

THE FUTURE OF GUANTÁNAMO BAY: RECOVERING THE RULE OF LAW IN THE DETENTION FACILITY AND THE MILITARY COMMISSIONS

November 11-12, 2021 | University of Pennsylvania



Agenda at a Glance

Thursday, November 11, 2021

4:00-5:30 p.m. ET

World Forum | Perry World House
and on Zoom

(PUBLIC) Book Talk with Spencer Ackerman

Friday, November 12, 2021

NOTE: All events on Friday by invitation only

9:00-9:30 a.m. ET

Registration & Breakfast

9:30-10:45 a.m. ET

Welcome & Session One: The U.S. Withdrawal from Afghanistan and Its Impact on the Gitmo Detention Facility

10:45-11:15 a.m. ET

Break

11:15 a.m.-12:30 p.m. ET

Session Two: The Authority for Detention and the Military Commissions at Gitmo

12:30-1:30 p.m. ET

Lunch

1:30-2:45 p.m. ET

Session Three: Detainee Transfers to U.S. Jurisdictions

2:45-3:15 p.m. ET

Break & Afternoon Refreshments

3:15-4:30 p.m. ET

Session Four: The Impact of Classification on Gitmo and the Military Commissions

4:30-4:45 p.m. ET

Break

4:45-6:00 p.m. ET

Session Five: National Accountability and Responsibility to Detainees and the American Public

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(PUBLIC) BOOK TALK WITH SPENCER ACKERMAN

The Center for Ethics and the Rule of Law (CERL) at the Annenberg Public Policy Center of the University of Pennsylvania, together with the Middle East Center, is delighted to host Pulitzer Prize-winning author **Spencer Ackerman** for a conversation on his book *Reign of Terror*. **Claire Finkelstein**, Algernon Biddle Professor of Law and Professor of Philosophy at the University of Pennsylvania Carey Law School and CERL faculty director, will moderate the talk.

Friday, November 12, 2021

9:00-9:30 a.m. ET

(BY INVITATION ONLY) REGISTRATION & BREAKFAST

9:30-10:45 a.m. ET

(BY INVITATION ONLY) WELCOME & SESSION ONE: The U.S. Withdrawal from Afghanistan and Its Impact on the Gitmo Detention Facility

Session Chair: Prof. Claire Finkelstein

In this session, we will discuss the U.S. withdrawal from Afghanistan and consider how the clear intent of the current administration to end U.S. military involvement in Iraq and Afghanistan impacts what the United States could or should do regarding the military commissions and the Gitmo detention facility. Can we now move beyond a wartime paradigm to stop terror and instead adopt a law enforcement model? Does precedent mandate that, since we are now in a state of armistice with the Taliban, the U.S. must release all uncharged detainees captured as part of the conflict in

Afghanistan? Does this answer change if these individuals were involved in the attacks on 9/11? Does the rapid rise of the Taliban, coupled with the attacks by ISIS-K, support a continuing need for the military commissions and detention facility, or might these developments create an enabling environment for abuse of this option, if permitted?

10:45-11:15 a.m. ET

BREAK

11:15 a.m.-12:30 p.m. ET

(BY INVITATION ONLY) SESSION TWO: The Authority for Detention and the Military Commissions at Gitmo

Session Chair: Prof. Harvey Rishikof

This session will evaluate the legal authority for the continued detention and prosecution before military commission of the Gitmo inmates. Military commissions have traditionally been wartime, in-the-field military tribunals for the trial of enemies accused of violating the rules of war. The military commissions at Guantánamo Bay were created in the aftermath of 9/11 attacks to try suspected terrorists associated with the event. In November 2001, President George W. Bush issued a Military Order directing the Secretary of Defense to oversee the detention and trial of noncitizens who were suspected of participating in terrorist activities. Guantánamo Bay was selected as the site of detention and trial, so that detainees could be removed from U.S. jurisdiction and deprived of constitutional protections normally afforded in Article III courts. Further, Guantánamo military commissions have less stringent evidentiary rules than Article III courts and courts martial, often permitting the use of controversial evidence that was allegedly obtained through the use of torture.

Over the last two decades, only eight detainees have been convicted by the military commissions, and many are still awaiting charges. This extreme inefficiency has resulted in decades of continued detention for many detainees, depriving them of access to a fair and speedy trial. In this session, members of the Gitmo working group will discuss the role of the military commissions

system, its failure in bringing about justice, and potential reforms in the future. In addition, this session will raise questions about the structure of the military commissions system more broadly. For example, is it just to prosecute non-state actors for violations of international humanitarian law? Similarly, should non-state actors continue to be labelled unlawful enemy combatants instead of either enemy combatants or criminal defendants?

