



June 2022

# GUANTÁNAMO BAY

## Accessing Detainee Medical Records as Part of Military Commissions' Proceedings

Accessible Version

## Why GAO Did This Study

Since 2002, the U.S. has operated military detention facilities at Naval Station Guantánamo Bay (NSGB) Cuba. Military commissions' proceedings were first established in 2001 to try non-U.S. citizens who aided, abetted, or conspired to commit acts of terrorism against the U.S. However, detainee defense teams have cited concerns about the completeness of detainee medical records and their timely access to them as part of military commissions' proceedings. These defense claims have been disputed by the prosecution.

House Report 116-120 included a provision for GAO to examine the policies at NSGB related to detainee medical records and their interaction with the military commissions' process. This report describes (1) federal law and DOD's policies and regulations governing the access to detainee medical records; (2) DOD's process for making detainee medical records available; and (3) DOD's efforts to decrease the classification of detainees' medical records within the context of military commissions' proceedings. Additionally, GAO has an ongoing review assessing the policies and procedures for providing health care to detainees and challenges associated with providing care.

GAO reviewed policies and procedures related to detainee medical records at NSGB from fiscal years 2015 through 2021. GAO also interviewed officials from relevant DOD organizations.

GAO received technical comments from DOD and incorporated them as appropriate. GAO is not making recommendations.

View [GAO-22-105810](#). For more information, contact Brenda S. Farrell at (202) 512-3604 or [FarrellB@gao.gov](mailto:FarrellB@gao.gov).

# GUANTÁNAMO BAY

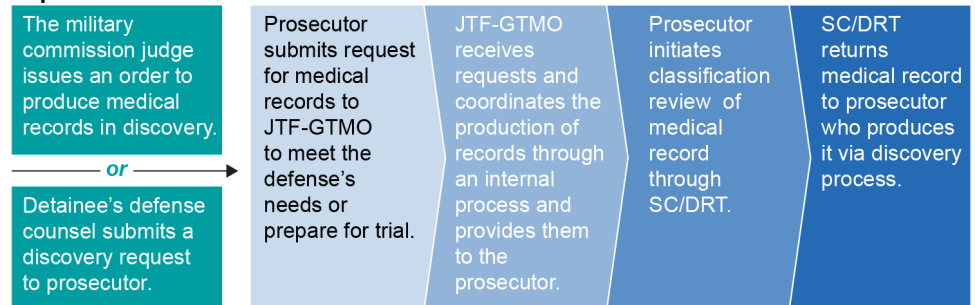
## Accessing Detainee Medical Records as Part of Military Commissions' Proceedings

## What GAO Found

The Military Commissions Act of 2009 provides the statutory basis for the military commissions' process and states that the defense counsel shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. The Act also requires the disclosure of exculpatory evidence to the defense from the prosecution, as soon as practicable. DOD's Manual for Military Commissions establishes procedures for the defense to have access to evidence such as the medical records of the accused as part of the discovery process. The discovery process for obtaining access to medical records applies only to detainees who have charges pending before a military commission. The determination of whether information is subject to disclosure initially rests with the prosecution and, if disputed by the defense, is ultimately decided by the military judge, according to DOD officials. The duty to provide discovery is continuous throughout the military commissions' proceeding.

DOD has established multiple steps and layers of review in its process for making records available to the prosecution and defense as part of military commissions' proceedings (see figure). These steps are intended to ensure that relevant law and regulations governing pre-trial discovery and protection of classified information are adhered to, according to DOD officials. The medical records request process is typically initiated when the defense counsel submits a discovery request to the prosecutor or a military commissions' judge issues an order to produce detainee medical records. According to DOD officials, when the prosecution requests detainee medical records for the purposes of a military commission, this initiates a process of an internal request for information within Joint Task Force Guantanamo Bay. Once the process of the internal request for information is complete, the copies of a detainee's medical records are provided to the prosecution, which is responsible for ensuring that the records are reviewed by the Security Classification/ Declassification Review Team and redacted, as appropriate. Under current procedures, detainee medical records are kept at a variety of classification levels and the declassification of those medical records is an essential step in producing detainee medical records as part of military commissions' proceedings.

### Department of Defense Medical Records Release and Production Process



JTF-GTMO Joint Task Force Guantanamo  
SC/DRT Security Classification/Declassification Review Team  
Source: GAO analysis of Department of Defense guidance. | [GAO-22-105810](#)

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**Text of Department of Defense Medical Records Release and Production Process**

- 1) The military commission judge issues an order to produce medical records in discovery.  
or  
Detainee's defense counsel submits a discovery request to prosecutor.
  - a) Prosecutor submits request for medical records to JTF-GTMO to meet the defense's needs or prepare for trial.
  - b) JTF-GTMO receives requests and coordinates the production of records through an internal process and provides them to the prosecutor.
  - c) Prosecutor initiates classification review of medical record through SC/DRT.
  - d) SC/DRT returns medical record to prosecutor who produces it via discovery process.

