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Abstract

On January 22, 2009, newly inaugurated President Barack Obama implemented Executive Order 13492. The order refers to the legal disposition of detainees at the Guantánamo Bay Naval Base and the termination of the detention center. The Executive Order lists five possible options to close Guantánamo Bay and to otherwise try and place current prisoners elsewhere: prosecution under military law, prosecution under federal law, permanent detainment, deportation and release. Still, Guantánamo Bay remains open. Guantánamo detainees exist in a legal limbo without formal charges and trial. Executive Order 13492 was created to place them elsewhere and close the detention center.

Keywords

Executive Order 13492, Guantanamo Bay, legal disposition, termination

Executive Order 13492: Legal Borderlands

*Laura Diaz***Abstract**

On January 22, 2009, newly inaugurated President Barack Obama implemented Executive Order 13492. The order refers to the legal disposition of detainees at the Guantánamo Bay Naval Base and the termination of the detention center. The Executive Order lists five possible options to close Guantánamo Bay and to otherwise try and place current prisoners elsewhere: prosecution under military law, prosecution under federal law, permanent detainment, deportation and release. Still, Guantánamo Bay remains open. Guantánamo detainees exist in a legal limbo without formal charges and trial. Executive Order 13492 was created to place them elsewhere and close the detention center.

VOLUME IV • 2016

Introduction

Link suggests, “no person should be subject to indefinite detention without trial” (Serrano, 2015). Indeed, the constitutional and human rights to due process represents one of the oldest, most central rights concepts in all of Western history, dating back to the Magna Carta in 1215 (Armaline, Purkayastha, & Glasberg, 2011). Yet today, Guantánamo Bay represents a direct challenge to the notion of due process and the practice of fundamental civil and political rights in the contemporary world. As of March 2015, approximately 91 detainees remain inside the Guantánamo Bay Naval Base (ACLU, 2015). The detainees should be charged or released, but instead they are kept in a detention center without properly defined legal rights. The detention of adults and children at Guantánamo Bay, often indefinitely without charge or trial, amounts to massive human rights violations according to the Universal Declaration of Human Rights (UDHR) and the legally binding International Covenant on Civil and Political Rights (ICCPR). For instance, as it is now known from the recent Congressional Intelligence Committee Report on Torture (Feinstein, 2014), detainees are commonly subject to torture, cruel and inhumane treatment, not recognized as a persons under the law, and remain detained indefinitely. Specifically, these common practices violate constitutional rights, such as writ of *habeas corpus* and due process. They also violate human rights such as Article 7 in the ICCPR stating, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation” (ICCPR, 1966, Art. 7). The objective of this paper is to detail the history and current status of

THEMIS

Executive Order 13492 and argue for its implementation on the basis of international human rights law and standards.

History

The 45 square mile site of Guantánamo Bay, Cuba has not always been controlled by the United States, nor used as a detention facility. In 1494, Christopher Columbus landed in Guantánamo Bay in search of gold. Although he was unsuccessful, the port was conquered and opened up for the British Navy. American interest in Guantánamo Bay grew around 1898 during the Spanish American War (Packard, 2013). In 1903, President Roosevelt signed a lease with Cuba's government stipulating, "the right to use and occupy the waters adjacent to said areas of land and water... and generally to do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose" (Sierra, 2005). In 1906, prior to the second US military intervention in Cuba, a new lease was signed, under which the US would pay \$2000 in rent per year, giving the US Navy authority to occupy the bay. In addition, all Cuban fugitives fleeing into the US would be returned to the Cuban government (Packard, 2013). In 1934, former Cuban president Fulgencio Batista renewed the lease with an additional provision, stating that the lease could only be terminated under mutual agreement. That provision was later challenged by Fidel Castro and followed by the 1959 Cuban Revolution (Fetinin, 2008). After the revolution triumphed, Cuba requested that the US relinquish control of Guantánamo Bay to the Cuban government. Rather than relinquish control, the US banned all entry of Cuban soldiers into Guantánamo Bay. This conflict refers back to the agreement between President Batista and the US stating, "until the two contracting parties agree to the

VOLUME IV • 2016

modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval stations...the stipulations of that agreement with regard to the naval station of Guantánamo shall continue in effect” (Sierra, 2005).

