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Naval Station Guantanamo Bay: History and Legal Issues Regarding Its Lease Agreements

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Summary

This report briefly outlines the history of the establishment of the U.S. naval station at Guantanamo Bay, Cuba, during the first decade of the twentieth century, its changing relationship to the community around it, and its heightened importance with military operations in Afghanistan and Iraq. It also explains in detail the legal status of the lease of the land on which the naval station stands, the statutory and treaty authorities granted to the President with regard to any potential closure of the naval station, and the second-order effects on such a closure that Cuba sanctions laws might have. A short list of additional readings ends the report.

At the end of the Spanish-American War in 1898, the Spanish colonies of Cuba, Puerto Rico, Guam, and the Philippines transitioned to administration by the United States. Of these four territories, only Cuba quickly became an independent republic. As a condition of relinquishing administration, though, the Cuban government agreed to lease three parcels of land to the United States for use as naval or coaling stations. Naval Station Guantanamo Bay, Cuba, was the sole installation established under that agreement. The two subsequent lease agreements, one signed in 1903 and a second in 1934, acknowledged Cuban sovereignty, but granted to the United States “complete jurisdiction and control over” the property so long as it remained occupied.

Relations between the naval station and its surrounding communities remained stable until the Cuban revolution of the late 1950s. As Cuban-American relations deteriorated in the aftermath of the 1959 Cuban revolution, the naval station found itself more and more isolated. When the Cuban government began shutting off the supply of potable water during the early 1960s, the United States took measures to render the naval station self-sufficient in both water supply and electrical power generation. It has remained so ever since.

The prominence of Naval Station Guantanamo Bay rose briefly during the Haitian refugee and Cuban migrant crises of the early 1990s. At one point in late 1994, the migrant population of the naval station approached 45,000. However, by the end of January 1996, the last of these temporary residents had departed.

The naval station’s return to prominence arose due to the establishment of facilities to house a number of wartime detainees captured during military operations in Afghanistan and Iraq. This practice began in early 2002 with the refurbishment of some of the property formerly used to house refugees. It later expanded to more substantial housing that is operated by Joint Task Force-Guantanamo, a tenant for which the naval station provides logistical support. Additional temporary facilities were eventually constructed on a disused naval station airfield for use by the military commissions created to try detainees.

The 1903 lease agreements between the governments of Cuba and the United States are controlled by the language of a 1934 treaty stipulating that the lease can only be modified or abrogated pursuant to an agreement between the United States and Cuba. The territorial limits of the naval station remain as they were in 1934, unless the United States abandons Guantanamo Bay or the two governments reach an agreement to modify its boundaries. While there appears to be no consensus on whether the President can modify the agreement alone, Congress is empowered to alter by statute the effect of the underlying 1934 treaty. There is no current law that would expressly prohibit the negotiation of lease modifications with the existing government of Cuba, but the House of Representatives passed a prohibition on carrying out such a modification without congressional approval as part of the National Defense Authorization Act for FY2017 (H.R. 4909/S. 2943).

As for “abandoning” the naval station, it appears that there are no statutory prohibitions against closing an overseas military installation. Nevertheless, Congress has imposed practical

impediments to closing the naval station by, for example, restricting the transfer of detainees from Guantanamo Bay to foreign countries and banning their transfer to the United States. The existence of various Cuba sanctions laws may also impede a closure of Naval Station Guantanamo Bay by making it difficult to give or sell any property to the government of Cuba.

For information on the Guantanamo detention facility, see CRS Report R41920, *Detainee Provisions in the National Defense Authorization Bills*, by Jennifer K. Elsea and Michael John Garcia; and CRS Report R40139, *Closing the Guantanamo Detention Center: Legal Issues*, by Michael John Garcia et al. For background on U.S. policy toward Cuba, see CRS Report R43926, *Cuba: Issues for the 114th Congress*, by Mark P. Sullivan.

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Introduction

Naval Station Guantanamo Bay, Cuba, must be distinguished from the military commissions and detention facilities located within its boundaries, which are separate and independent military organizations with the naval station acting as host to the other two. While the Obama Administration expressed an intention to close the detention facilities at the naval station as early as its first month in office, the Administration maintains that it has no intention or plan to alter the status of the naval station itself.¹ In recent years, however, Congress has in successive National Defense Authorization Acts enacted restrictions on the transfer of detainees from Guantanamo, as well as provisions designed to prevent the closure or abandonment of the naval station.²

Naval Station Guantanamo Bay: The 45 square miles of land on which the station sits have been leased from the Cuban government since the early years of the twentieth century. The naval station was established to serve as a protected harbor, coaling station, and eventually a convoy staging area and airfield. Because the station is a facility of the United States Navy, its military chain of command runs from the station commanding officer through the commander of Navy Region Southeast in Jacksonville, Florida, and the commander of Navy Installations Command in Washington, DC, to the Chief of Naval Operations. The naval station provides logistical support to the detention and military commission facilities located within its boundaries.

