

INTRODUCTION: GUANTANAMO BAY: WHAT NEXT?

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In the spring of 2013, experts and policy-makers from around the country gathered at Southern Illinois University School of Law to examine Guantanamo Bay and the future of U.S. detainee policy.¹ The event was remarkable not only because of the varying and unique perspectives the panelists and moderators brought to the discussion, but because the symposium occurred just as the United States was preparing to both renew its efforts to try detainee suspects and to close the facility in which some had been held for over a decade. This volume of the *Southern Illinois University Law Journal* is devoted to the topic of that symposium and contains pieces from many of those who participated. This collection of experiences, perspectives, observations, and legal analysis will most certainly become a centerpiece of research on Guantanamo Bay and serve as a resource as academics, policy-makers, and the country ask what the future will hold for those detained on this once discreet strip of land in the Caribbean Sea.

Guantanamo Bay has a fascinating and unusual history in its own right, apart from it being the location of the U.S. detention facility in the “war on terrorism.” The forty-five square mile track of land in the Caribbean was originally leased from Cuba by the United States in 1903 as a refueling station for the Navy—a vital role it retains today.² According to the Navy Installations Command website, Naval Station Guantanamo Bay “is on the front lines for regional security in the Caribbean area. The base supports the ability of U.S. Navy and Coast Guard ships, along with allied nation ships to operate in the Caribbean area by providing contingency and quality logistical support with superior services and facilities.”³

During my visit to Guantanamo Bay in the spring of 2012 with then Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, William Lietzau, I was surprised to learn of the operational diversity

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1. See Symposium, *Guantanamo Bay: What Next?*, 37 S. ILL. U. L.J. 487 (2013); see also Matt Daray, *Guantanamo Bay's Events to Affect U.S. History*, DAILY EGYPTIAN, Feb. 24, 2013; Pete Rosenbery, *Symposium to Examine Guantanamo Bays Future*, SIU NEWSROOM, Feb. 18, 2013.
2. See *Naval Station Guantanamo Bay: History*, CNIC, available at http://www.cnic.navy.mil/regions/cnrse/installations/ns_guantanamo_bay/about/history.html (last visited Oct. 11, 2013).
3. See *Naval Station Guantanamo Bay: Installation Information*, CNIC, available at http://www.cnic.navy.mil/regions/cnrse/installations/ns_guantanamo_bay.html (last visited Oct. 11, 2013).

of the base. While my focus on this isolated plot of land had always been with regards to its detention facilities, I had not appreciated the significance of the base's primary mission as a forward operating position for the United States in the region. Whether it be lending assistance to refugees, helping to intercept narcotics shipments, or providing refueling of military vessels, Guantanamo Bay is much more than the detention facilities that have made it so infamous around the world. As I toured the base, I never ceased to be amazed as we drove past the shopping center, the movie theater, the McDonald's, the school, the football field, and many other signs and symbols that reminded me that, despite being hundreds of miles from home, I was surrounded by American influences and ideals. And yet, when my van traveled over the hills and past the check-points separating the detention facilities from the majority of the base and its inhabitants, all that I had seen seemed to wash away and my focus became unflinchingly narrow once again. And, of course, this is what happened on an international level after 2001. All that Guantanamo Bay has been historically and remains today is overshadowed by the issues that this symposium addresses.

For the last decade, despite the multiplicity of the base's operations and the locations strategic importance to a broad range of missions, it has come to symbolize only one issue: terrorist detention during America's "war on terrorism." This new and narrow view of Guantanamo Bay began in 2001 when President George W. Bush ordered the creation of military commissions in response to the terrorist attacks of September 11th.⁴ By early 2002, Guantanamo Bay had become the selected site for the detention of terrorist suspects being held in preparation for trial before military commissions. Over the next decade, few cases would reach finality and, while many of those detained at Guantanamo Bay were eventually released or transferred, a significant number of detainees remain there today awaiting resolution through the military commission process or, perhaps, some other mechanism for release.

Adding to the complexity of determining the future of Guantanamo Bay, President Barack Obama ordered the facility closed upon entering office in 2009.⁵ In the Order, the President stated, "The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order."⁶ Of course, that closure never occurred and, today, Guantanamo Bay remains the site of a detention facility for terrorist suspects. In 2013, President

4. See Press Release, White House, President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), *available at* <http://www.mc.mil/Portals/0/Military%20Order%20of%20Nov%2013,%202001.pdf>.

5. See Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

6. *Id.* at 4898.

