



Dominique Vannier
Editor

Guantanamo

Facility, Security
and Legal
Considerations

Defense, Security and Strategies

NOVA

DEFENSE, SECURITY AND STRATEGIES

GUANTANAMO
FACILITY, SECURITY AND
LEGAL CONSIDERATIONS

DOMINIQUE VANNIER
EDITOR

 **nova**
publishers
New York

Copyright © 2013 by Nova Science Publishers, Inc.

All rights reserved. No part of this book may be reproduced, stored in a retrieval system or transmitted in any form or by any means: electronic, electrostatic, magnetic, tape, mechanical photocopying, recording or otherwise without the written permission of the Publisher.

For permission to use material from this book please contact us:

Telephone 631-231-7269; Fax 631-231-8175

Web Site: <http://www.novapublishers.com>

NOTICE TO THE READER

The Publisher has taken reasonable care in the preparation of this book, but makes no expressed or implied warranty of any kind and assumes no responsibility for any errors or omissions. No liability is assumed for incidental or consequential damages in connection with or arising out of information contained in this book. The Publisher shall not be liable for any special, consequential, or exemplary damages resulting, in whole or in part, from the readers' use of, or reliance upon, this material. Any parts of this book based on government reports are so indicated and copyright is claimed for those parts to the extent applicable to compilations of such works.

Independent verification should be sought for any data, advice or recommendations contained in this book. In addition, no responsibility is assumed by the publisher for any injury and/or damage to persons or property arising from any methods, products, instructions, ideas or otherwise contained in this publication.

This publication is designed to provide accurate and authoritative information with regard to the subject matter covered herein. It is sold with the clear understanding that the Publisher is not engaged in rendering legal or any other professional services. If legal or any other expert assistance is required, the services of a competent person should be sought.

FROM A DECLARATION OF PARTICIPANTS JOINTLY ADOPTED BY A COMMITTEE OF THE AMERICAN BAR ASSOCIATION AND A COMMITTEE OF PUBLISHERS.

Additional color graphics may be available in the e-book version of this book.

Library of Congress Cataloging-in-Publication Data

ISBN: 978-1-62417-864-1

Published by Nova Science Publishers, Inc. † New York

PREFACE

Since 2002, the United States has operated military detention facilities at its Naval Station in Guantanamo Bay, Cuba, to hold individuals detained during overseas counterterrorism operations. In 2009, the President directed the closure of these facilities within one year. Since then, a number of statutes have prohibited the transfer of Guantanamo Bay detainees to the United States. This book describes the current Guantanamo Bay detention facilities and infrastructure; examines the DoD corrections facilities and factors to be considered if these facilities were used to hold the detainees; and discusses other security and legal considerations.

Chapter 1 – A report of United States Government Accountability Office (GAO)-13-31 to the Chairman, Select Committee on Intelligence, U.S. Senate, dated November 2012.

Chapter 2 – Following the terrorist attacks of 9/11, Congress passed the Authorization to Use Military Force (AUMF), which granted the President the authority “to use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks” against the United States. Many persons subsequently captured during military operations in Afghanistan and elsewhere were transferred to the U.S. Naval Station at Guantanamo Bay, Cuba, for detention and possible prosecution before military tribunals. Although nearly 800 persons have been held at Guantanamo at some point since early 2002, the substantial majority of Guantanamo detainees have ultimately been transferred to another country for continued detention or release. Those detainees who remain fall into three categories: (1) persons placed in non-penal, preventive detention to stop them from rejoining hostilities; (2) persons who face or are expected to face criminal charges; and (3) persons who have been cleared for transfer or release, whom the United

States continues to detain pending transfer. Although the Supreme Court ruled in *Boumediene v. Bush* that Guantanamo detainees may seek *habeas corpus* review of the legality of their detention, several legal issues remain unsettled.