Joint Task Force – Guantanamo: The various detention facilities on the eastern extremities of the station are operated by Joint Task Force (JTF) – Guantanamo, a combined Army, Navy, Air Force, Marine Corps, and Coast Guard organization that is currently commanded by a Navy rear admiral (lower half). JTF – Guantanamo is a subordinate of U.S. Southern Command (USSOUTHCOM), one of the nine Combatant Commands, which is headquartered in Doral, Florida, near Miami. JTF – Guantanamo was established in late 2002.

Office of Military Commissions – South Detachment: Military commissions were created by the President under the authority of the Military Commissions Act of 2006,³ since amended. The Director of the Office of Military Commissions is directly subordinate to the Secretary of Defense and the Deputy Secretary of Defense. The Office of Military Commissions is located in Washington, DC.⁴ The office’s Guantanamo Bay detachment (OMC-South) works in a temporary facility, Camp Justice, that sits on the closed McCalla airfield on the east side of the mouth of Guantanamo Bay.

¹ Executive Order 13492, “Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Close of Detention Facilities,” 74 *Federal Register* 4897-4900, January 27, 2009; and Department of Defense, “Department of Defense Press Briefing by Secretary Carter and Gen. Dempsey in the Pentagon Briefing Room,” press release, July 1, 2015, <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5648>.

² For more information on these provisions, see CRS Report R41920, *Detainee Provisions in the National Defense Authorization Bills*, by Jennifer K. Elsea and Michael John Garcia.

³ P.L. 109-366; 120 Stat. 2600. Military Commissions are codified as Chapter 47A of Title 10, United States Code. For more information on military commissions, see CRS Report R41163, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, by Jennifer K. Elsea.

⁴ Information on the Office of Military Commissions may be found online at <http://www.mc.mil/ABOUTUS.aspx>.

Figure I. Naval Station Guantanamo, Cuba

Source: By CRS using data from Esri. Map created by Bisola Momoh, Visual Information Specialist.

A History of Naval Station Guantanamo Bay, Cuba

The origins of the U.S. military installation at Guantanamo Bay, Cuba, lie in the execution of military operations during the Spanish-American War of April – August 1898. While the principal reasons for the declaration of war by both Madrid and Washington centered on U.S. intervention in an ongoing indigenous revolution in the Spanish colony of Cuba – a precipitating event was the sinking of the battleship USS *Maine* by an explosion in Havana harbor in February – the war was fought on Cuban and Puerto Rican soil in the Caribbean and on Guam and in the Philippines in the Pacific. At war's end, the United States retained control of Spain's former territories in the Pacific and Puerto Rico, while Cuba eventually established an independent government after several years of U.S. occupation.

The military campaign in Cuba began with the landing of U.S. Marines at Guantanamo Bay on the island's southeastern coast in early June 1898 and the eventual capture of the various Spanish fortifications in the vicinity by a combined U.S.-Cuban force. The bay proved a valuable staging area for the subsequent land and naval campaigns against the city of Santiago de Cuba, 41 miles to the west, and Puerto Rico, 600 miles to the east. The Marine camp created to the east of the bay's mouth during the operation was disestablished in August 1898, and Spain ceded control of Cuba, along with the other contested territories, to the United States in the Treaty of Paris of 1898.

Congress inserted the so-called Platt Amendment into the Army appropriations act for FY1902.⁵ The provision authorized the President to return control of the island to the people of Cuba on the condition that the country ratify a constitution containing specific provisions recognizing certain U.S. rights, including “the right to intervene for the preservation of Cuban independence and the

⁵ 31 Stat. 898, part of the Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and two, enacted March 2, 1901. Senator Orville Hitchcock Platt of Connecticut sat on the chamber's Committee on Cuban Relations.

maintenance of a government adequate for the protection of life, property, and individual liberty.” With regard to the future naval station, Article VII of the Amendment provided:

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States.

Independence and the Land Lease

Cuba became an independent republic in 1902, and the Platt Amendment became part of the country’s 1901 constitution. In February 1903, under President Theodore Roosevelt, the United States and Cuba signed a lease agreement “for the purposes of coaling and naval stations.”⁶ According to Article III of the lease agreement:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas....⁷

In May 1903, both countries signed a treaty defining bilateral relations that incorporated the full text of the Platt Amendment, including Article VII cited above.⁸ The Senate gave its advice and consent to the treaty on March 22, 1904.

President Roosevelt signed an additional lease agreement in October 1903,⁹ which set the sum to be paid and provided for various other rights and obligations. The President cited the Platt Amendment as his authority to sign the agreement; the President did not seek, and the Senate did not provide, its advice and consent.

In 1934, during the Administration of President Franklin Delano Roosevelt, the 1903 Treaty was abrogated and replaced with a new friendship treaty, the 1934 Treaty of Relations.¹⁰ The Senate gave its advice and consent without condition on May 31, 1934.¹¹ The new treaty repealed the controversial Platt Amendment language of the 1903 treaty, which was the basis for several U.S. military interventions in Cuba (1906, 1912, 1917, and 1920). The new treaty did, however, include a provision related to the lease of Guantanamo. With regard to the U.S. military facility, Article III of the 1934 treaty provides:

Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval station, the stipulations of that agreement with

⁶ For the full text of the amendment, see Transcript of Platt Amendment (1903), Ourdocuments.gov, available at <http://www.ourdocuments.gov/doc.php?doc=55&page=transcript>.

