

RETURNING GUANTANAMO BAY TO CUBAN CONTROL

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The revival of relations between the United States and Cuba since the end of 2014 has included the restoration of diplomatic ties, a limited easing of travel and financial restrictions, and new efforts to cooperate in areas ranging from law enforcement to the environment. However, a “full normalization” of bilateral relations¹ is subject to resolving many outstanding issues. Among the main ones are a U.S. demand that Cuba compensate American interests for property seized during the Revolution, and Cuba’s insistence that the United States lift its trade embargo and return control of Guantanamo Bay to Cuba.²

None of the outstanding issues is isolated—each can become interdependent with others in the negotiations to broaden relations — but every issue has distinct characteristics that can determine what might be done to address it. This paper focuses on identifying the legal and political options that may shape how the United States responds to Cuba’s demand

for recovering control of Guantanamo Bay. It will also discuss some practical implications for both the United States and Cuba of satisfying this demand.

THE GUANTANAMO BAY LEASE AND THE TERRITORY’S LEGAL STATUS

Guantanamo Bay is a coastal territory that covers 45 square miles (117 square kilometers) of land and water in southeast Cuba. It was leased for an indefinite period by the United States in 1903 in compliance with the Platt Amendment, which Cuba accepted as a condition for gaining independence from U.S. military control in 1902.³ The Platt Amendment obliged Cuba to “sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon” for the purposes of enabling the United States “to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense.”⁴

1. This term is often used by U.S. officials, *e.g.*, “we have begun a process of full normalization” (remarks by Secretary of State John Kerry, 20 July 2015, <http://www.state.gov/secretary/remarks/2015/07/245094.htm>, accessed 17 July 2016). There is no international standard for “full normalization” but it is understood to refer to comprehensive relations. When the United States and Vietnam established “permanent normal trade relations” in 2006, Vietnam described this as a “full normalization of relations” that would “establish a sustainable foundation for the development of bilateral relations in all fields, particularly economic, trade and investment” (Embassy of the Socialist Republic of Vietnam in the United States of America, “PNTR Legislation Marks Full Normalization of Relations: FM Spokesman,” press release, 21 December 2006).

2. The White House. “Charting a New Course on Cuba,” <https://www.whitehouse.gov/issues/foreign-policy/cuba>, accessed 16 July 2016; *Granma*, “Ratificamos la voluntad de Cuba de avanzar hacia la normalización de las relaciones con los Estados Unidos,” 20 July 2015.

3. Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June 30, 1902 (Act of March 2, 1901), 31 Stat 895, Ch 803 (1901).

4. *Ibid.*, para. 7.

The text of the lease of Guantanamo Bay⁵ is spread over two bilateral accords that were concluded several months apart. The first was an executive agreement between the U.S. and Cuban presidents in February 1903 that created the lease, defined the territory it covered and elaborated its main provisions.⁶ The second agreement was a treaty in July 1903 that contained additional clauses.⁷ A subsequent Treaty of Relations in 1934 clarified how the lease may be terminated and reconfirmed the terms of the two 1903 agreements as the operative legal instruments that constitute the lease.⁸

The U.S. and Cuban legal relationships with the leased zone were established by the executive agreement, which gave the United States “complete jurisdiction and control” at Guantanamo Bay for the duration of the lease while affirming that Cuba had “ultimate sovereignty” over the territory.⁹ This agreement fixed the lease’s duration not in years but as “the time required for the purposes of coaling and naval stations.”¹⁰ Cuba’s potential to actively display any form of sovereign authority there was precluded in Cuban domestic law by a 1934 court judgment that required Cuba to consider Guantanamo Bay as foreign territory.¹¹ U.S. court rulings eventually deemed the area to be under the *de facto* sovereignty of the United States,¹² which has continued to affirm Cuba’s *de jure* sovereignty there.