In January 2009, President Obama issued an Executive Order to facilitate the closure of the Guantanamo detention facility within a year. This deadline has not been met, but the Administration has repeatedly stated its intent to close the facility. Efforts to close Guantanamo have been hampered by a series of congressional enactments limiting executive discretion to transfer or release detainees into the United States, including, most recently, the Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA, P.L. 111-383) and the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (2011 CAA, P.L. 112-10). By prohibiting funds from being used to transfer or release detainees into the United States, or to assist in the transfer or release of detainees into the country, these acts seem to ensure that the Guantanamo detention facility remains open at least through the 2011 fiscal year, and perhaps for the foreseeable future. Moreover, the measures appear to make military tribunals the only viable forum by which Guantanamo detainees could be tried for criminal offenses, as no civilian court operates within Guantanamo, unless efforts to close the facility are successfully renewed. Upon signing each of these measures into law, President Obama issued a statement describing his opposition to the restrictions imposed on the transfer of Guantanamo detainees, and asserted that his Administration will work with Congress to mitigate their effect. In March 2011, President Obama issued a new Executive Order that establishes a process to periodically review whether the continued detention of a lawfully held Guantanamo detainee is warranted, potentially resulting in some of detainees being cleared for release and transferred to a foreign country.

The closure of the Guantanamo detention facility raises a number of legal issues with respect to the individuals formerly interned there, particularly if those detainees are transferred to the United States. The nature and scope of constitutional protections owed to detainees within the United States may be different from the protections owed to aliens held abroad. The transfer of detainees to the United States may also have immigration consequences. This report provides an overview of major legal issues likely to arise as a result of executive and legislative action to close the Guantanamo detention facility. It discusses legal issues related to the transfer of Guantanamo detainees (either to a foreign country or into the United States), the continued detention of such persons in the United States, and the possible removal of persons brought into the country. It also discusses selected constitutional issues that may arise in the

criminal prosecution of detainees, emphasizing the procedural and substantive protections that are utilized in different adjudicatory forums (i.e., federal civilian courts, court-martial proceedings, and military commissions).

CONTENTS

Preface		vii
Chapter 1	Guantánamo Bay Detainees: Facilities and Factors for Consideration If Detainees Were Brought to the United States <i>United States Government Accountability Office</i>	1
Chapter 2	Closing the Guantanamo Detention Center: Legal Issues <i>Michael John Garcia, K. Jennifer, R. Elsea, Chuck Mason and Edward C. Liu</i>	57
Index		151

Chapter 1

**GUANTÁNAMO BAY DETAINEES:
FACILITIES AND FACTORS
FOR CONSIDERATION IF DETAINEES WERE
BROUGHT TO THE UNITED STATES***

United States Government Accountability Office

WHY GAO DID THIS STUDY

Since 2002, the United States has operated military detention facilities at its Naval Station in Guantánamo Bay, Cuba, to hold individuals detained during overseas counterterrorism operations. In 2009 the President directed the closure of these facilities within 1 year. Since then, a number of statutes have prohibited the transfer of Guantánamo Bay detainees to the United States. GAO was asked to review existing U.S. facilities and identify factors to be considered in the event that restrictions were lifted and Guantánamo Bay detainees were transferred to the United States. This report describes the (1) current Guantánamo Bay detention facilities and infrastructure, (2) DOD corrections facilities and factors to be considered if these facilities were used to hold the detainees, and (3) DOJ facilities holding individuals charged with

* This is an edited, reformatted and augmented version of the Highlights of GAO-13-31, a report to the Chairman, Select Committee on Intelligence, U.S. Senate, dated November 2012.

or convicted of terrorism-related crimes, and factors to be considered if these facilities were used to hold the detainees.

To conduct its work, GAO reviewed relevant laws and policies on detention operations; visited several facilities at Guantánamo Bay and DOD and DOJ sites in the United States selected for their range of housing configurations; and interviewed officials at both agencies. GAO's review is descriptive and did not include an evaluation of whether specific U.S. facilities would be suitable for holding Guantánamo Bay detainees, nor did GAO address legal factors that are still being adjudicated. GAO is not making any recommendations in this report. In commenting on this report, DOJ stated that it has no plans to transfer detainees to the United States. This report is an unclassified version of a classified report issued in November 2012.