⁷ The agreement included three separate parcels of land at (1) Guantanamo, (2) a site in northwestern Cuba, and (3) Bahia Honda. Only the naval station at Guantanamo was actually built. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, TS 418 (entered into force February 23, 1903), *available online at* http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

⁸ U.S.-Cuba Treaty, 33 Stat. 2248. Ratifications were exchanged in July 1904.

⁹ Agreement providing conditions for the lease of coaling or naval stations, TS 426 (entered into force October 6, 1903), *available online at* http://avalon.law.yale.edu/20th_century/dip_cuba003.asp.

¹⁰ Treaty of Relations, U.S.-Cuba, 48 Stat. 1682, TS 866 (entered into force June 9, 1934), *available online at* http://avalon.law.yale.edu/20th_century/dip_cuba001.asp.

¹¹ 78 CONG. REC. 10116.

regard to the naval station of Guantanamo shall continue in effect. The supplementary agreement in regard to naval or coaling stations . . . , also shall continue in effect in the same form and on the same conditions with respect to the naval station at Guantanamo. So long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.

U.S. - Cuban Relations Deteriorate; Naval Station is Isolated

Relations between the naval station and the surrounding community remained stable from the time of its establishment through both world wars and well into the 1950s. This began to change with the initiation of the Cuban revolution, which originated in the nearby hills of Cuba's Oriente Province. An example of that change was the capture of 29 sailors on liberty outside the base gates on June 27, 1958, by forces led by Raúl Castro, brother of revolutionary leader Fidel Castro. The last of the sailors was released on July 18 of the same year.¹² All Cuban territory outside of the base boundary was declared off-limits to U.S. personnel on January 1, 1959, the day that the government of Fulgencio Batista collapsed.¹³

As bilateral relations deteriorated in the aftermath of the Cuban revolution, the United States broke diplomatic relations with Cuba on January 3, 1961.¹⁴ The Cuban government cut off the supply of water to the naval station on February 6, 1964, and the naval station has remained self-sustaining in water and electrical power in the years since.¹⁵

The Naval Station's Role Changes

In the early 1990s, the naval station was used to house a sizeable number of Haitians and Cubans fleeing their countries by boat and seeking asylum. A September 1991 coup in nearby Haiti prompted several thousand Haitians to attempt escape by sea and by December, more than 6,000 were being housed at facilities on Navy ships and ashore at the naval station.¹⁶ According to the naval station's online history, the flow of migrants continued to increase through the fall of 1994, when the Haitian and Cuban population rose to more than 45,000, prompting an evacuation of Department of Defense (DOD) civilians and service family members.¹⁷ The migrant population gradually fell thereafter, with the last of the temporary population leaving by the end of January 1996.

¹² Peter Kihss, "All Servicemen Freed in Cuba," *New York Times*, July 19, 1958, p. 1. The article noted that Raúl's forces had kidnapped fifty American and Canadian civilians and servicemen between June 26 and June 30 of that year.

¹³ See Naval Station Guantanamo Bay, Cuba, History, http://www.cnmc.navy.mil/regions/cnrse/installations/ns_guantanamo_bay/about/history.html; and United Press International, "Batista Flees, Cuba Riots," *Daily Boston Globe*, January 2, 1959, p. 1.

¹⁴ Associated Press, "U.S. Breaks Cuba Relations," *Boston Globe*, January 4, 1961, p. 1. For background, see CRS Report R43926, *Cuba: Issues for the 114th Congress*, by Mark P. Sullivan.

¹⁵ Associated Press, "Johnson Firm on Cuba, Pledges Water for Base," *Boston Globe*, February 7, 1964, p. 1.

¹⁶ Barbara Crossette, "U.S. Transfers Haitians to Base in Cuba," *New York Times*, November 27, 1991, p. A3; and Barbara Crossette, "U.S. Expanding Refugee Center As More Haitians Flee Homeland," *New York Times*, December 3, 1991, p. A6.

¹⁷ Naval Station Guantanamo Bay, Cuba, History. DOD reports the current population of the naval station as 878 active duty and reserve military personnel, 87 civilians, and their families. See Department of Defense, *Base Structure Report - Fiscal Year 2015 Baseline*, Washington, DC, p. PERS-12, <http://www.acq.osd.mil/eie/Downloads/BSI/Base%20Structure%20Report%20FY15.pdf>.