12:30-1:30 p.m. ET

(BY INVITATION ONLY) LUNCH

1:30-2:45 p.m. ET

(BY INVITATION ONLY) SESSION THREE: Detainee Transfers to U.S. Jurisdictions

Session Chair: Col. Moe Davis

This session will evaluate the political and practical feasibility of using other U.S. jurisdictions to handle matters currently before the military commissions. Further, participants will discuss the roadblocks and potential pitfalls to using U.S. prisons on the mainland for the execution of sentences for detainees. This will include discussing the possibility of transferring detainees from the military commissions to federal courts for remote guilty pleas, full contested trials, and/or sentencing proceedings. Participants in the session will also discuss the potential implications of any physical transfer to a U.S. location on detainees' immigration status, and they will raise questions about the constitutionality of any death sentence that may be imposed in a military commission or federal court.

For many years, detractors of the military commissions have advocated the transfer of detainees awaiting trial before the commissions to federal court. An attempt to move Khalid Sheik Mohammed to federal court in the southern district of New York was met with outrage and opposition. In addition, the 2017 National Defense Authorization Act forbade any federal monies from being used for the purpose of transferring Gitmo defendants into federal court. Other obstacles to transfer have to do with Gitmo's history of

torture and the resulting inadmissibility of evidence gained under torture in federal court.

One option is to separate those detainees prepared to enter guilty pleas, regardless of the forum, from those awaiting trial before the commissions. As some scholars have argued, guilty pleas might be conducted by video, with defendants remaining at Guantánamo. But with the taint in evidence, as well as the protracted length of these defendants' detention, it is unclear whether such pleas would be admissible in federal court.

2:45-3:15 p.m. ET

BREAK & AFTERNOON REFRESHMENTS

3:15-4:30 p.m. ET

(BY INVITATION ONLY) SESSION FOUR: The Impact of Classification on Gitmo and the Military Commissions

Session Chair: Mr. Adam Thurschwell

Throughout the war on terror, there has been a persistent debate about the way to balance national security interests with the need for a transparent government. Within this broader debate, the problem of over-classification has pervaded attempts to prosecute detainees in Guantánamo Bay. Although the defense counsels for these detainees need sufficient information to develop and support their arguments, the availability of information must be balanced against the government's interest in ensuring that classified information does not fall into the wrong hands. Both the prosecution and the defense, however, appear to agree that over-classification has delayed the start of trial progress of the cases being brought against detainees who are being held in Guantánamo Bay.

In this session, participants will discuss the United States' classification practices in the context of the military commissions system and Guantánamo Bay. If over-classification has led to stalled trials and cumbersome legal procedures, as well as dramatically increased costs for U.S. taxpayers, should the U.S. rethink its approach to weighing the costs and benefits of its precautions from

the standpoint of national security? The session will also consider whether transparency and the open availability of information should be balanced and weighed against the government's interest in protecting classified information. Government transparency is vital to the functioning of a democracy, and in an ideal world, there would be no need for secrecy. However, given pragmatic concerns about the risk that increased transparency might pose to national security, how should the United States move forward to address this current impasse?

4:30-4:45 p.m. ET

BREAK

4:45-6:00 p.m. ET

(BY INVITATION ONLY) SESSION FIVE: National Accountability and Responsibility to Detainees and the American Public

Session Chair: Mr. Alberto Mora

Closing the Guántanamo Bay detention facility would be the first step in a process that must also include a national pursuit of accountability and acceptance of a continuing responsibility for U.S. abuses.

This session will address what it would mean for the United States to take responsibility for its past actions. Various factors pose complications when striving for accountability. Nonetheless, there are concrete steps that Congress and the president can take in holding the U.S. accountable for its actions in Guantánamo Bay. CERL working group members will also discuss steps that could be taken, such as: (1) a Senate Judiciary Committee report; (2) an executive order that establishes the future of Guantánamo; (3) the need for the U.S. to commit to complying with international humanitarian law. Why is holding the U.S. accountable for the atrocities and violations committed at Guantánamo pertinent to national security? Can these future steps repair the United States' tarnished international reputation? What are the implications if the United States never ultimately takes accountability?

This session will also discuss the responsibilities the U.S. will have toward detainees after they are transferred to another country or tribunal, in addition to the history of efforts that have been made to transfer detainees to jurisdictions outside of the United States. In particular, it will examine the responsibilities that the United States may have toward transferred detainees under domestic and international law, such as duties of rehabilitation, compensation, and continuing responsibility for health care. Or, alternatively, would these duties transfer to other countries or international tribunals after they have taken custody of a detainee? With detainees who are cleared for transfer, there will be questions as to what the state of negotiations with other countries, coupled with the legal and political hurdles to accomplishing future transfer, would look like. Under those circumstances, would there be room for the International Court of Justice to step in? Alternatively, would it be preferable to create a special international commission to play a role in handling affairs related to the transfer and/or release of detainees?