WHAT GAO FOUND

As of November 2012, the Department of Defense (DOD) held 166 detainees in five separate facilities in conditions ranging from communal living to maximum- security segregated cells that limit detainee interaction. In addition, DOD maintains facilities and infrastructure dedicated to detention support operations. For example, DOD operates an extensive information-technology infrastructure, conducts operations to support the protection of military personnel, and performs other missions at Guantánamo Bay such as securing two courthouses used for military commissions.

Within the United States, DOD operates six corrections facilities that are equipped to confine servicemembers for more than 1 year. On average, as of August 2012, these facilities were operating at about 48 percent capacity, but this varies across different facilities and housing units. GAO identified from interviews with DOD officials and analysis of detention operations documents several factors that would need to be considered in the event that the Guantánamo Bay detainees were transferred to one of DOD's U.S. facilities. The following four factors, among others such as legal and cost considerations, would have to be considered: (1) ensuring compliance with international law and U.S. laws and policies; (2) ensuring the continued safety and security of DOD personnel and the detainees, as well as the general public; (3) collecting intelligence information from the detainees; and (4) maintaining current missions and services provided by the corrections facilities and associated installations. For example, DOD's current ability to minimize risks to the public is attributable to Guantánamo Bay's remote

location and limited access, whereas DOD corrections facilities in the United States are generally located on active military installations in close proximity to the general public. Additionally, DOD officials indicated that locating detention operations on an active military installation could present risk to the installation's core operations such as administrative and training operations.

The Department of Justice (DOJ), through its Bureau of Prisons and Marshals Service, uses over 2,000 facilities to hold about 280,000 individuals charged with or convicted of federal crimes. Facilities range from low to high security and provide various conditions of confinement. GAO identified from interviews with DOJ officials and analysis of detention operations documents several factors that would need to be considered in the event that the Guantánamo Bay detainees were transferred to one of DOJ's U.S. facilities. The following three factors, among others such as legal and cost considerations, would have to be considered: (1) formulation of policies and practices for housing the detainees; (2) ensuring the safety of facility personnel, the detainees, and the general public; and (3) identifying adequate space for housing the detainees and maintaining separation of detainees from the current inmate population. For example, according to DOJ officials, existing facilities would need to be modified or current inmates relocated because the Bureau of Prisons and Marshals Service would segregate Guantánamo Bay detainees from the inmate population for security purposes. Also, as of August 2012, system-wide Bureau of Prisons facilities were about 38 percent overcrowded, and holding Guantánamo Bay detainees could require triple bunking of inmates or expansion of facility capacity in order to maintain security for personnel, inmates, and detainees.

ABBREVIATIONS

ADX	U.S. Penitentiary Florence Administrative-Maximum
AUMF	Authorization for Use of Military Force
BOP	Bureau of Prisons
DOD	Department of Defense
DOJ	Department of Justice
Marshals Service	U.S. Marshals Service
UCMJ	Uniform Code of Military Justice

November 14, 2012

The Honorable Dianne Feinstein

Chairman
Select Committee on Intelligence
United States Senate

Dear Madam Chairman,

Since January 2002 the United States has operated military detention facilities at its Naval Station in Guantánamo Bay, Cuba, to detain individuals captured during overseas counterterrorism operations. In January 2009, the President issued an Executive Order directing the closure of the Guantánamo Bay detention facilities within one year.¹ Subsequently, in June 2009 the first in a series of appropriations and authorization measures limiting or prohibiting the use of appropriated funds to transfer Guantánamo Bay detainees to the United States was enacted.² You requested that we review existing U.S. federal facilities and identify factors to be considered in the event that Guantánamo Bay detention facilities were closed and legal restrictions on transfer did not continue, and the 166 detainees currently held in these detention facilities were transferred to the United States.³ Accordingly, this report describes (1) current Guantánamo Bay detention facilities and infrastructure; (2) Department of Defense (DOD) corrections facilities in the United States, and factors to be considered if they were used to hold Guantánamo Bay detainees; and (3) Department of Justice (DOJ) corrections facilities in the United States that hold individuals charged with or convicted of terrorism-related crimes, and factors to be considered if they were used to hold Guantánamo Bay detainees.⁴ We are also issuing a classified version of this report in November 2012. That version includes an additional appendix, which provides a discussion of Guantánamo Bay facilities used for classified operations that would need to be considered if the detainees were transferred to facilities in the United States.