In 1992, the Bush Administration commented that all detainees held inside the Guantánamo Bay detention center are not entitled to US rights (Sierra, 2005). It is a direct violation of Article 26 under the ICCPR stating, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law” (ICCPR, 1966, Art. 26). Around 1991, the naval base was used as a prison, and by 1994, there were 30,000 Cubans and 20,000 Haitians held at the base for an estimated annual cost of \$1,000,000. In 2002, the US Naval Station at Guantánamo Bay (GTMO) started two new missions: “(1) creating and operating a detention facility for enemy combatants selected for transfer from other detention locations; and (2) creating and operating an intelligence collection program to exploit those detainees” (Davis, 2010, p. 119). GTMO’s new missions provoked arguments against the detention facility and researchers claim the mixture of two distinct missions into one detention facility obscures the difference between command and control and will generate tension and detrimental consequences as a result (Davis, 2010).

Over a decade has passed since Guantánamo Bay incarcerated its first prisoners from the Afghanistan war. Since the prison officially opened in 2001, there has been a total of 779 prisoners in what the ACLU considers an “island outside the law” (ACLU, 2015). Today, 91 men remain imprisoned; 48 of whom have been cleared for release and 27 of whom the US has designated for indefinite detention without charge or trial

THEMIS

(ACLU, 2015). It costs the US a total of \$152 million per year to keep imprisoned the 48 men cleared for release. In contrast, it would only cost \$1.8 million to detain those 48 men inside a US federal prison.

Executive Order 13492

The United States has a long history of disputes and political discourse regarding the legal status of specific residents. However, the detainees at Guantánamo Bay have brought an entirely new and different conflict concerning legal rights and notions of sovereign territory/citizenship. How and under what legal framework do we legally dispose of these detainees in order to close the Guantánamo Bay Detention Center? The United States' boundaries are not physically marked. These boundaries are constructed in law, not only through formal legal controls upon entry and exit, but also through the construction of the rights of citizenship and non-citizenship, thus, creating three forms of legal status: lack of rights, alien, and ulghers. Guantánamo detainees are considered ulghers, or stateless enemy combatants without a passport, birth certificate, or rights; in other words, they exist in a legal limbo (Dudziak & Volpp, 2005).

In reference to Executive Order 13492, three sections address the aforementioned issues. Section 2 contains facts regarding the detainees at Guantánamo Bay. In Section 3, the Obama Administration wrote a plan of action to abrogate Guantánamo Bay. In Section 4, the Obama Administration explains available options for the disposition of the prisoners. President Obama issued the order in hopes that “Guantanamo’s legacy of illegal detention and ill-treatment could be brought to end in a manner that would restore confidence in American

VOLUME IV • 2016

justice and in the U.S. as a country committed to upholding the rule of law” (Chaffee, 2010, p. 187). The following three subsections will outline sections two, three, and four of Executive Order 13492 for a better understanding of the reasons why Guantánamo’s detention center remains open.

Section 2 of Executive Order 13492 states that “over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo” (Executive Order 13492, p. 204). Guantánamo Bay prisoners detained as suspected terrorists and enemy combatants are kept without the right to trial, an attorney, or any protection from torture—a non-derogable right under international law. Some have been detained at the facility from four to six years in defiance of the Department of Defense declaring them eligible for transfer or release. Detainees at Guantánamo Bay are denied the constitutional right of *habeas corpus*—the right of a person in custody (with charges) to be brought in front of a judge. Instead, they are imprisoned without knowing their charges and treated poorly under the cruel supervision of prison guards (Executive Order 13492). For example, Abu Zubaydah was hospitalized, placed on life support, and unable to speak. The CIA destroyed intelligence reports based on his interrogations. Despite his need for medical care, Abu Zubaydah was placed in isolation for a total of 47 days (Feinstein, 2015). Zubaydah, like many others, was subject to torture without a status review of his detention. According to Pearlstein (2012), the remaining Guantánamo detainees are entitled to periodic administration review to assess their continued detention.