For a number of years after the Revolution, Cuba argued that the lease was void on various grounds that were based on Cuban and international law, although it did not initiate any formal legal process to enforce that position.¹³ Cuba’s stance later became more ambiguous, and at times it appears to accept the arrangement as legally valid, as in the following statement from the Ministry of Foreign Relations in 2004:

The Cuban government’s position as to the legal situation of the American Naval Base at Guantanamo is that, by being in the legal form of a lease, it does not grant a perpetual right but a temporary one over that part of our territory, by which, in due course, as a just right of our people, the illegally occupied territory of Guantanamo should be returned by peaceful means to Cuba.¹⁴

A nuanced version of this statement, currently on the ministry’s website, is less straightforward:

The Cuban government’s position on the legal status of the U.S. base at Guantánamo is that, since, legally speaking, it is derived from a lease, the lease holders were ceded a temporary and not perpetual right over this part of our territory, and that justice for our people demands that, in due course, it must be peacefully returned to Cuba.¹⁵

The United States, for its part, has argued that the lease remains valid as a bilateral agreement under international law, generating an obligation for Cuba to

5. A small second area, Bahía Honda, was included in the lease, but the United States did not use it and returned control of it to Cuba after a decade.

6. Agreement for the lease to the United States of lands in Cuba for coaling and naval stations [“Agreement of 16/23 February 1903”], Treaty Ser No 418 (1903).

7. Lease of certain areas for naval or coaling stations [“Agreement of 2 July 1903”], Treaty Ser No 426 (1903).

8. Treaty of Relations, 48 Stat 1682, Treaty Ser No 866 (1934), art. 3.

9. Agreement of 16/23 February 1903, art. 3.

10. *Ibid.*, art. 1.

11. *In re Guzman & Latamble*, Cuba S Ct, Ann Dig of Pub Intl Law Cases 1933–1934 (Intl Law Rep 7) 112 (1934).

12. *E.g.*, in *Boumediene v. Bush*, 128 S Ct 2229 (2008).

13. Michael J. Strauss, *The Leasing of Guantanamo Bay* (Westport, Conn.: Praeger, 2009), 170–76.

14. Ministerio de Relaciones Exteriores de Cuba, “Cuba y su defensa de todos los Derechos Humanos para todos,” report distributed in the UN Economic and Social Council Commission on Human Rights, April 6, 2004, UN document E/CN.4/2004/G/46.

15. Ministerio de Relaciones Exteriores de Cuba, “A veritable moral and legal black hole in the territory illegally occupied by the US naval base at Guantanamo,” http://anterior.cubaminrex.cu/Derechos%20Humanos/Articulos/Archivo/2005/LibroBlanco2005/English/5_1.html, accessed 16 July 2016.

comply, and that on this basis the continued U.S. presence at Guantanamo Bay is also legal.¹⁶

Although both the United States and Cuba may end the lease of Guantanamo Bay by negotiating its termination, the 1903 executive agreement and the 1934 Treaty of Relations designate the United States as the only party that can terminate it unilaterally.¹⁷ By stating the lease's duration as "the time required for the purposes of coaling and naval stations," the executive agreement defers to the only state that can determine this period, as the "time required" is inherently a function of U.S. needs and interests. The 1934 treaty specifies that unless the United States and Cuba agree otherwise, the lease will remain in effect "(s)o long as the United States of America shall not abandon the said naval station of Guantanamo," thereby making the duration of U.S. jurisdiction and control contingent on an act (abandonment) by the United States.

Cuba has ruled out the use of military force as a means for recovering control over Guantanamo Bay.¹⁸ By also not initiating legal proceedings toward that end, Cuba signals that it will be up to the United States to take the action necessary for control to be transferred.¹⁹ The bilateral negotiations toward normalized relations offer a context that may produce incentives for this to occur.

U.S. LEGAL OPTIONS: THE CLOSURE OF MILITARY BASES

For the United States, the aspects of domestic law that are most relevant to returning control of Guantanamo Bay to Cuba are (1) those that address the closure of U.S. military bases; and (2) those that would govern the termination of the lease and the transfer of control of the territory.

