 Stat. 1283.

⁴⁴ In 2016, the Obama administration considered a proposal that would allow Guantánamo prisoners to plead guilty to terrorism charges in federal court by videoconference. *See* Charles Levinson, *Exclusive: Justice Department opposes new Obama proposal on Guantánamo*, REUTERS (June 21, 2016, 7:05 AM), <https://www.reuters.com/article/us-usa-gitmo-justice-exclusive-idUSKCN0Z719D>; *see also* Carol Rosenberg, *Could secret 9/11 hearing near Pentagon clarify role of U.S. Constitution at Guantánamo?*, MIAMI HERALD (Sept. 28, 2018, updated Oct. 1, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article218865675.html>. The logistics and legal implications of holding a *full jury trial* in an Article III court on the mainland—with the accused attending every required aspect of the trial by videoconference at Guantánamo—present unique constitutional concerns that could result in such proceedings being declared unconstitutional on appeal. This white paper intentionally focuses on a solution with far clearer precedent, the creation of Article III courts, which should increase the potential for this proposal to be viewed as viable and adoptable.

⁴⁵ *See id.* at 15-16, 38-39; Department of Justice, Office of Public Affairs, *Statement of the Attorney General on the Prosecution of the 9/11 Conspirators* (Apr. 4, 2011), <https://www.justice.gov/opa/speech/statement-attorney-general-prosecution-911-conspirators> (when it was preparing to bring the 9/11 detainees to trial in U.S. Article III courts, the Department of Justice “had consulted extensively with the intelligence community and developed detailed plans for handling classified evidence”); The Constitution Project, *A Critique of “National Security Courts”*: A Report by the Constitution Project’s Liberty and Security Committee & Coalition to Defend Checks and Balances 2 (June 23, 2008), http://constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf; *see also* Classified Information Procedures Act (“CIPA”), Pub. L. 96-456, 94 Stat. 2025, 18 U.S.C. App. §§ 1-16 (federal statute, passed in 1980, that protects classified information in the context of a criminal trial); *United States v. Shehadeh*, 857 F. Supp. 2d 290 (E.D.N.Y. 2012) (granting the government’s *ex parte, in camera* motion for a protective order as to classified information held by the government in a prosecution involving international terrorism, on the grounds that disclosure would be inimical to national security); *United States v. Abu Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006) (in a terrorism prosecution, granting the government’s request to close to the public an evidentiary hearing involving the testimony of Israeli agents on behalf of the government, where the agents’ anticipated testimony was certified by the U.S. government to be classified); *United States v. Ressay*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002) (denying access by a newspaper to classified materials from an international terrorism

prosecution on the grounds that “safeguarding the national security is a compelling interest [that] . . . does not necessarily dissipate at the end of the trial”); *United States v. Kadir*, 718 F.3d 115 (2d Cir. 2013) (holding that the Eastern District of New York properly decided not to declassify portions of a government report during a terrorism prosecution).

⁴⁶ Carol Rosenberg, *When it Comes to Guantánamo, Trump is Truly the Builder in Chief*, MIAMI HERALD (Mar. 27, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/Guantánamo/article207035814.html>.

⁴⁷ See *Courtroom II*, OFFICE OF MILITARY COMMISSIONS, <https://www.mc.mil/FACILITYESSERVICES/Facilities/Courtrooms/CourtroomII.aspx> (last visited Dec. 13, 2018).

⁴⁸ See ABA Report at 16.

⁴⁹ See U.S. Const. art. III; Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J. L. REFORM 45, 76 (2010).

⁵⁰ U.S. Const. art. III § 2, cl. 3 (emphasis added).

⁵¹ 18 U.S.C. § 3238.

⁵² See, e.g., *United States v. Williams*, 509 F. App'x 899 (11th Cir. 2013) (unpublished) (affirming the criminal prosecution in a U.S. district court of a defendant who engaged in sexual abuse in Japan and was subsequently arrested in the United States).