Obama reiterated his commitment to closing the detention facilities, stating, “History will cast a harsh judgment on this aspect of our fight against terrorism and those of us who fail to end it.”⁷

Within this complex history, this symposium and its authors offer the reader unique and detailed views inside Guantanamo Bay and examine not only its past, but its future.

Professor Eric Jensen begins by considering the justifications offered for detaining terrorist suspects at Guantanamo Bay.⁸ In particular, he examines the concepts of “release” and “repatriation” under international law and examines the potential impact of statements by President Obama that the war in Afghanistan will be over by the end of 2014. Importantly, Professor Jensen’s piece carefully considers the differences between Taliban and al-Qaeda detainees and the possibility that an end to the war in Afghanistan does not mean that there has been an end to hostilities in the wider conflict.

Professor Cindy Buys then offers the reader insights into a particular detention story to probe what role international law and international bodies should play in the Guantanamo debate.⁹ The story she describes is that of Djamel Ameziane, an individual who petitioned the Inter-American Commission on Human Rights for his release from Guantanamo Bay. His story is one that both personalizes the issues raised by the continued detention of prisoners at Guantanamo Bay and challenges one to consider the role of international law norms in analyzing American detention policy.

Professor Michael Strauss next considers whether Cuba might be liable under international law for wrongdoings committed at Guantanamo Bay because the land on which the base is housed remains part of that nation’s sovereign territory.¹⁰ In examining this question, he considers both the potential liability that might attach to Cuba and the ramifications of this analysis on other territorial leasing agreements, including military bases and “black sites” used for interrogations or renditions.

Professor David Frakt examines whether military commissions under the Military Commissions Act of 2009 (MCA 2009) satisfy the requirements of international law, particularly international rule of law and

7. See Husna Haq, *Obama Vows Again to Close Guantanamo: What are the Sticking Points?*, CHRISTIAN SCI. MONITOR (May 24, 2013), available at <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2013/0524/Obama-vows-again-to-close-Guantanamo-What-are-the-sticking-points-video>.

8. Eric Jensen, *Guantanamo and the End of Hostilities*, 37 S. ILL. U. L.J. 491 (2013).

9. Cindy Buys, *The Role of International Law and Institutions in U.S. Detention Policy and Practices*, 37 S. ILL. U. L.J. 513 (2013).

10. Michael Strauss, *Cuba and State Responsibility for Human Rights at Guantanamo Bay*, 37 S. ILL. U. L.J. 533 (2013).

fair trial standards.¹¹ In conducting his analysis, Professor Frakt both introduces the reader to the types of international laws that are applicable to the military commissions and examines whether the trials at Guantanamo Bay are structured and administered in conformity with these requirements.

Professor Benjamin Davis offers his personal observations of Guantanamo Bay after having observed the military commissions both remotely from Fort Meade, Maryland, and as an observer at Camp Justice in Cuba.¹² In his article, Professor Davis describes what he perceives as a series of dualities at Guantanamo Bay, such as the beaches and the detention centers and the “on-screen” court proceedings and the “off-screen” interrogations. Along with examining these dualities, he offers a vision of what he believes Guantanamo Bay should be in the future in light of what he observed and what he described as the American idea of Guantanamo.

Finally, Professor Christopher Behan examines the role of classified information during the Guantanamo Bay military commission trials.¹³ In particular, he considers the MCA 2009 and the system established by that Act for utilizing classified information during trial. Despite what he describes as a “superior framework” in the MCA 2009 for dealing with these issues, Professor Behan goes on to identify three reasons the procedures will likely fail when applied to the military commissions. Through his analysis, one learns not only of the legal complexities of dealing with classified information, but also of the practical implications of operating within the confines of a military commission.

Through each of the articles contained in this symposium, the reader is introduced to the challenges, confusions, and captivations that are Guantanamo Bay. For over a decade the world community has grappled with how to unravel this complex situation. The pieces in this volume will be invaluable as that inquiry continues and we contemplate not only where we have been over the last ten years, but where we are going next with Guantanamo Bay.

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11. David Frakt, *Applying International Fair Trial Standards to the Military Commissions of Guantanamo*, 37 S. ILL. U. L.J. 551 (2013).
 12. Benjamin Davis, *The 9/11 Military Commission Motion Hearings: An Ordinary Citizen Looks at Comparative Legitimacy*, 37 S. ILL. U. L.J. 599 (2013).
 13. Christopher Behan, *Military Commissions and the Conundrum of Classified Evidence: A Semi-Panglossian Solution*, 37 S. ILL. U. L.J. 643 (2013).