Source: GAO analysis of Dept of Defense guidance. | GAO-22-105810

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### **Abbreviations**

CIA	Central Intelligence Agency
CUI	Controlled Unclassified Information
DOD	Department of Defense
HVD	High Value Detainee
JTF-GTMO	Joint Task Force Guantánamo
MCA	Military Commissions Act
Non-HVD	Non-High Value Detainee
NOFORN	Not Releasable to Foreign Nationals
NSGB	Naval Station Guantánamo Bay
ORCON	Originator Controlled
SC/DRT	Security Classification/Declassification Review Team
TS	Top Secret

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June 28, 2022

Congressional Committees

Since January 2002, the U.S. has operated military detention facilities at its Naval Station in Guantánamo Bay (NSGB), Cuba to detain and prevent individuals accused of terrorism and war crimes from returning to the battlefield. According to DOD officials, there have been nearly 800 detainees held at NSGB since 2002; however, as of April 2022, only 37 detainees remained. Military commissions' proceedings were first established at NSGB in 2001 to try non-U.S. citizens who aided, abetted, or conspired to commit acts of terrorism against the U.S.<sup>1</sup>

Detainees' defense teams have cited concerns about the completeness of and timely access to detainee medical records as part of military commissions' proceedings. Detainee defense teams also have noted that there is a lack of transparency in the detainee medical record request process as part of military commissions' proceedings. Both of these defense claims have been disputed by the prosecution.

We have previously reported on various topics related to the detention operations at NSGB and the military commissions' proceedings. In 2019, we reviewed the feasibility of expanding access to military commissions' proceedings that are open to the public.<sup>2</sup> We recommended that DOD identify and analyze the risks associated with potential options for expanding public access to these proceedings, and develop a strategy, as appropriate, for how it will meet its public access goals with the expected increase in public interest. DOD concurred with this recommendation, but, as of January 2022, DOD had not implemented it.

In 2012, we identified factors to be considered in the event that restrictions were lifted and Guantánamo Bay detainees were transferred to the U.S.<sup>3</sup> We found that several factors would need to be considered,

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<sup>1</sup>As of April 2022, five detainees had been convicted before a military commission and 10 detainees had ongoing cases before a military commission, according to DOD officials.

<sup>2</sup>GAO, *Military Courts: DOD Should Assess the Tradeoffs Associated with Expanding Public Access to and Information about Terrorism Trials*, [GAO-19-283](#), (Washington, D.C.: Feb. 12, 2019).

<sup>3</sup>GAO, *Guantánamo Bay Detainees: Facilities and Factors for Consideration If Detainees Were Brought to the United States*, [GAO-13-31](#), (Washington, D.C.: Nov. 14, 2012).

including policies and procedures for housing the detainees and ensuring the safety of facility personnel, the detainees, and the general public. We did not make any recommendations as the Department of Justice stated at that time that they had no plans to transfer detainees to the U.S.

House Report 116-120 accompanying a bill for the National Defense Authorization Act for Fiscal Year 2020 included a provision for us to examine the policies at NSGB related to detainee medical records and their interaction with the military commissions' process.<sup>4</sup> This report describes (1) federal law and DOD's policies and regulations governing the access to detainee medical records; (2) DOD's process for making detainee medical records available; and (3) DOD's efforts to decrease the classification of detainees' medical records within the context of pretrial discovery in military commissions' proceedings. Additionally, in response to this same mandate, we have an ongoing review assessing the policies and procedures for providing health care to detainees, including training provided to medical providers, and any challenges to providing this care. We expect to issue the final report in late 2022.

To address our objectives, we reviewed policies and procedures related to detainee medical records at NSGB from fiscal years 2015 through 2021. While there are several ways detainees and their representatives can request access to their medical records, we limited the scope of our review to detainee access to medical records as part of military commissions' proceedings.<sup>5</sup> Specifically, we reviewed military commissions' court orders related to discovery<sup>6</sup>; the Military Commissions Act of 2009 (MCA)<sup>7</sup> and the 2019 Manual for Military Commissions,<sup>8</sup> as well as DOD guidance.<sup>9</sup> We also reviewed DOD's report to Congress on

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<sup>4</sup>H.R. Rep. No. 116-120 at 208 (2019).

<sup>5</sup>Medical records may also be requested by detainees and their representatives by citing the Freedom of Information Act or during habeas corpus litigation.

<sup>6</sup>In general, discovery refers to the process that provides the accused and defense counsel an opportunity to obtain evidence and witnesses during a military commission proceeding.

<sup>7</sup>The Military Commissions Act of 2009, Pub. L. No. 114-84, §§ 1801-1807 (2009) and codified at 10 U.S.C. § 948a, et seq.

<sup>8</sup>Department of Defense, *Manual for Military Commissions 2019 Edition* (May 2, 2019).

<sup>9</sup>Examples of DOD guidance include Department of Defense Instruction 2310.08, *Medical Program Support for*

detainee medical records, and interviewed officials from the Office of the Secretary for Defense, U.S. Southern Command, NSBG, Joint Task Force Guantánamo Bay (JTF-GTMO), detainee defense teams, Office of the Chief Prosecutor, and non-governmental organizations.

