

Foreword

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The U.S. detention center at Guantánamo Bay, Cuba, has become synonymous with arbitrary imprisonment, torture, and other abuses committed during the “war on terror.” Since January 2002, the United States has imprisoned more than 775 individuals at Guantánamo; 171 remain detained.¹ Following his inauguration, President Obama ordered Guantánamo’s closure, explaining that the prison has undermined America’s values and reputation, while likely creating more terrorists than it ever incapacitated.² A political backlash, however, stymied plans for the prison’s closure, and Guantánamo remains as controversial today as it was when the first prisoners were brought there almost a decade ago. This issue is dedicated to the symposium held last year at Seton Hall Law School entitled National Security Policy and the Role of Lawyering: Guantánamo and Beyond, which addressed important legal and ethical issues raised by Guantánamo.

The purpose of bringing prisoners to Guantánamo was to detain them outside the law. Although the United States exercises total, exclusive, and permanent control over the naval base, Guantánamo remains formally under Cuban sovereignty.³ For the architects of America’s “war on terror,” Guantánamo offered several attractions: a place over which the United States had total power but, due to an absence of sovereignty, could seek to evade accountability and judicial review. The Supreme Court ultimately rejected this argument, ruling

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¹ *The Detainees—The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees> (last visited Oct. 5, 2011).

² President Barack Obama, Remarks by the President on National Security at the National Archives (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

³ See Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 35-40 (2004).

that Guantánamo detainees have a right to habeas corpus.⁴ However, that right was established only after protracted legal battles, and, for years, the United States government succeeded in holding detainees at Guantánamo without access to lawyers or to the courts while employing highly coercive interrogation techniques that bordered on, and in some instances amounted to, torture.⁵

From its inception, secrecy pervaded virtually every aspect of Guantánamo. For years, the United States refused to disclose even the names of the men it was holding there, let alone the basis for their detention. It denied prisoners access to their families, conducted closed hearings to determine if prisoners were “enemy combatants,” and sought to conceal illegal interrogation methods by deeming them classified. Secrecy, in short, served as a means to avoid accountability, hide mistakes, and perpetuate the myth that, as Bush administration officials put it, Guantánamo housed “the worst of the worst.”⁶

Lawyers, journalists, and nongovernment organizations have fought during the last decade to lift the veil of secrecy from Guantánamo. None has been more important and influential in this truth-seeking process than the Seton Hall University School of Law’s Center for Policy and Research (the “Center”). In 2006, the Center published its first report, *Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*.⁷ Relying solely on publicly available documents, this groundbreaking report provided both a more complete picture of the detainees and a counter-narrative to the Bush administration’s claim that everyone at Guantánamo was a dangerous terrorist. The report finds, for example, that—*according to the government’s own data*—a large majority of detainees did not participate in combat against the United States, only eight percent of detainees were al Qaeda fighters, and more than half of the detainees had no definitive connection with al Qaeda.⁸ The report, which received wide media attention, had a far-reaching im-

⁴ See *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that Guantánamo detainees have a constitutional right to habeas corpus under the Suspension Clause); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that Guantánamo detainees have a right to habeas corpus under federal statute).

⁵ See generally JONATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM* (2011).

⁶ See Ken Ballen & Peter Bergen, *The Worst of the Worst?*, FOREIGN POL’Y (Oct. 20, 2008), http://www.foreignpolicy.com/articles/2008/10/19/the_worst_of_the_worst.

⁷ Mark Denbeaux et al., *Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*, 41 SETON HALL L. REV. 1211 (2011).

⁸ *Id.* at 1212, 1218.

pact, one that still informs public debate about Guantánamo today. The report helped alter the public perception of Guantánamo, underscoring the arbitrary and lawless nature of the detentions there.

Under the leadership of Professor Mark Denbeaux, the Center has since 2006 published seventeen Guantánamo reports, with more still anticipated. Six of these reports are included in this symposium edition. In addition to the first report profiling the detainees, the reports published here include *No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo*, which exposes the flaws in the military tribunals created by the Bush administration to avoid judicial review.⁹ As the report details, these tribunals—known as Combatant Status Review Tribunals (CSRTs)—denied detainees access to the evidence against them, routinely refused detainee requests to call witnesses, and provided “personal representatives” rather than attorneys who met only briefly with detainees and who, in some cases, advocated against them.¹⁰ By providing a comprehensive account of the CSRTs’ failings, the report helped lay the groundwork for the Supreme Court’s 2008 decision in *Boumediene v. Bush* which ordered prompt habeas corpus hearings for the detainees.¹¹

Another report, *The Guantánamo Detainees During Detention: Data From Defense Department Records*, challenges the government’s one-sided account of detainee behavior at Guantánamo.¹² The report concludes that, government statements to the contrary, detainees posed a much greater danger to themselves than to their guards.¹³ The report helped expose the government’s effort to characterize desperate actions by detainees, including attempted suicides, as “injurious self-manipulative behavior”¹⁴ to avoid its responsibility for deteriorating conditions at Guantánamo.