The legal procedure established for the closure of military bases²⁰ within the United States differs from the process by which bases located outside U.S. sovereign territory (generally referred to as "overseas" bases) may be closed. For domestic bases, the Defense Base Closure and Realignment Act of 1990²¹ created a mechanism in which a Defense Base Closure and Realignment Commission appointed by the U.S. president considers base closure recommendations by the Department of Defense.²² The Commission decides on a list of bases to be closed and submits it to the president, who must approve or reject the list in its entirety. Presidential approval triggers a 45-day period during which Congress may reject the list, and if it is not rejected the Department of Defense may proceed to close the bases.²³ In selecting bases to recommend for closure, the Department of Defense uses eight criteria; the first four refer to military value and have priority, while the others concern financial issues and the economic and environmental impact on nearby communities.²⁴

16. Memorandum from Leonard C. Meeker, Deputy Legal Adviser, Department of State, to Dean Rusk, Secretary of State. February 2, 1962 (National Security Archive, Cuban Missile Crisis Collection, Document CC00160).

17. Both agreements are sometimes referred to as "unequal treaties," a status that could justify their voidance (see, e.g., Strauss, *The Leasing of Guantanamo Bay*, 120; Olga Miranda, "How to End the Guantánamo Treaty," in Fidel Castro, *Guantanamo: Why the Illegal US Base Should be Returned to Cuba* (Melbourne: Ocean Press, 2011), 93).

18. Miranda, "How to End the Guantánamo Treaty," 103.

19. "(T)his solution is out of our hands" (*ibid.*, 93).

20. The term "base" is used generically here, and in the law described herein, to refer to any U.S. military facility regardless of whether it is classified as a base in the hierarchy of U.S. military installations.

21. P.L. 101-510.

22. Defense Base Closure and Realignment Commission, <http://www.brac.gov/about.html>, accessed 16 July 2016.

23. Kenneth R. Mayer, "Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation," *Legislative Studies Quarterly* 20 (3), 1995, 393-94.

24. "Final Selection Criteria, Department of Defense Base Closure and Realignment," attachment to memorandum from Michael W. Wynne, Acting Under Secretary of Defense, 4 January 2005, http://www.brac.gov/docs/criteria_final_jan4_05.pdf, accessed 16 July 2016. The criteria were established by the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005 (P.L. 108-375) as an amendment to the Defense Base Closure and Realignment Act of 1990.

Bases outside the United States are exempt from this procedure. This accommodates the fact that the dynamics which can lead to their closure are different from those affecting domestic bases. Overseas U.S. bases exist as the result of bilateral or multilateral agreements, and their closure may be produced by decisions or other actions by the “host” state, or by the expiration of the agreement. When the decision to close an overseas U.S. base is made by the United States, there are no mandatory criteria in U.S. law that must be considered in making the determination — it may be made for military, financial, diplomatic or other reasons that the United States deems in its interest. Similarly, U.S. law does not mandate a specific process to follow.²⁵

Because the closure of a U.S. military base overseas may not be up to the United States, it may occur without approval, or even discussion, by Congress. Nonetheless, a desire by Congress to influence the process resulted in the Defense Base Closure and Realignment Act of 1990 having a section on the Closure of Foreign Military Installations,²⁶ which stated the following:

It is the sense of Congress that –

the termination of military operations by the United States at military installations outside the United States should be accomplished at the discretion of the Secretary of Defense at the earliest opportunity;

in providing for such termination, the Secretary of Defense should take steps to ensure that the United States receives, through direct payment or otherwise, consideration equal to the fair market value of the improvements made by the United States at facilities that will be released to host countries;

the Secretary of Defense, acting through the military component commands or the sub-unified com-

mands to the combatant commands, should be the lead official in negotiations relating to determining and receiving such consideration; and

the determination of the fair market value of such improvements released to host countries in whole or in part by the United States should be handled on a facility-by-facility basis.