We conducted this performance audit from August 2019 to June 2022 in accordance with generally accepted government auditing standards.<sup>10</sup> Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

The mission of caring for the health and well-being of the detainees rests with U.S. Southern Command's JTF-GTMO and its Joint Medical Group, with support from the Naval Station Hospital Guantánamo Bay. According to DOD officials, service members, civilian employees, and contractors support detention operations at NSGB — to include Joint Medical Group personnel. As part of providing medical care to detainees at NSGB, DOD is required by instruction to maintain accurate and complete medical records on all of the detainees.<sup>11</sup> Copies of these medical records can be requested by the detainee or their designated legal representatives, such as their defense counsel, during military commissions' proceedings. These medical records may also be utilized as evidence by the prosecution or defense during military commissions' proceedings. Such requests are governed by the legal and procedural rules that pertain to pretrial discovery; for example in 2018, a military judge granted a defense motion that the government must provide Mr. Hawsawi and his defense counsel all of his medical records for the time he was in Central

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*Detainee Operations*, (Sept. 5, 2019) (Change 1, Aug. 25, 2021) and Department of Defense Memorandum, *Access to Detainee Medical Records by the Office of Military Commissions* (May 2, 2008).

<sup>10</sup>This work was suspended from March 2020 to October 2021 due to the COVID-19 pandemic.

<sup>11</sup>Department of Defense Instruction 2310.08, *Medical Program Support for Detainee Operations*, (Sept. 5, 2019) (Change 1, Aug. 25, 2021).



Intelligence Agency (CIA) custody.<sup>12</sup> According to the Military Judge's order, the defense asserted that summaries of medical records could not explain the origin of Mr. Hawsawi's injuries or reveal how the application of enhanced interrogation techniques led to his injuries. Medical records may also be requested by detainees and their representatives by citing the Freedom of Information Act<sup>13</sup> or during habeas corpus litigation<sup>14</sup>.

The Military Commissions Act of 2009 (MCA) establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents engaged in hostilities against the U.S. for violations of the law of war and other offenses.<sup>15</sup> The MCA defines an unprivileged enemy belligerent as a person who has engaged in hostilities against the U.S. or its coalition partners; has purposefully and materially supported hostilities against the U.S. or its coalition partners; or was part of al Qaeda at the time of the alleged offense. While the MCA also provides protections for the accused individuals undergoing trial (the accused) similar to rights afforded to defendants in a federal criminal trial, the MCA is more closely aligned with military court-martial practice.<sup>16</sup> For example, the MCA states that procedures for military commissions are based upon the procedures for trial by general courts-martial under the Uniform Code of Military Justice, Chapter 47 of the U.S. Code, except for certain provisions such as provisions related to speedy trial and pretrial hearings or investigations.

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<sup>12</sup>United States versus Khalid Shaikh Mohammad, Walid Muhammad Salih, Mubarak Bin 'Attash, Ramzi Bin Al Shibh, Ali Abdul Aziz Ali, Mustafa Ahmed Adam, Al Hawsawi, Military Judge Ruling, AE-4191 (July 30, 2018). The Military Judge denied the defense motion to compel the government to provide medical records that are "complete and unredacted", however, the judge ordered the government to provide each accused with all their medical records compiled during their time in CIA custody either through discovery or by judicially approved summaries or substitutions.

<sup>13</sup>See 5 U.S.C. § 552 generally referred to as the Freedom of Information Act.