Section 3 of Executive Order 13492 details options to close Guantánamo Bay. It states, “the Secretary of Defense, the

THEMIS

Secretary of State, and, as appropriate, other review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible” (Executive Order 13492, p. 205). Obama’s goal was to close down the detention center within one year of signing the order. Yet, there remains approximately 91 inmates to review before closing the prison. The detainees’ options listed in Executive Order 13492 are: “They shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States” (Executive Order 13492, p. 205). However, a decision like this is not easily made because of their classification as ulghers (Executive Order 13492).

Section 4 leads to the discussion of placement of the detainees and the “Immediate Review of All Guantánamo Detentions” (Executive Order 13492, p. 205). The review will be conducted by the Attorney General, the Secretaries of Defense, State, and Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. The reviewers will determine which detainees have the option of transfer or release. Those not eligible for release or transfer will be tried under a court of law for their offenses. Detainees not placed under the possibilities Obama suggests will be left to the review of national security and foreign policy to decide. It is difficult to determine under which law and jurisdiction the detainees will be tried, even though this matter is defined in the context of borders of identity and borders of territory (Executive Order 13492). Because of the prisoners’ statelessness, it requires more actions than options drafted onto an order to close down the facilities.

VOLUME IV • 2016

Analysis

Legal Disposition

The term legal disposition refers to the disposal of a problem. In relation to this paper, it is the disposal of the detainees at Guantánamo Bay to achieve complete abolition of the detention facilities. Dudziak and Volpp (2012) suggest the term disposition to be used and understood both as a status and practice, through the hardships of a non-citizen. This interpretation of the detainees relates to the political dispute of their rights. As explained in the Executive Order, “The individuals currently detained at Guantánamo have the constitutional privilege of the writ of *habeas corpus*. Most of these individuals have filed petitions for a writ of *habeas corpus* in Federal court challenging the lawfulness of their detention” (Executive Order 13492, p. 204). Meaning, prisoners have the right to be tried in court before being disposed of. The Department of Defense treats Guantánamo detainees or stateless individuals as enemy combatants (Executive Order 13492). According to The United Nations High Commissioner for Refugees (UNHCR), “The international legal definition of a stateless person is set out in Article 1 of the 1954 Convention relating to the Status of Stateless Persons, which defines a stateless person as ‘a person who is not considered as a national by any State under the operation of its law’” (UNHCR, 2015a). Causes of statelessness include: “Gaps in a country’s legal regime relating to nationality and the emergence of new states, changes in borders, loss or deprivation of nationality, and criminal activity” (UNHCR, 2015b). Stateless individuals have no passport, birth certificate, or rights. Without an identity, they belong nowhere. Dudziak and Volpp (2012) wrote, “if one possesses formal citizenship, one’s state will enforce one’s

THEMIS

rights, and that it is the lack of formal citizenship that has produced the nightmare of statelessness” (p. 601). Unfortunately, this label has created a dilemma in regards to the processing, release, and placement of inmates and the closure of facilities.

The Executive Order offers five options for the legal processing of Guantánamo detainees:

It is in the interests of the United States that the executive branch undertakes a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice (Executive Order 13492, p. 204).

Unfortunately, six years after releasing Executive Order 13492, the prison remains open. Kaplan (2005) wrote, “it has become increasingly clear that, more than anomaly, Guantánamo represents the start of the ‘road to Abu Ghraib,’” a prison notorious for torture, execution and horrid living conditions (p. 831). There are still hundreds of detainees undergoing ill and inhumane treatment because of their legal status. This discourse introduces the idea of abolition and its possibility for Guantánamo Bay.

Territorial Ambiguity

Before starting a discussion regarding the permanent closure of Guantánamo Bay, it is imperative to understand where the US naval base detention center at Guantánamo Bay is located. According to Kaplan (2005), “Guantánamo lies at the heart of the American Empire” (p. 832). Kaplan (2005) argues against Ginsburg who states, “Guantánamo is a legal black hole, a legal limbo, a prison beyond the law, a permanent United

VOLUME IV • 2016

States penal colony floating in another world” (p. 831). Kaplan (2005) believes it takes a great deal of legal construction to create a place such as Guantánamo Bay. Kaplan (2005) refers to Chief Justice Melville Weston Fuller later in the article; “The ‘occult meaning’ of the ‘unincorporated territory,’ he argued, gave congress the unrestricted power to keep any newly acquired territory ‘like a disembodied shade in an intermediate state of ambiguous existence for an indefinite period’” (Fuller, as cited in Kaplan, 2005, p. 842). It has been more than six years since Obama signed Executive Order 13492 and there has been no additional effort to shut down the prison.