“Sense of Congress” resolutions, however, are not legally binding; even when embedded in legislation, they “have no force in law.”²⁷ Rather, they are expressions of the views of Congress, as when it wishes to see certain policies adopted or procedures followed by the executive branch, although in these cases they do not constitute actual statements of U.S. policy nor do they establish the desired procedures. Thus, the “sense of Congress” resolution pertaining to the closure of U.S. military facilities overseas may be ignored without risk of legal consequences for the Department of Defense or for the executive branch more generally.²⁸

U.S. LEGAL OPTIONS: TERMINATING THE LEASE BY VIRTUE OF ITS FORM

Certain aspects of law that could allow the United States to return control of Guantanamo Bay to Cuba pertain to how the lease may be terminated. These refer to both the form and the content of the arrangement. With respect to its form, the two 1903 agreements that comprise the lease — the February executive agreement and the July treaty — are legally equivalent in terms of engaging the United States at the bilateral level. While an executive agreement does not require approval by Congress and a treaty does (it requires the consent of two-thirds of the Senate),²⁹ the two types of accords assume the same character by creating international obligations for the United States.³⁰ International law considers them identical

25. In addition, the political and economic impact in the United States of closing an overseas base may be less than for a domestic base.

26. P.L. 101–510, sec. 2921.

27. Christopher M. Davis and Paul S. Rundquist, “Sense of Resolutions and Provisions,” Congressional Research Service Report No. 98–825, 16 May 2016, p. 2.

28. The risk of eventual political or legislative consequences may nonetheless exist.

29. This occurs by approving a “resolution of ratification.”

30. Manuel John Garcia, “International Law and Agreements: Their Effect Upon U.S. Law,” Congressional Research Service Report No. RL32528, 18 February 2015, p. 1.

for purposes of the norms that govern agreements between states; most notably, the Vienna Convention on the Law of Treaties defines a “treaty” as “an (*i.e.*, any) international agreement concluded between States in written form and governed by international law.”³¹ (The Convention itself has not received the U.S. Senate’s consent, but it is generally accepted as customary international law that applies to all states, a view broadly shared by the United States.³²)

Any U.S. bilateral agreement, regardless of its type, may be altered or terminated by another agreement, regardless of its type, between the same parties. In the case of an executive agreement that did not entail Congressional approval, it is logical that its termination could also be effected through a new executive agreement. But when the process of ending a bilateral agreement depends only on unilateral action by the United States — as is the case with the Guantanamo Bay lease — the matter becomes simpler: the predominant view among U.S. constitutional scholars is that the president has the legal authority to do this without consulting Congress.³³

Presidents do not appear to be constrained legally in their decision to terminate treaties. To be sure, the unilateral termination of a treaty by a president is uncommon in practice and raises serious domestic and international political questions, however, the Supreme Court has concluded that treaty termination is a power of the executive.³⁴

Despite their legal equivalency as bilateral instruments, the February 1903 executive agreement and July 1903 treaty that comprise the lease of Guantanamo Bay are not equivalent within the U.S. legal hier-

archy. The treaty’s “object and purpose” was to add provisions to the territorial lease that the executive agreement had created; it is wholly dependent on the existence of the executive agreement, and has meaning and effect only so long as the executive agreement is in force.³⁵ Thus, the U.S. president may end the lease of Guantanamo Bay by terminating the executive agreement, either as a discrete act or through a new accord with Cuba. The president could terminate the treaty as well, but in the absence of a complete consensus on the president’s constitutional authority to end a treaty without Congressional approval, the termination of the executive agreement alone would be sufficient. In this case, the treaty would continue to exist as an obsolete instrument void of any legal relevance.

U.S. LEGAL OPTIONS: TERMINATING THE LEASE BY VIRTUE OF ITS CONTENT

Under the Vienna Convention on the Law of Treaties, a treaty — or executive agreement — may be terminated in conformity with its provisions.³⁶ As the executive agreement that created the Guantanamo Bay lease specified its duration as “the time required for the purposes of coaling and naval stations,”³⁷ a decision by the executive branch that the U.S. no longer “requires” the territory for such purposes would automatically cause the lease to end. The moment the “requirement” ceases to exist would become the legal moment of expiration, at which time control of Guantanamo Bay would revert to Cuba immediately, unless the United States and Cuba were

31. Vienna Convention on the Law of Treaties (1969), art. 2 (1) (a).

32. U.S. Department of State, “Vienna Convention on the Law of Treaties,” <http://www.state.gov/s//treaty/faqs/70139.htm>, accessed 18 July 2016.