In *Profile of Released Guantánamo Detainees: The Government’s Story Then and Now*, the Center took on the important issue of detainee recidivism,¹⁵ which is often invoked to prevent the release of detainees

⁹ Mark Denbeaux et al., *No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo*, 41 SETON HALL L. REV. 1231 (2011).

¹⁰ *Id.* at 1235.

¹¹ 553 U.S. 723 (2008).

¹² Mark Denbeaux et al., *The Guantánamo Detainees During Detention: Data From Defense Department Records*, 41 SETON HALL L. REV. 1269 (2011).

¹³ *See id.* at 1269.

¹⁴ *See id.* at 1279–85.

¹⁵ Mark Denbeaux et al., *Profile of Released Guantánamo Detainees: The Government’s Story Then and Now*, 41 SETON HALL L. REV. 1287 (2011).

from Guantánamo. The report finds that a detainee's nationality, rather than a careful assessment of the evidence, was the critical factor in determining who was released from Guantánamo.¹⁶ It thus underscores the dangers an extrajudicial detention system like Guantánamo poses—not only to those it mistakenly sweeps up, but to America's counter-terrorism efforts as well.

Two other reports deal more specifically with interrogations at Guantánamo. *Captured on Tape: Interrogation and Videotaping of Detainees at Guantánamo* reveals that more than 24,000 interrogations have been conducted at Guantánamo, all of which were videotaped.¹⁷ While many tapes have been destroyed, the report notes that some may still exist, and urges that steps be taken to avoid their future destruction.¹⁸ *Torture Who Knew? An Analysis of the FBI and Department of Defense Reactions to Harsh Interrogation Methods at Guantánamo* finds that the Department of Defense effectively ignored FBI reports documenting hundreds of instances of improper conduct by Defense Department interrogators at Guantánamo.¹⁹ The report thus sheds light not only on the mistreatment of detainees at Guantánamo, but also on the continuing absence of accountability for those abuses.

The Center's reports have played a vital role in shaping the public's understanding of Guantánamo, providing a more complete and accurate picture of the prison. The reports also offer a model for law school student involvement, offering hundreds of students an opportunity to apply their research skills to some of the most pressing issues of the day. The significance of the Guantánamo reports, however, transcends their impact on current debate. The reports compile, preserve, and analyze a wealth of information about Guantánamo that will be studied by generations of scholars and researchers to come—information, that but for the reports, would likely be lost to history.

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Many issues addressed in the reports are also the subject of the articles and essays published alongside them in this issue. As the reports suggest, Guantánamo is replete with irony and contradiction. Among them, is the irony that being prosecuted for war crimes in a

¹⁶ *Id.* at 1291.

¹⁷ Mark Denbeaux et al., *Captured on Tape: Interrogation and Videotaping of Detainees at Guantánamo*, 41 SETON HALL L. REV. 1307, 1308–09 (2011).

¹⁸ *Id.* at 1315–16.

¹⁹ Mark Denbeaux et al., *Torture Who Knew? An Analysis of the FBI and Department of Defense Reactions to Harsh Interrogation Methods at Guantánamo*, 41 SETON HALL L. REV. 1319, 1336–37 (2011).

military commission can prove the fastest way to gain release from the detention center. Joshua L. Dratel's piece, *How I Learned to Stop Worrying and Love the Military Commissions*, explores this contradiction.²⁰ Dratel, a prominent criminal defense attorney, previously represented David Hicks, one of the first people charged before a military commission at Guantánamo. As a result of a plea deal, Hicks was returned to Australia to serve a nine-month sentence.²¹ In his essay, Dratel explains how civilian defense counsel's experiences litigating in a properly constituted criminal court system enable them to expose the inadequacies of military commissions.²²

The main purpose of a habeas corpus proceeding is to determine whether a prisoner is wrongfully held. But, in order for a court to make that determination, the government must first provide it with sufficient information about the prisoner and the basis for his confinement. This information-disclosing function of habeas is the subject of Jon Connolly and Marc D. Falkoff's article, *Habeas, Informational Asymmetries, and the War on Terror*.²³ Connolly and Falkoff explain the important role habeas plays in promoting transparency by increasing the available information about detainees.²⁴ They argue for a robust interpretation of the government's disclosure obligations, which they explain, ultimately benefits the executive as well as the judiciary.²⁵

Lawyers for detainees have played a critical role in helping expose abuses at Guantánamo. Lawyers nevertheless still operate under significant restrictions, which are imposed as a condition of their gaining access to their clients. Those restrictions are described in Shayana Kadidal's *Confronting Ethical Issues in National Security Cases: the Guantánamo Habeas Litigation*.²⁶ Kadidal explores the ethical dilemma and risks involved in representing detainees in habeas proceedings.²⁷ He describes, for example, how classification review of at-

²⁰ Joshua L. Dratel, *How I Learned to Stop Worrying and Love the Military Commissions*, 41 SETON HALL L. REV. 1339 (2011).

²¹ William Glaberson, *Australian Guantánamo Gets 9 Months*, N.Y. TIMES, (Mar. 31, 2007), <http://www.nytimes.com/2007/03/31/world/americas/31iht-web0331-hicks.5095543.html>.