⁵³ See, e.g., *United States v. Ghailani*, 761 F. Supp. 2d 167 (S.D.N.Y. 2011) (conviction arising out of the defendant's involvement in the terrorist bombing of the U.S. embassies in Kenya and Tanzania); *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (convictions by jury trial arising from a conspiracy to bomb U.S. commercial airliners in southeast Asia, among other crimes); *United States v. Naseer*, 38 F. Supp. 3d 269 (E.D.N.Y. 2014) (conviction by jury trial arising from plot to bomb sites in England, Copenhagen, and elsewhere at the direction of al Qaeda); *Moreno-Godoy v. United States*, Nos. 13 Civ. 2382(JSR)(GWG), 07 Cr. 354, 2014 WL 1088300, at *1 (S.D.N.Y. Mar. 20, 2014) (conviction by jury trial, pursuant to § 3238, arising from conduct including a scheme to attack U.S. helicopters in Colombia).

⁵⁴ *Latest Al Qaeda Conviction Again Proves Federal Court Best Venue for Terrorism Cases*, HUMAN RIGHTS FIRST (Oct. 2, 2017), <https://www.humanrightsfirst.org/blog/latest-al-qaeda-conviction-again-proves-federal-court-best-venue-terrorism-cases>.

⁵⁵ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) (addressing history of Naval Station at Guantánamo Bay).

⁵⁶ See Pub. L. 89-571, 80 Stat. 764; see also *United States District Court for the District of Puerto Rico*, UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov/united-states-district-court-district-puerto-rico>. Previously, beginning with Puerto Rico's establishment in 1900, the district court of Puerto Rico was a territorial court. See *Territorial Courts*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/courts/territorial-courts>. Then, in 1915, a statute assigned Puerto Rico to the First Circuit and provided for appeals from the district court of Puerto Rico to the U.S. Circuit Court of Appeals for the First Circuit. See 38 Stat. 803.

⁵⁷ See *U.S. Territories*, U.S. CITIZENSHIP & IMMIGRATION SVCS., <https://www.uscis.gov/tools/glossary/us-territories>. To be clear, while Congress' control over Guantánamo is plenary, just like Congress' control over territories under the Territorial Clause (U.S. Const. Art. IV, Sec. 3 (“Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”)), Guantánamo is not an unincorporated territory of the United States and remains *outside* the United States.

⁵⁸ See Gustavo A. Gelpi, *The 50th Anniversary of the District of Puerto Rico Article III Court*, THE FEDERAL LAWYER (July 2016), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2016/July/Columns/In-the-Legal-Community_1.aspx?FT=.pdf.

⁵⁹ *Boumediene v. Bush*, 553 U.S. 723, 755 (2006) (emphasis added).

⁶⁰ *Id.* at 771 (emphasis added).

⁶¹ *Id.* at 764.

⁶² See Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418, available at http://avalon.law.yale.edu/20th_century/dip_cuba002.asp (emphasis added).

⁶³ *Boumediene*, 553 U.S. at 753.

⁶⁴ *Id.* at 747-48.

⁶⁵ *Id.* at 765.

⁶⁶ *Id.* at 727.

⁶⁷ *Id.* at 751. The Court also held that Cuban courts and the Cuban government do not have jurisdiction over U.S. military personnel or the detainees at Guantánamo. *Id.* Thus, the presence of an Article III court at Guantánamo would not conflict with the Cuban government’s jurisdiction or sovereignty.

⁶⁸ This paper assumes that the Sixth Amendment would apply in these cases, although the issue may not be entirely without dispute. See *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) (Article II—not Article III—court recognizing alien defendants had a Sixth Amendment right to a jury trial when they were prosecuted in a U.S. court in a foreign territory under U.S. control but outside U.S. sovereignty (occupied Berlin); applied to prosecution for armed aircraft hijacking involving “friendly aliens”—citizens of countries in which “the United States is at peace with, and maintains diplomatic relations with” and who were “not enemy nationals, enemy belligerents or prisoners of war”).

⁶⁹ The Sixth Amendment also entitles the accused to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the assistance of counsel for his defense.

⁷⁰ U.S. Const. amend. VI.

⁷¹ 509 F. App’x 899 (11th Cir. 2013) (unpublished).

⁷² *Id.* at 902 (citing U.S. Const. art. III, § 2).

⁷³ *Id.*

⁷⁴ See cases cited *supra* at note 53.

⁷⁵ See section III.A, *infra*, regarding how incorporating the new court into an existing judicial district would streamline the jury selection process for trials of Guantánamo detainees.

⁷⁶ U.S. Const. amend. VI.