Another role for the naval base emerged in the aftermath of the September 11, 2001 terrorist attacks on New York and Washington, DC. On November 13, 2001, President George W. Bush issued a military order directing the detention of certain non-citizens suspected of involvement in international terrorism.¹⁸ Refurbishment of the disused refugee facilities and construction of new detention centers at the naval station was first announced in the press on January 2, 2002, within four months of the 2001 terrorist attacks.¹⁹ Joint Task Force-160, a multi-service unit under Marine command, arrived at the naval station in early January 2002 to begin construction of facilities for up to 2,000 detainees.²⁰ Almost immediately, the first detainees, approximately 300, began to transfer to these facilities from Kandahar, Afghanistan.²¹

Joint Task Force-Guantanamo was created in November 2002 to operate the newly created detention facilities. According to *The Guantánamo Docket*, a website maintained by the *New York Times*, the detainee population reached its maximum size, 684, in June 2003. As of October 20, 2016, the site reported that 60 detainees were held at the site, and another 711 had been transferred to other countries.²²

¹⁸ Presidential Documents, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 *Federal Register* 57831-57836, November 16, 2001.

¹⁹ Unattributed, “Rumsfeld: US Will Finish Afghan Mission, Find Bin Laden,” *Dow Jones International News*, January 3, 2002, p. 15:47.

²⁰ Carol Rosenberg, “U.S. Military Deploys to Cuba, will Build Prison,” *Miami Herald*, January 7, 2002, p. 1A.

²¹ Steve Vogel, “Afghan Prisoners Going to Gray Area,” *Washington Post*, January 9, 2002, p. A1; Ellen Knickmeyer, “U.S. Ships First Batch of al-Qaida Prisoners Out Toward Guantánamo,” *Associated Press Newswires*, January 9, 2002, 19:29.

²² Details regarding legislation pertaining to wartime detainees may be found in CRS Report R42143, *Wartime Detention Provisions in Recent Defense Authorization Legislation*, by Jennifer K. Elsea and Michael John Garcia.

Figure 2. U.S. Naval Station Guantanamo, Detail

Source: By CRS using data from Esri, HERE, DeLorme, USGS, Intermap, increment P Corp., NRCAN, Esri Japan, METI, Esri China (Hong Kong), Esri (Thailand), TomTom, MapmyIndia, © OpenStreetMap contributors, and the GIS User Community, HSIP Gold 2015. Map created by Bisola Momoh, Visual Information Specialist.

The Legal Status of the Land Lease

As previously noted, the wording of Article III of the 1934 Treaty of Relations between the United States and Cuba provides that:

Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval station, the stipulations of that agreement with regard to the naval station of Guantanamo shall continue in effect. The supplementary agreement in regard to naval or coaling stations, also shall continue in effect in the same form and on the same conditions with respect to the naval station at Guantanamo. So long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.²³

Thus, the two earlier executive agreements²⁴ pertaining to the Guantanamo lease (one entered into force on February 23, 1903, and the second entered into force on October 6, 1903) can only be

²³ Treaty of Relations, U.S.-Cuba, 48 Stat. 1682, TS 866 (entered into force June 9, 1934), *available online at* http://avalon.law.yale.edu/20th_century/dip_cuba001.asp.

²⁴ Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, TS 418 (entered into force February 23, 1903), *available online at* http://avalon.law.yale.edu/20th_century/dip_cuba002.asp; Agreement providing conditions for the lease of coaling or naval stations, TS 426 (entered into force October 6, 1903), *available online at* http://avalon.law.yale.edu/20th_century/dip_cuba003.asp. Executive agreements are international (continued...)

modified or abrogated pursuant to an agreement between the United States and Cuba. The territorial limits of the naval station remain as they were in 1934, unless the United States abandons Guantanamo Bay (effectively ending the lease) or the two governments reach an agreement to modify its boundaries.²⁵ The pertinent question is whether, under U.S. law, a modification or termination of the lease agreements can be accomplished with an executive agreement or whether it must take the form of a treaty, ratified pursuant to the advice and consent of the Senate. A second question is whether the President has the authority to “abandon” the naval station without action by Congress.

Presidential Authority to Modify or End the Guantanamo Lease

The Constitution is silent as to how international agreements – such as the agreements between the United States and Cuba – are to be amended or abrogated. The general rule of practice is that a modification to an international agreement should be accomplished by the same means through which the original agreement was made.²⁶ However, this does not appear to be a legal requirement and, at any rate, there is some precedent demonstrating that Congress (or the Senate, in giving its advice and consent) appears to have the authority to approve the use of a different vehicle for modifying an international agreement, possibly depending on the subject matter of the treaty.²⁷

The two Guantanamo lease agreements appear to have elements of both congressional-executive agreements (authorized by the Platt Amendment) and executive agreements pursuant to a treaty (the 1903 Treaty with Cuba incorporating the Platt Amendment). Article VII of the Platt Amendment required Cuba to lease lands for coaling and naval stations as “agreed upon by the President of the United States.” That authority for the President to make lease agreements without further involvement of the Senate (or Congress) did not specify whether the President could later alter or abrogate such agreements, but such authority would seem to be fairly implied by the treaty. The Platt Amendment, however, was repealed by the abrogation of the 1903 treaty.²⁸ Thus, the language of the 1934 Treaty of Relations is controlling.