33. Memorandum from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to John Bellinger III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, 15 November 2001, p. 8, <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memoabmtreaty11152001.pdf>, accessed 17 July 2016.

34. Glen S. Krutz and Jeffrey S. Peake, *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers* (Ann Arbor: University of Michigan Press, 2009), 31.

35. The July 1903 treaty is sometimes referred to as the “Complementary agreement of the February 16/23, 1903 agreement on coaling and naval stations” (Castro, *Guantánamo*, 129).

36. Art. 54 (a).

37. Agreement of 16/23 February 1903, art. 1.

to agree on a “grace period” or on a specific future handover date.³⁸

A determination of military necessity is the only reason for any U.S. military facility to be established, whether domestic or overseas, and by extension for the territory where it is located to be “required.” Any other reason that may be given as justification for the facility’s existence, such as military or non-military activities that occur there out of convenience but that are not site-specific, create a situation in which the territory in question is desirable but falls short of being absolutely necessary, *i.e.*, “required.”

In the case of Guantanamo Bay, the prison for alleged terrorists has been the primary activity since it was established in 2002. It is operated by a “tenant command,” the Joint Task Force, which, along with the judicial facilities for the prisoners, are functions of the Department of Defense but are not directly associated with site-specific military needs at Guantanamo Bay.

Indeed, Guantanamo Bay was not the only place where the prison could be located, it was simply considered the best of various choices. The United States selected it after weighing various factors — the impact on U.S. domestic security, the site’s own security, its location, its size, the impact on relations with other states, the risk of litigation by prisoners, and costs — and it was deemed to have more advantages and fewer disadvantages than other sites on U.S. sovereign territory, on other territory controlled by the United States (*e.g.*, Guam), or in other states.³⁹

There is no legally mandated process by which the U.S. president or the executive branch more generally may decide that Guantanamo Bay is no longer “required,” or even when such a determination reaches the point of being considered a decision with the legal effect of triggering the end of the lease. The matter is thus an administrative one, which gives the executive branch considerable leeway in determining how, and by whom, such a decision may come into existence.

Before the prison was created, other U.S. activities at Guantanamo Bay had diminished to almost nil. In 2005, the U.S. Navy quoted the commander at Guantanamo Bay, Leslie J. McCoy, as describing the site prior to the prison as a “minimum-performance arena” with only enough personnel “to keep the base going, to keep the lights on.”⁴⁰

The Helms-Burton Act of 1996 may also be seen as confirming that the territory is no longer “required for the purposes of coaling and naval stations.” In an effort to promote the transformation of Cuba into a democracy, the act made it U.S. policy “to be prepared to enter into negotiations with a democratically elected government in Cuba either to return the United States Naval Base at Guantanamo to Cuba or to renegotiate the present agreement under mutually agreeable terms.”⁴¹ The nature of the value to the United States of Guantanamo Bay was thus legally transformed from one of a military character to one tied to U.S. policy promotion. Imposing this obligation on the United States without regard to the military value of Guantanamo Bay signals that such value

38. The return of control of a leased territory to the host state when the lease expires has occurred both ways. Control of Hong Kong and the Canal Zone passed to the host states (respectively China and Panama) immediately upon the expiration of the leases, while an accord in 1906 concerning the lease of the Lado Enclave in Sudan, then under British control, to King Leopold II of Belgium stated that “(w)ithin six months of the termination of His Majesty’s occupation the Enclave shall be handed over to the Soudanese Government” (Agreement between Great Britain and the Independent State of the Congo, modifying the Agreement signed at Brussels, 12th May 1894 (1906), art. 1, in Edward Hertslet, *The Map of Africa by Treaty*, vol. 2, 3rd ed. (London: Routledge, 1967), 584).

39. Daniel F. McCallum, “Why GTMO?” Research Paper, U.S. National War College, 2003, 2–8. <http://handle.dtic.mil/100.2/ADA442074>, accessed 20 July 2016. The decision was not entirely military, having been made by a working group led by the Department of Defense and including the Department of Justice (with the Federal Bureau of Investigation), the Department of State, the Central Intelligence Agency and the National Security Council.