⁷⁷ *United States v. Moussaoui*, 382 F.3d 453, 464 (4th Cir. 2004); see also *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962) (“[T]he Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it”).

⁷⁸ See *Moussaoui*, 365 F.3d at 464-65 (noting that it is a “well established and undisputed principle that the process power of the district court does not extend to foreign nationals abroad”); see also *United States v. Theresius Filippi*, 918 F.2d 244, 246 n.2 (1st Cir. 1990) (“The United States has no subpoena power over a foreign national in a foreign country.”).

⁷⁹ *United States v. Cruz-Jiminez*, 977 F.2d 95, 100 (3d Cir. 1992).

⁸⁰ *State ex rel. Meyers v. Howell*, 740 P.2d 792, 797 (Or. Ct. App. 1987) (holding that “under both the Oregon and federal constitutions, only the withholding of evidence that is material and favorable to a criminal defendant gives rise to a claim of violation of the Compulsory Process Clauses”); *United States v. Sattar*, 314 F. Supp. 2d 279 (S.D.N.Y. 2004) (where terrorism defendant challenged the U.S. government’s refusal to reveal the whereabouts of a witness, defendant failed to establish his Sixth Amendment right to compulsory process because he did not plausibly show that the witness’s testimony would have been both material and favorable to his defense); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (government’s deportation of two eyewitnesses did not violate defendant’s right to compulsory process because defendant failed to “make some plausible showing of how their testimony would have been both material and favorable to his defense”); *Williams*, 509 F. App’x at 902 (no compulsory process violation where defendant “made no attempt . . . to name any witness who would be material and favorable to his defense, [or] any showing . . . regarding said witness’s materiality and favorability” (internal quotation marks omitted)).

⁸¹ *United States v. Zabaneh*, 837 F.2d 1249, 1259-60 (5th Cir. 1988).

⁸² See, e.g., *Moussaoui*, 365 F.3d at 300 (holding that, where “enemy combatant witnesses are in the custody of an official of the United States Government,” “we are concerned not with the ability of the district court to issue a subpoena to the witnesses, but rather with its power to issue a [testimonial writ] to the witnesses’ custodian”); *Cruz-Jiminez*, 977 F.2d at 99 (holding that, where a defendant asserts a Sixth Amendment right to the testimony of an incarcerated witness, “a federal court may, in its discretion, issue a writ of habeas corpus ad testificandum to secure the appearance of a state or federal prisoner as a witness in federal court”); *Braden v. 30th Jud. Cir. Ct.*, 410 U.S. 484, 494-95 (1973) (“The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in . . . custody.”).

⁸³ The Supreme Court of the United States recently reaffirmed the requirement for unanimous jury verdicts in all convictions for serious offenses. *Ramos v. Louisiana*, 590 U.S. ___ (2020) (unanimous jury verdicts required in state criminal trials for serious offenses), available at https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf.

⁸⁴ See Department of Justice, Office of Public Affairs, *Statement of the Attorney General on the Prosecution of the 9/11 Conspirators* (Apr. 4, 2011), <https://www.justice.gov/opa/speech/statement-attorney-general-prosecution-911-conspirators> (“As the indictment unsealed today reveals, we were prepared to bring a powerful case against Khalid Sheikh Mohammed and his four co-conspirators – one of the most well-researched and documented cases I have ever seen in my decades of experience as a prosecutor. We had carefully evaluated the evidence and concluded that we could prove the defendants’ guilt while adhering to the bedrock traditions and values of our laws.”). Even if detainees were acquitted in an Article III court, however, the government has previously asserted the right to continue detaining them until they are no longer deemed an “enemy combatant.” See Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay, Amnesty International, AMR 51/053/2002 (Dec. 12, 2002) at 53-4 (the government has stated that “[e]ven in a case where an enemy combatant might be acquitted, the United States would be irresponsible not to continue to detain them until the conflict is over. Detaining enemy combatants for the duration of a conflict is universally recognized as responsible and lawful. This is fully consistent with the Geneva Conventions and other war authorities”).

⁸⁵ E.g., Walter E. Kuhn, *The Speedy Trial Rights of Military Detainees*, 62 SYRACUSE L. REV. 209 (2012).