It is not legally possible to close down a detention center filled with prisoners labeled “enemy combatants” (Kaplan, 2005). They cannot be prosecuted under military law since they have been continuously tortured at Guantánamo Bay. Additionally, they are not soldiers and they cannot be treated as such to be protected and prosecuted under military law. As Kaplan (2005) mentioned, they are stateless individuals. There is no information, or file, on some of the detainees at Guantánamo Bay. Without a file or charges, there is no simple method to place those detainees elsewhere. The constitution does not create any limitations regarding noncitizens outside of American soil (Kaplan, 2005). Meaning, Guantánamo detainees should be protected under the constitution. Guantánamo Bay prisoners are treated inhumanely. Even though the US government cannot trust them if they are released or returned to their home country, their inhuman treatment is not warranted. Therefore, it is beyond the bounds of possibility to reach an agreement on placement of the prisoners.

Theoretical Insight

Guantánamo Bay’s detention center is characterized as a

THEMIS

symbol of the Global War on Terror conducted by the US (Pahl, 2007). Essentially the US utilized Guantánamo Bay to wage a Global War on Terror to assert global authority and detain people under US custody, regardless of the place in which they were captured. The US demonstrated a complete disregard for international laws and domestic laws in other countries. As a result, it caused outrage in the international community (Chaffee, 2010). According to Davis (2010), “The circumstances surrounding how the detainees were captured, detained, and interrogated at secret CIA facilities have been and continue to be vigorously debated” (p. 117). Immediately after the September 11 attack on the United States, the decision was made to transfer detainees from the Global War on Terror to Guantánamo Bay and exploit them “for intelligence purposes in a controlled environment away from the battlefield and at a place some senior administration officials mistakenly believed was outside the reach of the federal courts” (Davis, 2010, p. 119). Former President Bush asserts that high value detainees were transferred from the CIA to Guantánamo in September of 2006 for the sole purpose of prosecution and criminal accountability. The intelligence group inside Guantánamo Bay had already been in place for over four years prior to the transfer of the high value detainees (Davis, 2010).

In February 2008, a US Court of Appeals for the D.C. Circuit maintained the requirement that the government reveal any and all extensive information to the courts for the reviews determining the status of detainees. Their status was to be determined by the Detainee Treatment Act of 2005. Although the courts seem to be eager to engage in trying the cases of GTMO detainees, the military is against this request and claims that it poses a great danger to national security (Crook, ed., 2008).

VOLUME IV • 2016

Since Obama came into office, the discourse on the continued detention at GTMO has become heated. However, there has not been much action from Congress. Americans argue about the “enhanced efforts” used in its premises, yet no political party wants the detainees in their state (inside the United States). Recent polls suggest that Americans do not want Guantánamo to close. While Guantánamo remains open, the US has a higher possibility to keep their global authority on the Global War on Terror; this is partly the reason why it remains open. Additionally, what should the government do with those detainees? We cannot hold them forever in a prison without any charges and there is not sufficient evidence to take them to trial; if there was, the evidence is so tainted that it would not be useful in trial (“No trial,” 2013).