²² See Dratel, *supra* note 20.

²³ Jon Connolly & Marc D. Falkoff, *Habeas, Informational Asymmetries, and the War on Terror*, 41 SETON HALL L. REV. 1361 (2011).

²⁴ *Id.*

²⁵ *Id.* at 1382–85.

²⁶ Shayana Kadidal, *Confronting Ethical Issues in National Security Cases: The Guantánamo Habeas Litigation*, 41 SETON HALL L. REV. 1397 (2011).

²⁷ See *id.*

torney-client communications threatens the presumptive confidentiality of those communications and how lawyers for high-value detainees, in particular, are restricted in their ability to share information with one another because they must notify the government what specific information they would like to share.²⁸ Kadidal also explains how advocating for detainee clients can expose habeas attorneys to the risk of criminal prosecution for material support for terrorism.²⁹ Kadidal ultimately questions whether Guantánamo habeas attorneys can truly fulfill their duty of zealous advocacy in light of these risks and restrictions.³⁰

James A. Cohen looks at another set of obstacles to representing Guantánamo detainees. In *Lawyering in a Vacuum*, Cohen describes the challenges lawyers face in developing the type of attorney-client relationship necessary for effective representation.³¹ As Cohen explains, many Guantánamo detainees were illegally imprisoned and grossly mistreated even before they were brought to Guantánamo.³² Additionally, cultural barriers exist between lawyers and Muslim detainee clients that can breed distrust of both the American legal system and those lawyers—a situation exacerbated by harsh and deceptive tactics used by the U.S. military, prison rules and policies, and the government's disregard of the attorney-client privilege.³³ Further, difficulties communicating with clients have sometimes led lawyers to substitute a more paternalistic model for a client-centered approach to representation.³⁴ Cohen concludes by suggesting some ways in which attorneys can mitigate these harms, including by more sensitive and nuanced discussions with their clients aimed at addressing barriers to representation.³⁵

Stephen I. Vladeck's *The D.C. Circuit After Boumediene* provides a timely analysis of the ongoing Guantánamo habeas litigation.³⁶ Vladeck examines the growing body of lower-court decisions issued in individual habeas cases since the Supreme Court recognized the de-

²⁸ *Id.* at 1398–402, 1404–06.

²⁹ *Id.* at 1414–20.

³⁰ *Id.* at 1426.

³¹ James A. Cohen, *Lawyering in a Vacuum*, 41 SETON HALL L. REV. 1427 (2011).

³² *See id.* at 1431, 1435.

³³ *Id.* at 1433–34.

³⁴ *Id.* at 1443.

³⁵ *Id.* at 1451.

³⁶ Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011).

tainees' constitutional right to habeas more than three years ago.³⁷ Vladeck focuses in particular on the D.C. Circuit's interpretation of the substantive standard for detention under the Authorization for Use of Military Force (AUMF),³⁸ the procedural and evidentiary rules governing their cases, and the availability of remedies from unlawful detention.³⁹ Vladeck concludes that, while not entirely inconsistent with *Boumediene*, the D.C. Circuit's decisions reveal some resistance to Supreme Court precedent, especially among a handful of outspoken D.C. Circuit judges.⁴⁰

In "*Damages or Nothing*": *The Post-Boumediene Constitution and Compensation for Human Rights Violations After 9/11*, Elizabeth Wilson examines another feature of post-9/11 detainee litigation: the ability of victims of torture and other abuses to seek a civil damages remedy under *Bivens v. Six Unknown Federal Narcotics Agents*,⁴¹ the 1971 Supreme Court decision holding that individuals can sue federal officials for constitutional violations.⁴² In *Boumediene*, Wilson explains, the Supreme Court appeared to recognize that constitutional protections could apply extraterritorially even to noncitizens.⁴³ Wilson argues, however, that the Supreme Court has demonstrated no desire to extend this broader vision of the Constitution beyond the habeas corpus context, thus precluding compensation for even the most egregious constitutional violations.⁴⁴

A decade after 9/11, we are still trying to make sense of Guantánamo. Seton Hall University School of Law's Guantánamo reports provide an invaluable resource for anyone who wishes to understand the prison's impact on the United States and the world. The reports have greatly enhanced our knowledge about U.S. policies in the "war on terror" and will be studied by scholars, journalists, and others for generations to come. The articles and essays in this symposium issue similarly provide a window into numerous issues raised by Guantánamo. Like the reports, the articles and essays help put into perspective the evolving legacy of the United States' most infamous prison.

³⁷ *Id.*

³⁸ Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (2006)).

³⁹ Vladeck, *supra* note 36.

⁴⁰ *See id.* at 1488–89.

⁴¹ 403 U.S. 388 (1971).

⁴² Elizabeth A. Wilson, "*Damages or Nothing*": *The Post-Boumediene Constitution and Compensation for Human Rights Violations after 9/11*, 41 SETON HALL L. REV. 1491 (2011).

⁴³ *See id.* at 1495–96.

⁴⁴ *See id.* at 1592–93.