The scope of our work was to provide a descriptive review of the detention facilities and infrastructure at Guantánamo Bay as well as existing corrections facilities in the United States. Hence, our review did not include an evaluation of whether specific U.S. facilities would be suitable for holding Guantánamo Bay detainees, nor did we address legal factors that are still being adjudicated such as detainee habeas corpus rights,⁵ and right to counsel.⁶ In addition we are not making recommendations in this report.

To describe the current Guantánamo Bay detention facilities and infrastructure, we visited the detention and support facilities at the U.S. Naval Station Guantánamo Bay. We also reviewed laws and policies related to DOD's detention operations, an interagency report on detainees' status, and

DOD reports on conditions of detention at Guantánamo Bay. In addition, we discussed previous and current detention operations with officials from the Office of the Secretary of Defense, Joint Staff, U.S. Southern Command, Joint Task Force-Guantánamo, American Correctional Association, and another related organization.

To describe DOD corrections facilities in the United States and factors to consider if they were to hold Guantánamo Bay detainees, we reviewed DOD corrections policies and manuals and facility capacity data. We also reviewed analyses conducted in 2009 by DOD as part of its efforts to determine whether its facilities were equipped to conduct detention operations. Because analyses previously conducted by DOD to identify facilities in the United States were based on the assumption that all detention operations—including intelligence operations and military commission support—would remain the same, we maintained this assumption in our description of factors that might be considered in the event that Guantánamo Bay detainees were moved to DOD facilities in the United States. We conducted site visits and interviewed officials at DOD corrections facilities, which are operated by the Army and the Navy. We selected three facilities that represent both services' operating procedures and reflect a range of housing configurations, including both segregated and general-population housing units. There are three different types of corrections facilities operated by DOD: (1) Level I facilities, which are used for short-term (under 1-year) and pretrial confinement; (2) Level II facilities—consisting of five joint regional corrections facilities (two operated under the Army, and three under the Navy)—which are used for pretrial confinement and for inmates with sentences of 5 years or fewer; and (3) one Level III facility, which holds inmates with sentences exceeding 5 years and inmates sentenced to death. Because Level I facilities are not intended for long-term confinement, we limited the scope of our review to the Level II and Level III long-term incarceration facilities. In addition, we interviewed officials responsible for management of DOD corrections facilities, including officials from the Office of the Secretary of Defense, Joint Staff, Army Corrections Command, and Bureau of Naval Personnel.

To describe corrections facilities in the United States that hold individuals charged with or convicted of terrorism-related crimes or activities, and factors for consideration if Guantánamo Bay detainees were transferred to DOJ facilities in the United States, we reviewed laws and policies related to Bureau of Prisons (BOP) corrections operations, facility capacity data, and information related to the number and location of inmates under BOP custody who had a history of or connection to terrorism, including those charged with

