

Foreword

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This law review issue in part memorializes a historic event organized and hosted by Seton Hall Law School on October 5, 2006: the Guantánamo Teach-In.¹ The event was a remarkably successful hybrid of a relatively old forum for the substantive discussion of current politics and ideas, delivered through the relatively new medium of the World Wide Web. Seton Hall brought together dozens of experts—lawyers, human rights advocates, journalists, military officers, theologians, historians, ethicists and government officials—to discuss, in person, one of the most pressing moral and legal questions of our time: whether the existence of the system of indefinite detention of foreign nationals in Guantánamo Bay, pursued by the executive branch outside of any traditional legal constraints, is consistent with our constitutional republic. Through the miracles of modern technology, these discussions were simulcast, via the internet, to thousands of students' viewing monitors at hundreds of schools across the country, where they themselves could participate in their own consideration of the views projected from the Seton Hall Law School auditorium. Indeed, at last count, over 250 streams of the program went out to educational institutions—large and small—to an overall audience of thousands. Participating institutions ranged from private

* Associate Professor of Law, Seton Hall Law School. The author represents Murat Kurnaz, a now twenty-three year old detainee of Turkish descent who was released to his home country of Germany in August 2006. The principle organizers of and creative energy behind the Teach-In were Seton Hall Professor Mark Denbeaux, Bard College Professor Alan Sussman, and Northwestern Law School Professor Joe Margulies. The Teach In was an enormous undertaking that was made possible by the financial and moral support of Dean Patrick Hobbs and the technical support of Carmelo Lubrano and Michael McBride. Special recognition must go to a remarkable collection of Seton Hall students who dedicated many hundreds of hours laboring over invitations, technical issues, streaming processes, and all the dozens of unforeseen problems that are inherent to producing such an elaborate program. They are: Matthew Darby, Shana Edwards, David Gratz, John Gregorek, Shane Hartman, Daniel Mann, Megan Sassaman, Helen Skinner

¹ The entire Teach-In program is accessible through the Seton Hall Law Review website. For further information about the Seton Hall Law Review and the Guantánamo Teach-In, please visit the Seton Hall University School of Law website at law.shu.edu.

and state law schools, to undergraduate colleges, to theological seminaries, to community colleges to the Judge Advocate General's Legal Center and School in Charlottesville Virginia.

The diversity and intensity of interest seems to reflect in large part that Guantánamo remains a mysterious, secretive, and ultimately deeply troubling phenomenon. That the institution is troubling at a time when international and military legal norms have so far developed to condemn such an institution and that it is troubling in a place, such as the United States, which as much as anything else, stands for the proposition that a government constrained by law—rather than one driven by power, will, or discretion—is one of our greatest achievements. On a more visceral level, there seems to be something so discordant and antiquated about imprisoning our enemies across the seas—something so anomalous about the creation of a prison outside the law.

In speaking frequently to lay and law audiences alike about Guantánamo, I have observed that many feel confused about how we came to develop a phenomenon like Guantánamo, frustrated that Guantánamo has become dangerously and essentially symbolic of something gone very wrong with America—a sort of “anti Statute of Liberty” as Thomas Friedman has called it—and helpless about what they can do to end many of the perceived abuses associated with Guantánamo. The Teach-In, then, was designed in part to gather people physically in one place and, virtually, across the country, to attempt to answer a couple of important questions. First, what is Guantánamo—how did we get there, and how does it fit into a broader legal, historical, and moral context and, second, how should we respond?

To help answer these questions, we assembled a remarkable set of panelists on a wide variety of subjects. One of the remarkable things about Guantánamo is that it has affected—some might say corrupted—so many institutions and communities in American life. Therefore, we constructed this dialogue by inviting members of a variety of affected communities to come together here, to talk and reflect. Some of the remarks of panelists have been included in this volume.

At the outset, and to frame later discussions, Joe Margulies, lead counsel in *Rasul v. Bush*, and the author of an enormously well-written and critically-praised book, *Guantánamo and the Abuse of Presidential Power*, provided a “primer” on the Bush Administration's detention policy, of which Guantánamo is, of course, central. Our first substantive panel discussion, entitled “Journalists' Look Behind the

Wire,” featured prominent journalists covering Guantánamo: Jane Mayer of the *New Yorker*, whose writing has revealed remarkable policy decisions on Guantánamo and the practice of extraordinary renditions made by the Pentagon and White House; Carol Rosenberg of the *Miami Herald*, who has been covering Guantánamo longer and likely more frequently than any other print journalist; and Adam Zagorin of *Time*, who obtained and printed controversial interrogation logs of detainee Mohammed Al-Khatani. Moderated by Jack Hitt, himself a renowned journalist and essayist, this panel investigated a range of ethical issues, conflicts, and journalistic obligations that have arisen in the course of their coverage of this otherwise secretive program.

The second panel, moderated by Retired Brigadier General Dr. Stephen Xenakis, was entitled “First Do No Harm: Medical Professionals in Guantánamo.” The panel debated one of the most contentious moral issues arising out of the detention system at Guantánamo: the involvement of licensed medical professionals in the conduct of detainee interrogations. Leonard Rubenstein, the Executive Director of Physicians for Human Rights and Jonathan Marks, a Pennsylvania State University Associate Professor of Bioethics, Humanities, and Law, argued vigorously against any participation by any licensed medical professional in interrogations, particularly where medical expertise is sought by the military in order to specifically exploit a subject’s weaknesses and thereby make him more susceptible to interrogation. Dr. Gerald Koocher, the President of the American Psychological Association, defended his organization’s refusal to categorically condemn psychologist participation in interrogations, particularly where the presence of psychologists might actually moderate interrogation methods or prevent military excesses. Leonard Rubenstein, Professor Marks, and Dr. Xenakis each contributed thoughtful articles to this volume.