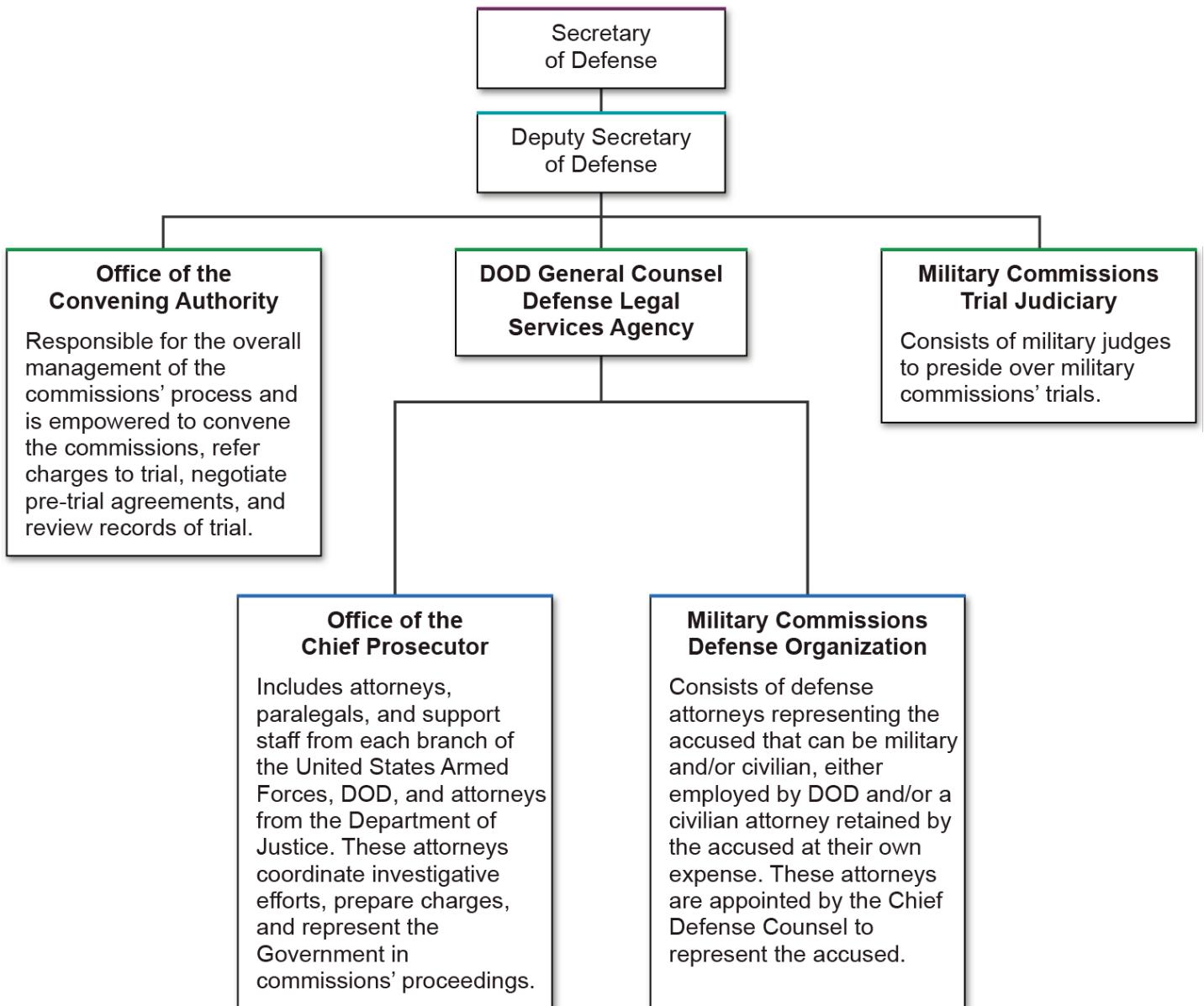
<sup>14</sup>See 28 U.S.C. § 2241 which recognizes the power of the judiciary to review a petition for a writ of habeas corpus seeking judicial review of confinement or detention. The U.S. Supreme Court has described the writ of habeas corpus as a means of reviewing the legality of Executive detention. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

<sup>15</sup>The Military Commissions Act of 2009, Pub. L. No. 114-84, §§ 1801-1807 (2009) and codified at 10 U.S.C. § 948a, et seq.

<sup>16</sup>For a chart comparing selected military commissions' rules under the Military Commissions Act of 2009, as amended, to the corresponding rules that apply in federal court, see Congressional Research Service: *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court* (Washington, D.C.: Mar. 21, 2014).

There are a number of DOD organizations responsible for conducting the commissions' proceedings and each has separate functions and responsibilities (see fig. 1).

**Figure 1: Department of Defense (DOD) Organizations Responsible for Military Commissions' Proceedings**



Source: GAO analysis of information from Department of Defense (DOD) officials. | GAO-22-105810

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**Text of Figure 1: Department of Defense (DOD) Organizations Responsible for Military Commissions' Proceedings**

- 1) Secretary of Defense
- 2) Deputy Secretary of Defense
  - a) Office of the Convening Authority  
Responsible for the overall management of the commissions' process and is empowered to convene the commissions, refer charges to trial, negotiate pre-trial agreements, and review records of trial.
  - b) DOD General Counsel Defense Legal Services Agency
    - i) Office of the Chief Prosecutor  
Includes attorneys, paralegals, and support staff from each branch of the United States Armed Forces, DOD, and attorneys from the Department of Justice. These attorneys coordinate investigative efforts, prepare charges, and represent the Government in commissions' proceedings.
    - ii) Military Commissions Defense Organization  
Consists of defense attorneys representing the accused that can be military and/or civilian, either employed by DOD and/or a civilian attorney retained by the accused at their own expense. These attorneys are appointed by the Chief Defense Counsel to represent the accused.
  - c) Military Commissions Trial Judiciary  
Consists of military judges to preside over military commissions' trials.