or convicted of terrorism-related crimes.⁷ In addition, we reviewed U.S. Marshals Service (Marshals Service) policies related to facility capacity data and information related to the number and locations of inmates charged with terrorism-related crimes in the custody of the Marshals Service.⁸ Also, we interviewed officials from BOP, the Marshals Service, the Office of the Deputy Attorney General, as well as other relevant DOJ component agencies, and we conducted site visits to four facilities selected to reflect diversity in types of housing units and security levels. While it is likely that conditions of confinement and related procedures for the detainees would change if they were moved into DOJ facilities, it is unclear what changes would occur. Thus, for the purposes of this report, when discussing factors for consideration if the detainees were moved to DOJ facilities, we assumed that most conditions and procedures would remain the same. Additionally, we interviewed officials from the Department of Homeland Security. According to Department of Homeland Security officials, its detention facilities are used to detain foreign nationals who are awaiting deportation from the United States, not detainees brought to the United States for law-of-war detention, pretrial detention, or postconviction incarceration; thus we subsequently removed the Department of Homeland Security from the scope of our work. For a full description of our scope and methodology, see appendix I.

We conducted this performance audit from January 2012 to November 2012 in accordance with generally accepted government auditing standards. 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.

BACKGROUND

Military Detention

In response to the September 11, 2001, terrorist attacks, Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President to “use all necessary and appropriate force against those ... [who] planned, authorized, committed, or aided the terrorist attacks” against the United States.⁹ Subsequently, many individuals detained during military operations in Afghanistan and elsewhere were transferred to the U.S. Naval

Station at Guantánamo Bay, Cuba—a site designated by the administration for long-term military detention operations under the authority of the AUMF and in accordance with international law. Approximately 1,800 servicemembers, civilian employees, and contractors support detention operations at Guantánamo Bay. An additional 4,200 individuals support other missions at Guantánamo Bay, including logistics and regional contingency operations, as it is the only U.S. naval station in the U.S. Southern Command area of responsibility.¹⁰ The Naval Station encompasses 45 square miles on both sides of Guantánamo Bay, sharing a 17-mile border with Cuba. (See figure 1.)

According to DOD officials, the installation's remote location enables DOD to limit aircraft flights and control maritime access points, and consequently provides an additional layer of security for the detention operations. DOD considers most of the individuals held in custody at Guantánamo Bay to be "unprivileged enemy belligerents" under U.S. and international law.¹¹ Those detainees are afforded certain legal rights and protections under both international law and U.S. law. For example, Executive Order 13492 states that custody at Guantánamo Bay shall conform with Common Article 3 of the Geneva Conventions, which, among other things, prohibits "outrages upon personal dignity" and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."¹² In addition, various U.S. laws, including the Detainee Treatment Act¹³ and the Military Commissions Act,¹⁴ govern aspects of detainee treatment and trial. The President's January 2009 order for the closure of Guantánamo Bay detention facilities directed the Secretary of Defense to undertake a review of the conditions of detention at Guantánamo Bay, and this review, known as the "Walsh Report," reported that the conditions of confinement at Guantánamo Bay conformed with Common Article 3 of the Geneva Conventions.¹⁵ According to DOD, the purpose of military detention is to remove enemy armed forces from the battlefield, as opposed to criminal incarceration, which is a punitive measure for individuals convicted of violating domestic law.

Under the authority of the AUMF, DOD has since January 2002 detained a total of 779 detainees at Guantánamo Bay.

The detainee population peaked at approximately 680 in June 2003, and the last detainee to arrive was transferred to Guantánamo Bay in March 2008. The U.S. government, through an interagency task force, has ongoing efforts to transfer detainees from Guantánamo Bay to other countries and, since January 2002, has transferred more than 600 detainees, either to their home

country or to a third country.¹⁶ In addition, in 2009, one detainee was transferred to the United States for trial and, in 2010, was convicted in a U.S. civilian court. He is currently serving a life sentence in a BOP facility in Florence, Colorado.

As of November 2012, 166 detainees were being held in military detention at Guantánamo Bay. Also, as of November 2012, 3 of these detainees had been convicted of crimes by military commissions at Guantánamo Bay.¹⁷ Additionally, 7 detainees—including the 5 individuals accused of planning the September 11 attacks—have charges pending and face potential trial by military commissions.¹⁸

According to DOD officials, the U.S. government, through an interagency task force, is currently negotiating with other countries to transfer more than one-third of the remaining 156 detainees.¹⁹ Table 1 reflects the current detention and prosecution status of all detainees held at Guantánamo Bay as of November 2012.