Impacts

Since the US started detaining prisoners of war as a result of global counterterrorism operations, it has spawned over 200 lawsuits, six United States Supreme Court decisions, four legislations, seven executive orders, over 200 books, and approximately 231 law review articles during the span of two presidential administrations (Pearlstein, 2012). A variety of US programs have elaborated on the growing concern of massive human rights violations. Hunger strikes is a very controversial topic in detention facilities globally. It can be assumed that the frustration and unrest are the sole causes of hunger strikes inside of GTMO. According to a report on Guantánamo detainees by Seton Hall University School of Law, “eight years is the longest hunger strike by a man at Guantánamo. It’s still going” (ACLU, 2015). The situation reached the extent of near death, resolved by force-feeding the inmates. As a result, there is a recent hunger strike lawsuit against the US Justice Department. The inmate,

THEMIS

Tariq Ba Odah, seeks release from the detention center. He has been held since 2002 without any charges and was cleared for transfer in 2010. Odah has been on a hunger strike for nearly eight years and weighs approximately 74.5 pounds. He is kept in an isolation unit and is force fed daily. The State Department wants to stop fighting the motion and the Justice Department is opposed to giving the prisoners any legal grounds (Bravin, 2015). With enough media attention on this lawsuit, there could potentially be some collateral effects amongst other detainees inside of Guantánamo, as well as prisoners inside other institutions globally (Bravin, 2015). Odah is one of thousands in global institutions that fight for their freedom on a daily basis through hunger strikes.

Until the US decides the extent of the legal rights of GTMO detainees, hunger strikes are one of the few options the inmates have to express their suffering, and to inform those outside the prison walls. Guantánamo Bay has released some detainees to their home countries. For example, Shaker Aamer was detained in Guantánamo Bay without formal charges for 13 years, from February 2002 until October 30, 2015. Widney Brown, from the US Human Rights Organization, stated on Democracy Now, that Aamer suffered a prolonged arbitrary detention without due process rights. Aamer was denied his rights under Article 9 in the UDHR, which states, “no one shall be subjected to arbitrary arrest, detention or exile” (UDHR, 1948, Art. 9).

Aamer was cleared for release in 2007 and again in 2009. Unfortunately, the Pentagon refused to release him and detained him for an additional eight years. Aamer is a British resident, but not a British citizen. Brown believes the US used his legal status as a pretext to keep him in captivity. During those

VOLUME IV • 2016

13 years, he was subjected to abuses including torture, beatings and sleep deprivation. At one point, he lost half his body weight while on a hunger strike (Goodman, 2015). According to Brown, this is a form of torture and the US violated both Odah and Aamer's human rights protected under Article 5 of the UDHR, which states, "no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment" (UDHR, 1948).

The continuation of GTMO will prolong the human rights violation of its detainees. We must end the US double standard on human rights. Simply keeping the facility open past the deadline on Executive Order 13492 is a prime example. First, the US military is violating the undeniable right of *habeas corpus* preceding the Magna Carta stating, "one who is restraining liberty to forthwith produce before the court the person who is in custody and to show cause why the liberty of that person is being restrained" (Habeas Corpus Act of 1679). Additionally, the military is violating due process, which is a right entitled to everyone as referenced in the constitution, stating "it forbids states from denying any person 'life, liberty or property, without due process of law' or to 'deny to any person within its jurisdiction the equal protection of the laws'" (US Const. Amend. XIV). Also, Article 9 from the ICCPR stating:

No one shall be subjected to arbitrary arrest or detention... Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him... Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...

THEMIS

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation (ICCPR, 1966, Art. 9).

The unsanitary living conditions and torture techniques violate Article 10 from the ICCPR stating, “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (ICCPR, 1966, Art. 10).

Conclusion

The Guantánamo Bay Naval Base is home to approximately 91 detainees, all of whom are kept in horrible conditions. The United States believes it is home to some of the worst enemy combatants. President Barack Obama proposed an Executive Order to abolish this inhumane treatment and to bring justice to all detainees in an appropriate manner. Yet, the government cannot reach an agreement with any of the five options the Obama Administration addressed in Executive Order 13492. The question is, what does the United States do with the 91 men remaining inside of Guantánamo? Worthington, an investigative journalist, states, “The remaining men should be given [refuge] in the US” (Hanley, 2011). The US claims that one in four men released from Guantánamo engage in subsequent terrorist acts. It is necessary to conduct further research on the potential options for GTMO detainees, considering the US cannot decide with the options given in Executive Order 13492. After six years, with minimal possibilities to shut down the prison, Guantánamo remains open and will continue to remain open unless further research or policies are conducted.

VOLUME IV • 2016

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THEMIS

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VOLUME IV • 2016

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THEMIS