Source: GAO analysis of information from Department of Defense (DOD) officials. | GAO-22-105810

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## Federal Law and DOD Guidance for Accessing Detainee Medical Records during Military Commissions' Proceedings

The MCA provides the statutory basis for the military commissions' process and states that the defense counsel shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. In addition, the MCA

requires the disclosure of exculpatory evidence to the defense from the prosecution, as soon as practicable.<sup>17</sup> The MCA states that exculpatory evidence is any evidence that reasonably tends to either negate the guilt of the accused or reduce the degree of guilt of the accused with respect to an offense charged. The evidence may include medical records of detainees. As of September 2021, in at least two military commissions' cases, military judges have issued orders related to defense access to detainee medical records.<sup>18</sup> For example, in *United States v. Hadi Al-Iraqi*, the military judge granted the defense request for expedited production of the accused's medical records. However, according to DOD, there are no known instances in which a detainee has received full and complete medical records. In accordance with law and governing policy, some level of redaction is applied to these records prior to receipt by the detainee. According to DOD officials, the detainee will receive a redacted version or an unclassified summary or substitution of their medical records.

DOD's Manual for Military Commissions establishes procedures for the defense to have access to evidence such as the medical records of the accused as part of the discovery process.<sup>19</sup> The discovery process for obtaining access to medical records applies only to detainees who have charges pending before a military commission. The Manual states that at the request of the defense counsel after charges are referred, the United States Government shall permit the defense counsel to examine any of the results or reports of physical or mental examinations of the detainee as well any scientific tests or experiments. These records must be in possession, custody, or control of the government, the existence of which must be known (or by the exercise of due diligence may become known) to the prosecutor, and must be material to the preparation of the defense or intended for use by the prosecutor as evidence at trial.

The determination of whether information satisfies this legal standard begins with the exercise of prosecutorial discretion and judgment and, if disputed by the defense, is decided by the military judge. The duty to provide discovery is continuous throughout the military commissions' proceeding. In other words, if at any time prior to or during the proceeding

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<sup>17</sup>Specifically, 10 U.S.C. § 949j.

<sup>18</sup>As of September of 2021, according to DOD, five detainees had been convicted and were either serving their sentence or were awaiting sentencing and 10 detainees had charges pending before a military commission.

<sup>19</sup>Department of Defense, *Manual for Military Commissions 2019 Edition* (May 2, 2019), Rule 701.

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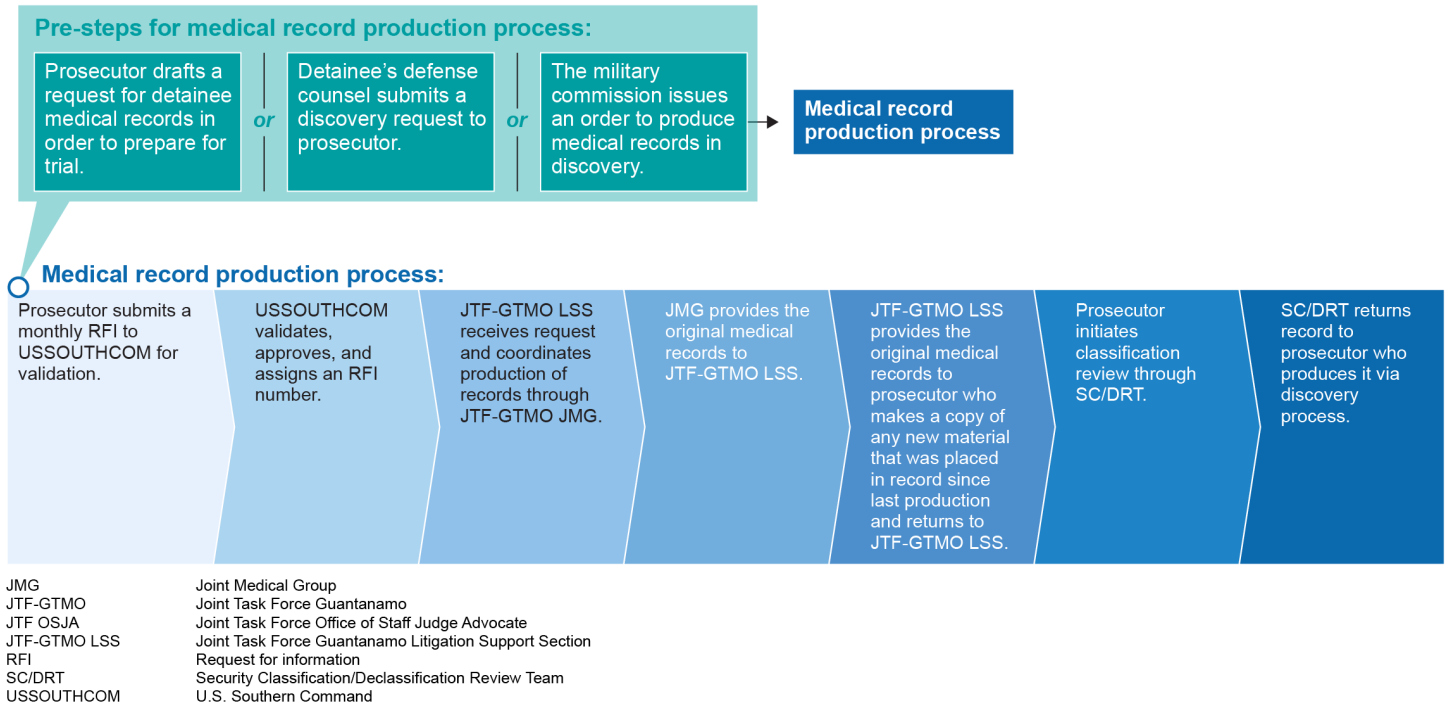
a party discovers additional material subject to disclosure under the rule, that party must promptly notify the other party or the military judge of the existence of that material.