40. Kathleen T. Rhem, “Guantanamo Bay Has Storied Past,” *American Forces Press Service News Articles*, U.S. Department of Defense, August 24, 2004.

41. Cuban Liberty and Democratic Solidarity (Libertad) Act [“Helms-Burton Act”], P.L. 104–114, 110 Stat 785 (1996).

has been lost on a permanent basis, given that the need for any military facility may fluctuate over time in the international context of geopolitics, conflicts and peace, and given that a state with a “democratically elected government” may at times be hostile to the United States.

U.S. LEGAL OPTIONS: TERMINATING THE LEASE BY ABANDONMENT

A decision to close the naval station at Guantanamo Bay would be a clear signal that the United States no longer requires the territory. But for the area to revert to Cuban control, it is not essential for the United States to formally close the facility, as a base that is no longer needed may remain open indefinitely. This has been illustrated in recent years by the unsuccessful efforts of the Department of Defense to convince Congress to authorize the president to constitute a new commission for approving a new round of domestic base closures:

Military leaders are eager to save money by shuttering some underused bases. But the move is extremely unpopular on Capitol Hill, where many lawmakers fear the process would jeopardize government jobs in their districts.⁴²

What is relevant here is that a base which is not closed legally or administratively but that has lost its usefulness may be subject to physical abandonment, and the 1934 Treaty of Relations opens the possibility for the United States to trigger the termination of the Guantanamo Bay lease this way — by taking actions that would constitute “abandonment” under analogous U.S. (or international or even Cuban) law.⁴³

While the concept of abandonment can entail a time factor, this factor may not necessarily be in the past.

Physically evacuating military personnel from a site with the intent that it be a permanent situation, particularly when combined with halting further attention to maintaining its facilities, or an official statement to acknowledge that the site is being abandoned, may be deemed legally sufficient in this regard. Control over Bahía Honda, the smaller second territory that was included in the 1903 lease but never used by the United States, reverted to Cuba by 1916 because “the United States abandoned the naval station at Bahía Honda.”⁴⁴

Like the other options above, a decision to withdraw troops from a military base is one that the executive branch has the authority to make without consulting Congress, as is the case with any decision regarding a base’s personnel and activities. There is also no legally mandated procedure that stipulates how a base may be abandoned or at what level within the executive branch the decision may be made. This reflects the reality of the military’s combat function, as a base may be abandoned due to the dynamics of a conflict, and the decision to do so may rest with the military officers in charge. This occurred, for example, when the U.S. Marines evacuated the base at Khe Sanh, South Vietnam, during the Vietnam War:

(A)fter the United States declared victory at Khe Sanh, American commanders decided to abandon the Marine base there. This made sense in military terms — the United States had inflicted huge casualties until the enemy forces withdrew, and now there was little point in staying.⁴⁵

In considering abandonment as an option for returning control of Guantanamo Bay to Cuba, one must note that the U.S. Constitution does give Congress the power to regulate what can be done with “the Territory or other Property of the United States.”⁴⁶

42. Andrew Tilghman, “The Pentagon threatened Congress: We’ll close bases without you,” *Military Times*, 19 April 2016.

43. The analogous laws at the national and sub-national level involve the abandonment of property. In international law, the analogy is with sovereign territory: “(T)erritory may be abandoned, but in order for this to operate both the physical act of abandonment and the intention to surrender title are required” (Malcolm N. Shaw, *International Law*, 7th ed. (Cambridge, U.K.: Cambridge University Press, 2014), 377).

44. Luis Machado y Ortega, *La Enmienda Platt* (La Habana: Siglo XX, 1922), 51.

45. Dominic D.P. Johnson and Dominic Tierney, *Failing to Win: Perceptions of Victory and Defeat in International Politics* (Cambridge, Mass.: Harvard University Press, 2006), 153.