⁸⁶ *Id.*; see e.g., *United States v. Ghailani*, 751 F. Supp. 2d 515, 520 (S.D.N.Y. 2010), *aff’d*, 733 F.3d 29 (2d Cir. 2013) (speedy trial rights of “enemy combatant” involved in 1998 U.S. Embassy bombings in East Africa were not infringed because, among other reasons, “[h]e would have been detained for that entire period as an enemy combatant regardless of the pendency of this indictment”).

⁸⁷ See *Terrorism-Related Convictions Have Been Secured in Federal Court Across the United States*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/sites/default/files/Terrorism-Convictions-Map.pdf>; Department of Justice, Office of Public Affairs, *Statement of the Attorney General on the Prosecution of the 9/11 Conspirators* (Apr. 4, 2011), <https://www.justice.gov/opa/speech/statement-attorney-general-prosecution-911-conspirators>.

⁸⁸ Department of Justice, Office of Public Affairs, *Statement of the Attorney General on the Prosecution of the 9/11 Conspirators* (Apr. 4, 2011), <https://www.justice.gov/opa/speech/statement-attorney-general-prosecution-911-conspirators>.

⁸⁹ There is precedent for Congress’s amendment of the federal court system: In 1982, for instance, Congress passed the Federal Courts Improvement Act, which created a United States Court of Appeals for the Federal Circuit, increasing the number of judicial circuits from 12 to 13. See Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in scattered sections of 28 U.S.C.A. (West Supp. 1983)).

⁹⁰ See 10 U.S.C. § 950g; Jennifer K. Elsea, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, CONG. RESEARCH SVC. (Aug. 4, 2014), available at <https://fas.org/sgp/crs/natsec/R41163.pdf>; Laura K. Donohue, *Terrorism Trials in Article III Courts*, 38 HARV. J.L. & PUB. POL’Y 105, 113 (2015).

⁹¹ See Laura K. Donohue, *Terrorism Trials in Article III Courts*, 38 HARV. J.L. & PUB. POL’Y at 113-114.

⁹² See *id.* at 129-30.

⁹³ 28 U.S.C. § 1861.

⁹⁴ To more easily accommodate jurors out of New York, jury flights could be chartered to originate out of New York (e.g., JFK), with a stop at Andrews Air Force Base outside of Washington, D.C. to pick up defense counsel and other attendees in D.C. (all flights currently originate from Andrews). Housing at Camp Justice, where the trials

actually occur, has traditionally been substandard and not amenable for jurors. New facilities are under construction and about to be under construction at Camp Justice and elsewhere on Guantánamo. Sheren Khalel, *Guantanamo sees new construction a decade after prison ordered shut*, MIDDLE EAST EYE (March 6, 2019), <https://www.middleeasteye.net/news/guantanamo-sees-new-construction-decade-after-prison-ordered-shut>. In short, there are other on-base housing options for military personnel stationed at Guantánamo that could be temporarily reassigned to jurors instead of military personnel, who could stay in the more expeditionary housing options.

⁹⁵ See generally *The Cost of the Guantánamo Bay Prison*, HUMAN RIGHTS FIRST (Jan. 2017), available at <https://www.humanrightsfirst.org/sites/default/files/cost-of-Guantánamo-brief.pdf>.

⁹⁶ These would include, at a minimum, hearings on legal questions. See Fed. R. Crim. P. 43(b)(3).

⁹⁷ While sequestrations are exceedingly rare and almost never ordered in modern criminal law practice, there is a small possibility that a judge could sequester a jury at Guantánamo. But that should not impact the decision to convert the military commissions into an Article III court.

⁹⁸ See *FAQs: Filing a Case*, UNITED STATES COURTS, <http://www.uscourts.gov/faqs-filing-case#faq-How-are-judges-assigned-to-cases?>

⁹⁹ See *id.* But see Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, CORNELL L. REV. 65, 73-75 (2017), available at <http://cornelllawreview.org/files/2017/11/2.Levyfinal.pdf> (challenging the “long-standing claim of random panel assignment,” including in the D.C., Second, and Fourth Circuits).

¹⁰⁰ See 10 U.S.C. § 950f, available at <https://www.law.cornell.edu/uscode/text/10/950f> (providing that the Court of Military Commissions Review “may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, *on the basis of the entire record*, should be approved” and that “[i]n considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact” (emphasis added)).