(...continued)

agreements entered into by the executive branch that are not submitted to the Senate for its advice and consent. There are three types of executive agreements: (1) congressional-executive agreements, in which Congress has previously or retroactively authorized an international agreement entered into by the executive branch; (2) executive agreements made pursuant to an earlier treaty, in which the agreement is authorized by a ratified treaty; and (3) sole executive agreements, in which an agreement is made pursuant to the President’s constitutional authority without further congressional authorization. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §303 (1987) (hereinafter “RESTATEMENT”); see also CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Michael John Garcia. Because the lease agreements were contemplated under both the Platt Amendment and the 1903 treaty with Cuba, they may be regarded as congressional-executive agreements and executive agreements pursuant to a treaty.

²⁵ The 1934 treaty does not appear to contemplate a partial abandonment of the territory of the naval station. Whether the President can agree to modify the boundaries by returning part of the territory to Cuba is subject to the same analysis that applies to the modification of the lease agreements.

²⁶ CONGRESSIONAL RESEARCH SERVICE, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, A STUDY PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS 18* (Comm. Print 2001) (hereinafter *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*).

²⁷ *Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligations under an Existing Treaty*, 20 Op. O.L.C. 389 (1996) (hereinafter “OLC”) The Office of Legal Counsel concluded that:

It lies within Congress’ power to authorize the President substantially to modify the United States’ domestic and international legal obligations under a prior treaty, including an arms control treaty, by making an executive agreement with our treaty partners, without Senate advice and consent.

²⁸ Treaty of Relations, *supra* footnote 10, art. I.

As noted above, the 1934 treaty permits abrogation or modification of the stipulations of the lease agreements only with the consent of Cuba, but does not clearly delegate the U.S. authority in this respect to the President. It might be argued that the fact that these agreements are executive agreements implies their amenability to alteration by means of another executive agreement, notwithstanding the failure of the 1934 treaty to so specify. Moreover, presidents have in the past claimed the authority to execute the terms of treaties, including the authority to terminate a treaty or part of a treaty,²⁹ pursuant to the Constitution's Take Care Clause.³⁰ The terms of the 1934 treaty do not permit the President to abrogate the lease without Cuba's consent, except perhaps by abandoning the naval station altogether (which would, under a plain text reading, modify the base's boundaries without affecting the lease agreements). However, it could be argued that an executive agreement with Cuba to close the base would in effect amount to an executive agreement pursuant to the 1934 treaty and would thus not require the advice and consent of the Senate.³¹ Such an argument may prove controversial, as the President and Congress do not appear to have reached any consensus with respect to where the authority to modify or abrogate treaties lies.³² The judiciary has thus far declined to resolve the question.³³

It seems, however, that Congress is empowered to alter the effect of the 1934 treaty as it applies to the executive branch. A statute passed later than a treaty is recognized to supersede the terms of the treaty to the extent that they are inconsistent, at least as far as domestic law is concerned.³⁴ Although not firmly established, it seems likely that Congress could override any implications that might be drawn from the 1934 treaty with respect to presidential authority to modify the Guantanamo lease by enacting legislation specifying that any such modification must be accomplished with the advice and consent of the Senate or the concurrence of Congress.³⁵ The House Foreign Affairs Committee of the 114th Congress reported favorably on a measure to

²⁹ OLC, *supra* footnote 27, at n.14. The OLC explained the position taken previously with respect to unilateral presidential termination of treaties and noted that:

Assuming that the President does have the power unilaterally to terminate a treaty, it appears to follow that he also has the authority to relieve the United States of the affirmative obligations imposed on it by particular treaty provisions. It would not follow, however, that he had the authority unilaterally to augment the United States' treaty obligations.

Id. For an historical overview of the apparent accretion of treaty termination power to the President, see Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014).

³⁰ U.S. CONST. art. II, §3 ("The President ... shall take Care that the Laws be faithfully executed ...").

³¹ Where a treaty contemplates implementation by international agreement, it may be argued that the President may implement relevant provisions by executive agreement, which will have the same effect and validity as the treaty itself, subject to the same constitutional limitations. See RESTATEMENT, *supra* footnote 24, §303 cmt f.

³² See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* footnote 26, at 18.

³³ See *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality opinion) (applying "political question" doctrine to vacate challenge by Members of the Senate to President Carter's unilateral termination of the mutual defense treaty with Taiwan). Notably, Congress had passed a sense of Congress that consultation between President and Congress should occur prior to any change in policy with respect to the continuation in force of the treaty. 92 Stat. 730, 746 (1978).

³⁴ See OLC, *supra* footnote 27 (citing *Head Money Cases*, 112 U.S. 580, 599 (1884); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899); *Alvarez y Sanchez v. United States*, 216 U.S. 167, 175-76 (1910); *United States v. Stuart*, 489 U.S. 353, 375 (1989) (Scalia, J., concurring in judgment); Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran, 4A Op. O.L.C. 289 (1980); see also CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Michael John Garcia.