46. Art. IV, sec. 3.

But Guantanamo Bay is under Cuba's sovereignty and is therefore Cuban territory and property: the lease makes the United States a tenant, not the owner. Meanwhile, U.S. courts have ruled that Guantanamo Bay is not U.S. territory as defined by the Immigration and Nationality Act of 1952, which detailed what U.S. territory does include.⁴⁷

Even if Guantanamo Bay were somehow considered U.S. property, it would matter little because a U.S. appeals court had ruled that the executive branch can dispose of land without the consent of Congress. The ruling allowed the United States to return control of the Canal Zone, another leased territory, to Panama by treaty.⁴⁸

IMPLICATIONS FOR THE GUANTANAMO BAY PRISON AND REMAINING DETAINEES

In discussing the return of control of Guantanamo Bay to Cuba, the “elephant in the room” is the U.S. prison for alleged terrorists. U.S. President Barack Obama issued an executive order in 2009 to close the prison,⁴⁹ but to date Congress has prevented its implementation. This raises several questions: whether a transfer of control of Guantanamo Bay may occur while the prison is still operational — and, if so, what would (or could) happen to the prison, and what would (or could) happen to the detainees.

The history of territories that are leased between states shows that a recovery of control by the host state when a lease terminates results in the host state resuming the exercise of its sovereign authority, including legal jurisdiction, over everything and everyone that is physically in the territory at the time of the transfer. The parties to a territorial lease some-

times negotiate “termination agreements” that address practical matters or other condition pertaining to the transfer of control,⁵⁰ and these may affect the legal treatment of persons within the territory, including those in prison. This occurred, for instance, with respect to the expiration of the United Kingdom's lease of Hong Kong from China in 1997. More than a decade earlier, the parties agreed that Hong Kong's existing laws would continue to apply for 50 years after China recovered control.⁵¹ In practice, this meant that persons who were in prison when control was transferred came under Chinese jurisdiction but with no immediate material change in their situations.

A total of 780 prisoners have been held at Guantanamo Bay for various periods since 2002. As of 20 July 2016, there were still 76 prisoners detained there, of which 59 have been imprisoned for more than a decade. Most of the prisoners have not been charged with crimes or brought to trial, and 31 have been approved for release.⁵² Nonetheless, a few trials have been occurring and some prisoners who have not been charged are deemed dangerous by U.S. officials.

Political as well as legal considerations would inevitably arise if Cuba were to assume jurisdiction over the remaining prisoners when recovering control of Guantanamo Bay. A possible scenario is that Cuba would consider this undesirable but acceptable as the price for achieving its long-standing national objective of getting control of the territory back — in effect, it would be exchanging an open-ended situation (the lack of control of Guantanamo Bay) for one of limited duration (the life span of the prisoners, if there is no change in their *status quo*). The prisoners'

47. P.L. 82-414, 66 Stat 163 (1952).

48. *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir, 1978). See, e.g., Raoul Berger, “Must the House Consent to Cession of the Panama Canal?” *Cornell Law Review* 64 (2), 1979, 275-318.

49. Executive Order 13492, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Close of Detention Facilities,” 22 January 2009.

50. Michael J. Strauss, *Territorial Leasing in Diplomacy and International Law* (Leiden: Brill, 2015), 173-80.

51. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong [“Sino-British Joint Declaration on Hong Kong”], 19 December 1984, 1399 U.N.T.S. 61, para. 3 (3) and (12).

52. Human Rights First, “Guantanamo by the Numbers,” <http://www.humanrightsfirst.org/resource/guantanamo-numbers>, accessed 20 July 2016.

treatment under Cuban jurisdiction may be subject to a negotiated agreement with the United States, or it may be for Cuba alone to determine.

Cuba is often criticized for its human rights record, not least by the United States, so it is relevant to ask how a transfer of prisoners to Cuban jurisdiction might affect their situation. Here, one can turn to the U.S. Department of State's annual human rights report on Cuba for an indication. It notes that Cuba's domestic laws require that prisoners be advised of the charges against them and given access to legal help within a week of being detained. The report has been critical of Cuba for failing to meet this deadline and keeping detainees waiting for "weeks and sometimes months."⁵³ Yet this delay is extremely brief relative to the amount of time most of the prisoners have awaited news of any U.S. charges against them, and their access to legal counsel under U.S. jurisdiction has been problematic.⁵⁴ In light of such factors, it is not out of the question that their situation under Cuban jurisdiction might improve.