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## DOD's Processes for Providing Detainee Medical Records

DOD has established multiple steps and layers of review in its process for reviewing detainee medical records and making them available to the prosecution and defense as part of military commissions' proceedings. These steps are intended to ensure that the law and regulations governing pre-trial discovery and disclosure of classified information are adhered to, and to further ensure that privileged information from a detainee/patient is not inadvertently disclosed to the prosecution. According to DOD officials, the three events that could trigger the medical record production process are (1) the prosecutor drafts a request for detainee medical records in order to prepare for trial; (2) the defense counsel submits a discovery request to the prosecutor; or (3) a military commission's judge issues an order to produce detainee medical records. Figure 2 describes DOD's medical records release process for producing detainee medical records as part of military commissions' proceedings.

**Figure 2: Department of Defense (DOD) Medical Records Release Process as Part of Military Commissions' Proceedings**



Source: GAO analysis of Department of Defense guidance. | GAO-22-105810

**Text of Figure 2: Department of Defense (DOD) Medical Records Release Process as Part of Military Commissions' Proceedings**

- 1) Pre-steps for medical record production process:
  - a) Prosecutor drafts a request for detainee medical records in order to prepare for trial.
  - b) Detainee's defense counsel submits a discovery request to prosecutor.
  - c) The military commission issues an order to produce medical records in discovery.
  - d) Medical record production process
- 2) Medical record production process:
  - a) Prosecutor submits a monthly RFI to USSOUTHCOM for validation.

- b) USSOUTHCOM validates, approves, and assigns an RFI number.
- c) JTF-GTMO LSS receives request and coordinates production of records through JTF-GTMO JMG.
- d) JMG provides the original medical records to JTF-GTMO LSS.
- e) JTF-GTMO LSS provides the original medical records to prosecutor who makes a copy of any new material that was placed in record since last production and returns to JTF-GTMO LSS.
- f) Prosecutor initiates classification review through SC/DRT.
- g) SC/DRT returns record to prosecutor who produces it via discovery process.

Source: GAO analysis of Department of Defense guidance. | GAO-22-105810

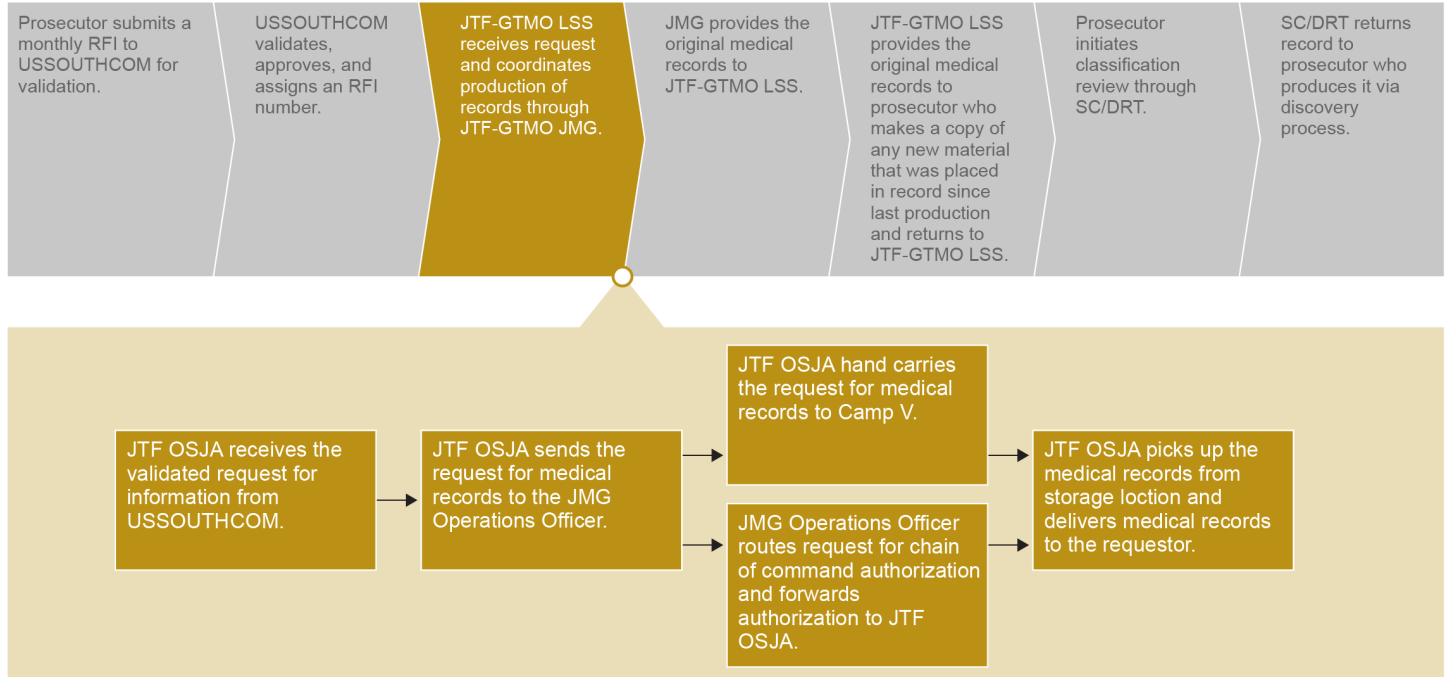
According to DOD officials, when the prosecution requests detainee medical records for the purposes of a military commission, this initiates a process of an internal request for information within JTF-GTMO. Once the process of the internal request for information is complete, the copies of a detainee's medical records will be provided to the prosecution, which is responsible for ensuring that the records are reviewed by the Security Classification/Declassification Review Team (SC/DRT) and redacted, as appropriate.<sup>20</sup> The medical records then are provided to the defense. This process, including JTF-GTMO's internal process for producing medical records as part of military commissions' proceedings, is shown below in figure 3.