³⁵ There is precedent for such legislation in the context of arms control treaties. Section 303 of the Arms Control and Disarmament Act prohibits any action that would obligate the United States "to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner" except by treaty or affirmative action of Congress. 22 U.S.C. §2573.

accomplish this objective.³⁶ If enacted, the United States Naval Station Guantanamo Bay Protection Act (H.R. 4678) would prohibit any action:

[T]o modify, abrogate, or replace the stipulations, agreements, and commitments contained in the Guantanamo Lease Agreements, or to impair or abandon the jurisdiction and control of the United States over United States Naval Station, Guantanamo Bay, Cuba, unless specifically authorized or otherwise provided by—

- (1) a statute that is enacted on or after the date of the enactment of this Act;
- (2) a treaty that is ratified with the advice and consent of the Senate on or after the date of the enactment of this Act; or
- (3) a modification of the Treaty Between the United States of America and Cuba signed at Washington, DC, on May 29, 1934, that is ratified with the advice and consent of the Senate on or after the date of the enactment of this Act.³⁷

The House of Representatives subsequently passed this language in Section 1099B of S. 2943, the National Defense Authorization Act for FY2017.³⁸ The version of the bill passed by the Senate does not contain a similar provision.

Congress has previously passed legislation establishing policy with respect to the Guantanamo leases. As part of the Cuban Liberty and Democratic Solidarity Act (LIBERTAD, P.L. 104-114), Congress established that the policy of the United States is 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.”³⁹ The provision appears to approve negotiations by the President with a democratic Cuban government over the possible return of Guantanamo Bay, but it does not explicitly approve the entry into such an agreement as a congressional-executive agreement. Moreover, it does not expressly prohibit the negotiation of lease modifications with the existing government of Cuba.

The President’s Authority to ‘Abandon’ Guantanamo

Under the 1934 Treaty of Relations with Cuba, the boundaries of the naval station at Guantanamo remain as they were then established unless the “United States of America” abandons the naval station. This provision raises the question whether the President can act on behalf of the United States to order the naval station abandoned without an executive agreement or legislative permission. At least in the absence of countervailing legislation, the President could make the argument that abandonment of the naval station amounts to the exercise of a provision of the 1934 treaty, in accordance with the Take Care Clause. As in the case of the actions described above, such a claim would likely prove controversial.

If the 1934 treaty is not interpreted to provide authority for the President to abandon the naval station, whether he can do so on his own initiative depends on whether a base closure is an executive function as either a constitutional power of the President or an authority that has been delegated by Congress. It appears that overseas basing decisions are shared between the President

³⁶ H.Rept. 114-496.

³⁷ H.R. 4678 §3 (114th Cong., as reported by committee).

³⁸ S. 2943 §1099B (114th Cong., House engrossed amendment). *See also* CRS Legal Sidebar WSLG1586, *House Approves Measure to Prevent Return of GTMO to Cuba without Congress’s Say So*, by Jennifer K. Elsea.

³⁹ P.L. 104-114 §201(12), *codified at* 22 U.S.C. §6061.

and Congress.⁴⁰ Consequently, the existence of such authority turns on relevant statutory provisions, and if no statute controls, it may be elucidated through prior practice.⁴¹

Historically, Congress has taken a moderately active role in overseas base closure decisions, while leaving a good deal of discretion with the military departments.⁴² Prior to closing a military base located in the United States meeting certain size requirements, the Secretary of Defense is required to notify Congress and wait for a certain period prior to taking action.⁴³ There is no such requirement, however, for military installations located overseas.⁴⁴ Consequently, it appears that there are no statutory prohibitions against closing an overseas military installation. However, Sections 1031-1034 of the National Defense Authorization Act for FY2016 (P.L. 114-92) impose practical impediments to closing the naval station by restricting the transfer of detainees from Guantanamo Bay to the United States or to foreign countries.⁴⁵

However, there may be an argument with respect to the President's authority to return the naval base to Cuba that is more or less exclusively pertinent to Guantanamo Bay. Such an argument would emphasize that Article III of the treaty recognizes the "ultimate sovereignty" of Cuba over the Guantanamo Bay leased area and grants U.S. rights of control and jurisdiction during its occupation.⁴⁶ Casting the abandonment of Guantanamo Bay as a recognition of Cuba's sovereignty over the area and the end of a military occupation (the Castro government has regarded U.S. presence at Guantanamo to be an "illegal occupation" of its territory)⁴⁷ could have implications related to the President's power to recognize foreign sovereigns and the territory they control, a power the Supreme Court has held belongs exclusively to the President.⁴⁸ Unless viewed as bolstered by an enumerated legislative power, a congressional effort to foreclose such an action could be challenged as interfering in the exercise of the President's recognition power, at least to the extent that it would force the executive branch to contradict itself in such a matter.⁴⁹

⁴⁰ See U.S. CONST. art. II, §2 (establishing the President as the commander in chief of federal military forces). U.S. CONST. art. I, §8, (empowering Congress to "provide for the common Defence ... ;To raise and support Armies ...; To provide and maintain a Navy; [and] To make Rules for the Government and Regulation of the land and naval Forces"). Congress also has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. CONST. art. IV, cl. 2.

⁴¹ While a survey of past overseas base closures is beyond the scope of this report, it is worth noting that overseas U.S. military installations resting on foreign sovereign soil do so as the result of either treaty or intergovernmental agreement. Many such installations were closed and returned to the administration of the host nation during the mid-1990s at the conclusion of the Cold War. Notable examples of former installations include Naval Station Subic Bay and Clark Air Base, the Philippines, High Wycombe Air Station and RAF Greenham Common in the United Kingdom, and U.S. Army Base Schweinfurt in Germany.