The third panel, entitled “Matters of Faith: Guantánamo and Religious Communities” addressed how different communities of faith have or should respond to Guantánamo. The panel was moderated by Dr. Ingrid Madsen, a Professor of Islamic Studies and the Director of Islamic Chaplaincy at the Hartford Seminary, and included representatives of three major faiths: Captain James Yee, the former Islamic advisor for the Guantánamo detainees and author of *For Love and Country*; Rabbi Michael Feinberg, the Executive Director of the New York Labor-Religion Coalition; and Reverend George Hunsinger, Professor at the Princeton Theological Seminary. Generally pleading for a strong moral condemnation of Guantánamo by all

persons of faith, the panelists expressed particular dismay about the use of torture and religious and cultural humiliation as interrogation techniques on prisoners.

The fourth panel included nationally prominent human rights lawyers who discussed potential legal responses to other aspects of American detention policy, apart from what is occurring in Guantánamo. It was entitled “American Detention Policy: The Next Frontier.” The panel was moderated by Jonathan Hafetz, a lawyer in the National Security Division of the Brennan Center for Justice, and contributor to this volume. Professor Margaret Satterthwaite of New York University Law School discussed the CIA practice of “extraordinary renditions,” and Gita Gutierrez of the Center for Constitutional Rights, and John Sifton of Human Rights Watch, discussed the use of the Bagram Air Force Base and secret “black” CIA sites to conduct detention and interrogation operations and the developing legal theories to challenge these practices.

The fifth panel, entitled “The History of Torture in the Modern World,” was moderated by Joe Margulies. As part of this panel, Walter Pincus, senior journalist with the *Washington Post*, described his work in uncovering the use of previously unauthorized interrogation techniques on detainees in Guantánamo. Professor Alfred McCoy, author of *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror*, documented the ways in which interrogation techniques in Guantánamo—themselves a product of long-standing CIA psychological torture techniques developed during the Cold War—officially migrated with government sanction to Abu Ghraib. John Conroy, a Chicago journalist and author of *Unspeakable Acts, Ordinary People*, and Professor Craig Haney, a designer of the famous Stanford Prison Study in the 1970s, described how ordinary individuals can be made to engage in immoral and brutal acts.

The sixth panel, entitled “The Military and the Commander-in-Chief,” asked how members of the armed services should respond to policies designed by their civilian commanders—including the choice to not follow limitations imposed by the Geneva Conventions or the Uniform Code of Military Justice—with which they strongly disapprove. The panel included Retired Rear Admiral Donald Guter, a former Navy JAG and current Dean of Duquesne Law School, who has been an outspoken critic of many Bush Administration practices in Guantánamo; Lieutenant Commander Charles Swift, counsel to Salim Hamdan, who successfully challenged, in *Hamdan v. Rumsfeld*, military commission procedures adopted by the Bush Administration; and Colonel Dwight Sullivan, Chief Military Defense Counsel for the

Military Commissions. This provocative discussion was moderated by Ronald W. Meister, former Military Judge, United States Navy.

Interspersed between the panels, we heard from lawyers representing detainees who, perhaps more than anyone else, were positioned to communicate the legal, physical, and emotional hardships their clients face. It was these testimonials that made the problems associated with Guantánamo real and powerful. Julia Tarver-Mason, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, LLP, described the desperate yet principled motivations for her Saudi client's prolonged hunger strike, and the brutal ritual, seemingly vindictive, of his forced feeding. Tom Wilner, a partner at Shearman & Sterling, LLP, and counsel in *Al Odah v. Bush*, discussed the numerous instances of religious and cultural humiliation his Kuwaiti clients experienced. Joshua Colangelo-Bryan, a lawyer at Dorsey & Whitney, described the hopelessness and despair that has driven his Bahraini client to attempt suicide—twelve times. I discussed a number of cases—including my client's—of demonstrable innocence, and the myriad ways in which innocent men wound up in Guantánamo. Brent Mickum, then a partner at Keller & Heckman, discussed the highly attenuated cases of his British clients, who were actually arrested in Africa, thousands of miles from any battlefield. Mark Falkoff, Associate Professor at Northern Illinois College of Law, and co-counsel for seventeen Yemeni detainees, read from a collection of poems he has collected from released and still-imprisoned detainees.

The Teach-In concluded with remarks from William H. Taft, IV, the former Legal Advisor to the United States Department of State. Mr. Taft had, in February 2002, written a powerful memorandum urging the White House to honor what he clearly believed were the country's obligations to apply the protections of the Geneva Conventions to detainees captured in the war in Afghanistan. It would seem that the administration's failure to abide by that sound and relatively simple counsel to obey our commitments under the rule of law might explain everything that has happened since. It is those subsequent, regrettable events, which the Teach-In reflected upon throughout the day.

The Teach-In could not, of course, represent a final or definitive history of our adventure in Guantánamo, not least because our adventure is not yet completed. It marks the start of a crucial and continuing conversation as well as a plea for continuing thoughtful reflection on this profound moral problem. Nevertheless, I would not have to venture far to suggest that the Teach-In provided the most significant national consideration of the myriad dilemmas raised by

our practices in Guantánamo, measured both in terms of substantive content of the program, and the breadth of the audience.