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<sup>20</sup>The SC/DRT consists of the original classification authorities from DOD components and commands. This neutral entity has the authority to classify and declassify information produced by DOD, to designate information produced by DOD that, pursuant to Military Commission Rules of Evidence 505 and 506 should be protected from public or other unauthorized disclosure and to authorize the use of such information in legal proceedings.

**Figure 3: Department of Defense (DOD) Medical Records Production Process**

**Medical record production process:**



JMG	Joint Medical Group
JTF-GTMO	Joint Task Force Guantanamo
JTF OSJA	Joint Task Force Office of Staff Judge Advocate
JTF-GTMO LSS	Joint Task Force Guantanamo Litigation Support Section
RFI	Request for information
SC/DRT	Security Classification/Declassification Review Team
USSOUTHCOM	U.S. Southern Command

Source: GAO analysis of Department of Defense guidance. | GAO-22-105810

**Text of Figure 3: Department of Defense (DOD) Medical Records Production Process**

- 1) Medical record production process:
  - a) Step 3: JTF-GTMO LSS receives request and coordinates production of records through JTF-GTMO JMG.
    - i) JTF OSJA receives the validated request for information from USSOUTHCOM.
    - ii) JTF OSJA sends the request for medical records to the JMG Operations Officer.



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- (1) JTF OSJA hand carries the request for medical records to Camp V.
  - (2) JMG Operations Officer routes request for chain of command authorization and forwards authorization to JTF OSJA.
  - iii) JTF OSJA picks up the medical records from storage location and delivers medical records to the requestor.

Source: GAO analysis of Department of Defense guidance. | GAO-22-105810

According to DOD officials, each prosecution team maintains trackers on what evidence, including detainee medical records, has been provided to the defense during the course of military commissions' proceedings. According to detainee defense counsel teams, they also track what detainee medical records they have received. These trackers can be used to identify gaps in medical records, where the records are in the process of being produced to the defense, and how long it takes the SC/DRT to declassify medical records for them to be produced to the defense counsel. According to DOD officials, detainee medical records are usually produced to the defense counsel within 2 to 3 weeks of the initial request. However, according to DOD officials, delays in production can and do occur. These can be caused by a number of factors, such as the volume and classification level of the material and disruptions in access and travel to GTMO caused by the COVID-19 pandemic, according to DOD officials.

For example, according to Mr. Ammar al-Baluchi's defense team (aka Ali Abdul Aziz Ali), they receive detainee medical records on a rolling basis approximately every 30 days and timely access to detainee medical records has improved in recent years. According to Mr. Abd Al Hadi Al-Iraqi's defense team, they have experienced challenges with timely access to detainee medical records and often experienced a 3 to 4 month delay in receiving their client's medical records. For example, according to the defense team, they did not receive any of their client's medical records for 2022 until April of 2022 and the records they received contained gaps. Officials from the prosecution acknowledged that there have been occasional gaps in the detainee medical records. According to those officials, when they are made aware of gaps, they will undertake efforts to ensure that any missing material is located and provided to the defense counsel.

There has been at least one military commission case in which the defense filed a motion to expedite the delivery of detainee medical

records. On September 16, 2021, the defense filed an emergency motion on behalf of Mr. Abd Al Hadi Al-Iraqi to compel the expedited production of discovery of his medical records stemming from concerns that the accused's medical condition was deteriorating.<sup>21</sup> In this case, the request for the expedited discovery of medical records was granted by the military judge.