The United States has negotiated the transfer of detainees at Guantanamo Bay to a number of other states — a process that, over time, has contributed to substantially reducing the prison's population. The United States has also criticized the human rights situations in some of the receiving nations, such as Saudi Arabia, where it reported pervasive violations.⁵⁵ One may thus conclude that U.S. perceptions of human rights problems do not disqualify a state from this process. This leaves open the possibility that the United States could end its involvement with the prison at Guantanamo Bay not by closing it but by shifting control of the territory to Cuba.

IMPLICATIONS FOR CUBA OF RECOVERING CONTROL OF GUANTANAMO BAY

Recovering control of a leased territory can have major social, economic or other implications for the host state. The extent of the tenant state's rights in the area and the duration of their exercise can sometimes dramatically affect the territory's condition at the time control is returned. In the case of a lengthy lease in which the tenant state has complete control — a situation that applies to Guantanamo Bay — the host state may find it more practical, or even beneficial, to accept the alterations than to try to restore physical aspects of the territory to their pre-lease situation, or to assimilate the territory into the host state's prevailing social, economic and/or political situations.

The assumption of control of Guantanamo Bay would likely have an enormous impact on the economic development of eastern Cuba, and a significant impact on the economy of the country more generally. The existing deep-water port there would become available for use in Cuban trade, which could influence the competitiveness and volume of trade between Cuba and Latin America and also beyond, considering that Guantanamo Bay is closer than Cuba's other main ports to the Panama Canal. Ports are known to spur economic development in the areas surrounding them and along transportation corridors to which they are linked.⁵⁶ Among the broader impact, a port "enables foreign firms to better access a national economy and thus compete with national firms, with some sectors being put out of business. However, the benefits of having better access to foreign markets and cheaper goods usually far

53. U.S. Department of State, "Cuba 2013 Human Rights Report," 8, <http://www.state.gov/documents/organization/220646.pdf>, accessed 18 July 2016.

54. Restrictions on prisoners' access to legal counsel have been a recurring theme since the prison's creation. See, e.g., Mark P. Denbeaux and Johathan Hafetz, eds., *The Guantanamo Lawyers* (New York: New York University Press, 2009).

55. U.S. Department of State, "Saudi Arabia 2015 Human Rights Report," <http://www.state.gov/documents/organization/253157.pdf>, accessed 20 July 2016.

56. Jean-Paul Rodrigue and Joseph Schulman, "The Economic Impacts of Port Investments," in *The Geography of Transport Systems*, ed. Jean-Paul Rodrigue, 3rd ed. (New York: Routledge, 2013), <https://people.hofstra.edu/geotrans/eng/ch7en/appl7en/ch7a5en.html>, accessed 19 July 2016.

exceeds the risk of having inefficient national firms being undermined.”⁵⁷

The infrastructure that the United States has developed over more than a century at Guantanamo Bay, including a small airport and other facilities, may be additional contributors to the overall economic and social development of the area. The potential for increased economic activity and job growth could be sufficient to generate new population flows toward eastern Cuba. Such prospects could justify a reorientation of Cuban priorities in favor of enhancing transportation and communications links between the main population centers and the eastern part of the island.

At present, there is no indication from Cuban economic plans or other available sources of information

that a transfer of control of Guantanamo Bay is being anticipated. Cuba’s demand for control may be mainly a political one at this point, although the efforts to broaden bilateral relations toward the level of “full normalization” create conditions that can make it a realistic possibility. Even if it is not a near-term probability, political opportunities can emerge at any time that alter the likelihood of the United States acting to satisfy this demand. Thus, it could be beneficial for Cuba to make contingency preparations in the event that such a transfer does take place. A readiness to assume control of Guantanamo Bay operationally as well as politically can shorten the period between the handover and the time Cuba is able to realize the economic and other gains that would come from it.

57. *Ibid.*