Source: DOD; Map Resources (map).

Figure 1. Location of U.S. Naval Station at Guantánamo Bay, Cuba.

Table 1. Detainee Detention and Prosecution Status as of November 2012

Status	Description of status	Number of detainees
Currently in Transfer Negotiations	Detainees for whom the U.S. Department of State is in current or planned negotiations with the detainees' home or third country for transfer. These detainees are not currently facing prosecution.	56
Continued Detention under the AUMF	Detainees who have been determined to require continued detention to protect against a significant threat to the security of the United States. These detainees are not currently facing prosecution.	46
Conditional Detention	Detainees from Yemen who will not be transferred until one of the following is satisfied (1) the security situation improves in Yemen, (2) appropriate rehabilitation programs become available, or (3) appropriate third-country resettlement options become available. ^a These detainees are not currently facing prosecution.	30
Possible Prosecution Pending	Detainees whose cases are under review in accordance with a joint DOD-DOJ protocol to determine if a case is feasible for prosecution and, if so, the appropriate forum and venue for that prosecution. ^b	24
Currently Facing Prosecution	Detainees with military commission charges pending.	7
Convicted	Detainees convicted through a military commission process at Guantánamo Bay.	3
Total		166

Sources: DOD, DOJ, and Guantánamo Review Task Force.

^aNot all detainees from Yemen are in Conditional Detention status. These conditions were specified in the final report of the Guantánamo Review Task Force, issued pursuant to Executive Order 13492. Guantánamo Review Task Force, *Final Report* (Jan. 22, 2010). They do not necessarily reflect subsequent legal restrictions on transfers, such as those described in footnote 19. Additionally, while all detainees facing conditional detention are from Yemen, they do not represent all detainees from Yemen currently held at Guantánamo Bay.

^bDOD and DOJ, *Determination of Guantánamo Cases referred for Prosecution* (undated).

Roles of the Federal Agencies in Detention and Incarceration

Executive Order 13492, signed by the President on January 22, 2009, directed the closure of the detention facilities at Guantánamo Bay within a year and stated that any individuals who remained in detention at Guantánamo

Bay at the time of the closure of its facilities “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.” Following the issuance of this Executive Order, an interagency working group including officials from DOD, DOJ, and the Department of Homeland Security began to identify existing facilities in the United States that could be used for continued military detention if the decision was made to transfer detainees to the United States.²⁰ Each of these departments operates confinement facilities in the United States, consistent with its missions and legal authorities.

- DOD operates a system of corrections facilities in the United States that are used for pretrial detention and incarceration of members of the U.S. armed forces who are charged with or convicted of violations of the Uniform Code of Military Justice (UCMJ).²¹
- DOJ, through BOP, operates a system of corrections facilities in the United States that are used for pretrial detention and incarceration of individuals convicted of violating federal laws. BOP’s mission is to confine federal inmates in the controlled, safe, secure, humane, and cost-efficient environments of prisons and community-based facilities, and to provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. DOJ’s Marshals Service is the enforcement arm of the federal court system and its mission includes responsibility for the custody of pretrial federal inmates until they are acquitted or convicted, and delivered to the designated BOP facility.
- The Department of Homeland Security operates a system of detention facilities to detain noncitizens who may be subject to removal from the United States under U.S. immigration laws.

According to DOD attorneys, DOD, under the AUMF, has legal authority to maintain custody of the detainees currently at Guantánamo Bay. A DOJ official from the Office of the Deputy Attorney General stated that DOJ would likely need additional authorities to detain law-of-war detainees for continued detention at BOP facilities, but indicated that he was unaware of any analysis of the issue because DOJ is not evaluating transferring detainees to the United States in light of transfer restrictions. With respect to the three detainees who have been convicted of crimes by military commissions, the Military Commissions Act provides that, “[u]nder such regulations as the Secretary of