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## DOD Has Taken Steps to Declassify Detainee Medical Records

Under current procedures, detainee medical records are kept at a variety of classification levels and the declassification of those medical records is an essential step in producing detainee medical records as part of military commissions' proceedings. Specifically, for those detainees still at NSGB, the high value detainees' (HVDs)<sup>22</sup> medical records can be classified at a variety of classification levels up to the Top Secret (TS), Not Releasable to Foreign Nationals (NOFORN), Originator Controlled (ORCON) level or be marked at the Controlled Unclassified Information (CUI) level.<sup>23</sup> Non-high value detainees' (non-HVD) medical records can also range in classification level and can be classified up to the Secret level or be marked CUI, according to DOD officials. The classification of detainee medical records largely depends on what kind of information is contained in the records. These records are all stored in paper form at NSGB, according to DOD officials.

According to DOD guidance, DOD has an obligation to maintain accurate and complete medical records on all of the detainees at NSGB.<sup>24</sup> Additionally, according to DOD guidance, health care personnel at NSGB have an obligation to safeguard patient's confidences and privacy as well

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<sup>21</sup>United States versus Abd Al Hadi Al-Iraqi, Emergency Defense Motion for Appropriate Relief Related to the Accused Medical Condition, AE-194C corrected copy (Sept. 24, 2021).

<sup>22</sup>As of March 2022, there were 15 high value detainees residing at NSGB and 22 non-high value detainees.

<sup>23</sup>According to DOD, the classification and handling of detainee medical records is conducted in accordance with Exec. Order No. 13526 *Classified National Security Information*, 75 Fed. Reg. 707 (Dec. 29, 2009).

<sup>24</sup>Department of Defense Instruction 2310.08, *Medical Program Support for Detainee Operations*, (Sept. 5, 2019).

as the confidentiality of their information according to the standards of the law.

The 2011 Regulation for Trial by Military Commission states that the prosecution should work with the original classification authorities of the evidence that may be used at trial to ensure that the evidence is declassified to the fullest extent possible, consistent with the requirements of national security.<sup>25</sup> Also, classified evidence must be protected and the regulation specifically prohibits the military judge from ordering the release of classified information to any person not authorized to receive such information.

The 2011 Regulation for Trial by Military Commission lays out the process by which classified evidence, such as detainee medical records, is to be released for military commissions' proceedings.<sup>26</sup> Upon receiving a copy of the detainee's medical records from the JTF-GTMO Litigation Support Section, the prosecution will submit all documents or other materials containing classified or protected information either intended for use in the litigation by the prosecution, or to be provided to the defense counsel in the discovery process to the SC/DRT. The submission goes to the SC/DRT or to the appropriate original classification authority at any other relevant non-DOD federal department or agency, such as the CIA, for classification review and use authorization. Also, the prosecution is required to work with the SC/DRT or the appropriate original classification authorities for any other relevant non-DOD federal departments or agencies to ensure that evidence that may be used at trial is declassified to the maximum extent possible, consistent with the requirements of national security.

Until the documents submitted to the SC/DRT and any other relevant non-DOD federal department or agency are reviewed for classification, they may not be used in any aspect of the military commissions' proceeding. The SC/DRT process can take around 21 days. However, according to DOD officials, members of the SC/DRT are significantly overworked trying to declassify records in support of the military commissions' process. According to DOD officials, the speed at which the SC/DRT's review is conducted depends upon the volume of work the SC/DRT has as well as the volume of records they have to review for a case. After the SC/DRT's review is complete, the documents are then

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<sup>25</sup>Department of Defense, *Regulation for Trial by Military Commission* (Nov. 6, 2011).

<sup>26</sup>Department of Defense, *Regulation for Trial by Military Commission* (Nov. 6, 2011).

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returned to the prosecution, which then produces them as part of the discovery process. According to a DOD official, as of April 12, 2022, the prosecution had provided a total of 50,258 pages of medical records to the defense teams in the 10 active military commission cases.

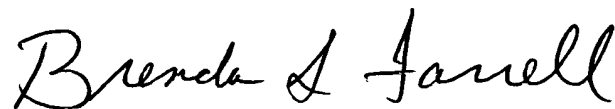
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## Agency Comments

We provided a draft of this report to DOD for review and comment. DOD provided technical comments, which we incorporated as appropriate.

We are sending copies of this report to the appropriate congressional committees and the Secretary of Defense. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-3604 or [farrellb@gao.gov](mailto:farrellb@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix I.



Brenda S. Farrell  
Director, Defense Capabilities and Management

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## GAO Contact

# Appendix I: GAO Contact and Staff Acknowledgments

Brenda S. Farrell at (202) 512-3604 or [farrellb@gao.gov](mailto:farrellb@gao.gov)

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## Staff Acknowledgments

In addition to the contact named above, Marcus Oliver (Assistant Director), Emily Martin (Analyst-in-Charge), Lori Atkinson, Tracy Barnes, Karen Doran, Jessica Farb, Michele Fejfar, Amie Lesser, Jeffrey Mayhew, Patrick Netherclift, and Richard Powelson made key contributions to this report.

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