⁴² See CRS Report R43425, *Military Base Closures: Frequently Asked Questions*, by Daniel H. Else.

⁴³ E.g., 10 U.S.C. §2687; 10 U.S.C. §993.

⁴⁴ 10 U.S.C. §2687a requires an annual report describing overseas base closures and evaluating the impact on U.S. national security, among other things.

⁴⁵ For information about detainee transfer restrictions, see CRS Report R42143, *Wartime Detention Provisions in Recent Defense Authorization Legislation*, by Jennifer K. Elsea and Michael John Garcia.

⁴⁶ See *supra*, footnote 7, and accompanying text.

⁴⁷ See, e.g., *Raúl Castro demands that US return Guantánamo base to Cuba*, The Guardian, January 28, 2015, available online at <http://www.theguardian.com/world/2015/jan/28/raul-castro-return-guantanamo-cuba-us>.

⁴⁸ *Zivotofsky ex rel. Zivotofsky v. Kerry (Zivotofsky II)*, 135 S. Ct. 2076 (2015) (invalidating a statute that permitted Jerusalem-born U.S. citizens to list Israel as their place of birth on their passports on the ground that it would force the executive branch to contradict its statements declining to recognize Jerusalem as Israel's capital).

⁴⁹ For an explanation of *Zivotofsky II*, see CRS Report R43773, *Zivotofsky v. Kerry: The Jerusalem Passport Case and Its Potential Implications for Congress's Foreign Affairs Powers*, by Jennifer K. Elsea.

It seems that Congress's relative inaction with respect to the closure of foreign bases would cut in the President's favor if such an assertion were ever to reach a court.⁵⁰

The 2016 NDAA and the Consolidated Appropriations Act, 2016 (2016 Omnibus, P.L. 114-113) prohibit certain expenditures with respect to returning the Naval Station to Cuba. Section 1036 of the 2016 NDAA prohibits the use of Department of Defense funds for fiscal year 2016:

- (1) to close or abandon United States Naval Station, Guantanamo Bay, Cuba;
- (2) to relinquish control of Guantanamo Bay to the Republic of Cuba; or
- (3) to implement a material modification to the Treaty Between the United States of America and Cuba signed at Washington, D.C. on May 29, 1934 that constructively closes United States Naval Station, Guantanamo Bay.⁵¹

The 2016 Omnibus provides that “None of the funds made available by [Division J] may be used to carry out the closure or transfer of the United States Naval Station, Guantánamo Bay, Cuba.”⁵²

Neither provision addresses the negotiation of a treaty modification to the lease agreements regarding Guantanamo Bay. If the executive branch were to negotiate a modification of the treaty and the Senate were to give its advice and consent, the resulting treaty could be interpreted to override Section 1036 under the “last in time” rule. If such a modification were to be made as an executive agreement (i.e., without Senate participation), such an override would be less likely, unless perhaps the agreement were to be deemed an “executive agreement pursuant to an earlier treaty.”⁵³

Moreover, the restrictions cover only certain funds available through FY2016. Funds available to another agency (e.g., the Department of State), or DOD funds authorized for appropriation in any other fiscal year, might permit action that could ultimately lead to the closure of U.S. Naval Station Guantanamo Bay. For example, authorizations for appropriation could be written to last for several years (e.g., military construction appropriation authorizations can typically last for up to three years). Some DOD funds may be obligated for a number of years (e.g., military construction appropriations may typically be obligated for up to five years).

The National Defense Authorization Act for FY2017 (S. 2943) appears likely to extend prohibitions related to the closure of the naval station. In addition to Section 1099B discussed above, the House-passed version of S. 2943 would continue the prohibition on the use of DOD funds to relinquish Guantanamo Bay to Cuba or implement a treaty modification to that end.⁵⁴ The version of the bill passed by the Senate would extend the FY2016 provision until the end of FY2017.⁵⁵

Impact of Cuba Sanctions Laws

If the lease of Guantanamo Bay were to be terminated, the Department of Defense would be faced with the challenge of repatriating or disposing of U.S. property at the naval station,

⁵⁰ *See id.*

⁵¹ P.L. 114-92, §1036(a). The 2016 NDAA also requires the Secretary of Defense to submit a report detailing military implications of the Naval Station. *Id.* §1036(b).

⁵² P.L. 114-113, Div. J, §139. Division J is the Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2016.

⁵³ *See supra* footnote 31.

⁵⁴ S. 2943 §1035 (114th Cong., House engrossed amendment).

⁵⁵ S. 2943 §1030 (114th Cong., engrossed in Senate)

including permanent improvements such as buildings. Current sanctions in place against Cuba⁵⁶ could make it difficult to give or sell any property to the government of Cuba. Section 620(a)⁵⁷ of the Foreign Assistance Act of 1961 (FAA)⁵⁸ provides that no assistance under the FAA shall be furnished to the present government of Cuba. Moreover, it provides that “except as may be deemed necessary by the President in the interest of the United States, Cuba [shall not] be entitled ... to receive any ... benefit under any law of the United States, until the President determines that such government has taken appropriate steps” to provide compensation to U.S. victims of Cuba’s expropriations. Under Section 204 of the LIBERTAD Act, the President is authorized to suspend these prohibitions only upon certifying that a transition government is in power in Cuba.⁵⁹ The prohibition will be automatically repealed upon the President’s certification that a democratically elected government in Cuba is in power.⁶⁰ Assistance under the FAA includes foreign military sales and military assistance, including transfer of excess defense articles.⁶¹

Section 614 of the FAA⁶² may offer a means of furnishing assistance to Cuba without regard to certain sanctions laws. It provides that the President may authorize assistance notwithstanding any provision in the FAA or Arms Control Export Act (AECA) if the President determines that to do so is important to the security interests of the United States and notifies the Speaker of the House and the chairman of the Committee on Foreign Relations of the Senate. The exercise of this special authority requires prior consultation with certain congressional committees and a written policy justification.

The primary authority for the disposal of foreign excess property, both real property and personal property, is codified in Chapter 7 of Title 40, U.S. Code. Excess property is any property that an agency has determined “is not required to meet the agency’s needs or responsibilities.”⁶³ Chapter 7 authorizes several means of disposal of foreign excess property, including (1) return of foreign excess property to the United States when such return is in the interests of the United States;⁶⁴ (2) sale, exchange, lease, or transfer, for cash, credit or other property;⁶⁵ (3) exchange for foreign currency or credit, or substantial benefits;⁶⁶ (4) donation in the case of medical materials;⁶⁷ or (5) abandonment, destruction, or donation of property that cannot be disposed of by any other authorized method.⁶⁸ Foreign excess property disposal authority under Title 40 is not among the foreign assistance provisions covered by sanctions laws described above,⁶⁹ however, it must be exercised “in a manner that conforms to the foreign policy of the United States.”⁷⁰ To the extent

⁵⁶ For a comprehensive list of current sanctions, see CRS Report R43888, *Cuba Sanctions: Legislative Restrictions Limiting the Normalization of Relations*, by Dianne E. Rennack and Mark P. Sullivan.

⁵⁷ 22 U.S.C. §2370(a).

⁵⁸ P.L. 87-195, 75 Stat. 474, *codified as amended at* ch. 32 of Title 22, U.S. Code.

⁵⁹ 22 U.S.C. §6064.

⁶⁰ 22 U.S.C. §6064(d)(1).

⁶¹ *See* 22 U.S.C. §2321j.

⁶² 22 U.S.C. §2364.

⁶³ 40 U.S.C. §102(3).

⁶⁴ 40 U.S.C. §702(a).

⁶⁵ 40 U.S.C. §704(b)(1).

⁶⁶ 40 U.S.C. §704(b)(2).

⁶⁷ 40 U.S.C. §703.

⁶⁸ 40 U.S.C. §704(b)(3).

⁶⁹ Disposal of any property that qualifies as a “munition” would still be banned under Section 40 of the Arms Export Control Act.

⁷⁰ 40 U.S.C. §701(b)(2)(B).

that its exercise would benefit the government of Cuba, the President would be required to make a determination that the national interest of the United States would be served.⁷¹

Another possible authority for transferring buildings and other improvements on naval station grounds may be found in Title 10, U.S. Code. The provision on overseas base closures contemplates transfers of real property or improvements to real property used by the Department of Defense pursuant to treaty, status of forces agreements, or “other international agreement to which the United States is a party.”⁷² For improvements valued at more than \$10 million, the Secretary of Defense is prohibited from entering into an “agreement of settlement with a host country regarding the release to the host country of improvements made by the United States to facilities at an installation located in the host country” until the Office of Management and Budget has had 30 days to review the proposed settlement. The provision does not clearly authorize the entry into an executive agreement of settlement with host countries, but suggests that such authority exists elsewhere. The exercise of such authority in such a way as to benefit the government of Cuba would have to be deemed necessary to U.S. interests to avoid the prohibition against assistance to Cuba in Section 620(a) of the FAA.⁷³

Suggested Additional Reading

Jonathan M. Hansen, *Guantanamo: an American History* (New York: Hill and Wang, 2011).

Theodore K. Mason, *Across the Cactus Curtain: The Story of Guantanamo Bay* (New York: Dodd, Mead, 1984).

Marion Emerson Murphy, *The History of Guantánamo Bay* (San Juan: District Publications and Printing Office, Tenth Naval District, 1953).⁷⁴

Michael J. Strauss, *The Leasing of Guantanamo Bay* (Westport, Connecticut: Praeger Security International, 2009).

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⁷¹ 22 U.S.C. §2370(a)(2).

⁷² 10 U.S.C. §2687a.

⁷³ 22 U.S.C. §2370(a)(2).

⁷⁴ Available online at <http://permanent.access.gpo.gov/lps17563/gtmohistorymurphy.htm>.