



THE SUPREME COURT, THE BUSH ADMINISTRATION AND GUANTÁNAMO BAY

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I. Introduction

On 20 November 2008 a United States federal court ordered the release of Lakhdar Boumediene and four other Algerian men held since 2001 at the Guantánamo Bay detention centre and ruled that their detention was unlawful. Reviewing the detainees' petition for a writ of habeas corpus, Judge Richard J. Leon found that the US Government had provided insufficient evidence to prove that the petitioners were 'enemy combatants'.¹ Several more habeas corpus petitions lodged with the District Court of the District of Columbia on behalf of Guantánamo inmates are waiting to be heard. These were made possible by a landmark June 2008 US Supreme Court ruling establishing that Boumediene and several other Algerian and Kuwaiti men detained at Guantánamo Bay were entitled, under the US Constitution, to legally challenge their detention in a US federal court.² President Barack Obama then lauded the ruling as 'an important step toward re-establishing our credibility as a nation committed to the rule of law'.³

One of Obama's first acts as President has been to order the closure of the Guantánamo detention facilities by January 2010 and the immediate suspension of the military commissions—special military tribunals with controversial rules and procedures—instituted by his predecessor, President George W. Bush, to try the terrorist suspects detained there. He also explicitly acknowledged the detainees' rights to habeas corpus privileges and to humane standards of confinement under the Geneva Conventions. According to the executive order, 'lawful means, consistent with the national security and foreign policy interests of the United States and the interests of

¹ Judge Leon ruled that evidence that the 5 planned to travel to Afghanistan in 2001 in order to fight US and allied forces in support of al-Qaeda was insufficient. Leon found the detention of a sixth petitioner to be lawful. US District Court for the District of Columbia, Civil case 04-1166 (RJL), *Boumediene et al. vs Bush et al.*, Final judgement, 20 Nov. 2008; and US District Court for the District of Columbia, Civil case 04-1166 (RJL), *Boumediene et al. vs Bush et al.*, Memorandum order, 20 Nov. 2008. DC District Court opinions can be accessed at <<http://www.dcd.uscourts.gov/court-opinions.html>>.

² US Supreme Court, Cases 06-1195 and 06-1196, *Boumediene et al. vs Bush et al. and al-Odah et al. vs United States et al.*, Opinion of the Court, 12 June 2008. Supreme Court opinions can be accessed at <<http://www.supremecourtus.gov/opinions/opinions.html>>.

³ Zernike, K., 'McCain and Obama split on justices' Guantánamo ruling', *New York Times*, 13 June 2008.

* The author would like to thank Daniel Nord, Ian Anthony, Ekaterina Stepanova, Sharon Wiharta and Caspar Trimmer of SIPRI for their assistance during the review process.

SUMMARY

● The special military commissions established at the US naval base at Guantánamo Bay to try terrorist suspects have been among the many controversial aspects of the 'global war on terrorism' declared by former US President George W. Bush in 2001.

The incarceration of those who have committed, or intend to commit, terrorist attacks against the interests of the USA or its allies is undeniably necessary from a national security perspective. However, the Bush Administration's chosen means—which included denying detainees the right to challenge the grounds of their detention in federal courts, access to legal counsel and rights under the Geneva Conventions—have been widely questioned and criticized. Even the US Supreme Court, which has a history of supporting the US Government in times of conflict, has repeatedly ruled against the Guantánamo policies. President Barack Obama faces some complex legal and security challenges in fulfilling his intention to close the Guantánamo detention facilities and finding alternatives to the military commissions.

This SIPRI Background Paper presents a brief overview of the military commissions, the legislation behind them and the legal challenges they have faced in the Supreme Court.



justice' must be found to deal with those terrorist suspects who are not approved for release, transfer or trial in a federal court.⁴ In the military commissions, the Obama Administration has undoubtedly inherited a set of complex legal and security challenges.

These rulings by the USA's highest court, occurring at a time when the country is engaged in armed conflict, have been described as 'astounding'

The *Boumediene vs Bush* ruling was the latest in a series of Supreme Court rulings since 2004 undermining the legal justifications put forward by the Bush Administration for its widely criticized policy of detaining alleged 'enemy combatants' at Guantánamo for extended periods and trying them before military commissions rather than US courts.⁵ These rulings by the USA's highest court on issues linked to the US-led 'global war on terrorism', occurring at a time when the country was engaged in armed conflict, have been described as 'astounding'.⁶

This paper provides an overview of the events that led to the June 2008 *Boumediene vs Bush* ruling, particularly the legal challenges to the Bush Administration's policy and how the administration responded to them. Some conclusions are presented in section III.

II. Military commissions and the Supreme Court

In the days immediately following the 11 September 2001 attacks on the USA, the Bush Administration implemented several measures to respond to what it interpreted as acts of war.⁷ President Bush proclaimed a national state of emergency.⁸ On the same day the US Congress adopted a joint resolution, the Authorization for the Use of Military Force, empowering the President to use

all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁹

In October, a military offensive was launched against the Taliban government in Afghanistan. The Taliban had hosted and subsequently refused to hand over leading members of the al-Qaeda organization—which was believed to be behind the 11 September attacks—or to support the USA in its campaign against international terrorists. Other measures taken by the Bush Administration to improve US national security and to act against emerging

⁴ Obama, B., 'Review and disposition of individuals detained at the Guantánamo Bay naval base and closure of detention facilities', Executive order, 22 Jan. 2009.

⁵ The controversy over the designation of detainees as 'enemy combatants', 'unlawful enemy combatants' etc. is not discussed in this paper.

⁶ Prof. Neal Katyal, Georgetown University Law Center, in 'Gitmo trial begins, but questions loom over detainee legal process', *NewsHour with Jim Lehrer*, PBS, 21 July 2008, transcript, <http://www.pbs.org/newshour/bb/law/july-dec08/gitmotrial_07-21.html>.

⁷ Bush, G. W., Address to a joint session of Congress and the American people, Washington, DC, 20 Sep. 2001.

⁸ Bush, G. W., 'Declaration of national emergency by reason of certain terrorist attacks', Proclamation, Washington, DC, 14 Sep. 2001.

⁹ Authorization for the use of military force, Joint resolution of the 107th Congress, US Public Law 107-40, signed into law on 18 Sep. 2001.



threats were the October 2001 Patriot Act and the November 2001 Military order on detention, treatment, and trial of certain non-citizens in the war against terrorism (hereafter referred to as the Military Order).¹⁰ The Military Order was meant to protect the USA and its citizen from further terrorist attacks by detaining and trying suspected international terrorists for ‘violations of the laws of war and other applicable laws’.¹¹ The military commissions, and facilities for detaining suspects, were located at the US Naval Station at Guantánamo Bay, Cuba—outside US sovereign territory.¹²

Military commissions

Military commissions have a long history in the USA.¹³ The Guantánamo military commissions, which the Supreme Court has recognized as being ‘born out of military necessity’, derive their authority from articles I and II of the US Constitution and are based on the 1950 Uniform Code of Military Justice (UCMJ), the foundation of US military law.¹⁴ Military commissions must be authorized by an act of Congress or through the common law of war. Their jurisdiction is ‘limited to offenses cognizable during time of war’ but does not require a state of war to have been declared by the US Congress.¹⁵ In general, the commissions may try any ‘persons not otherwise subject to military law’, for ‘violations of the laws of war and for offenses committed in territory under military occupation’.¹⁶ Three types of military commission can be distinguished: war courts, which include the current military commissions in Guantánamo, occupation courts and martial law courts.¹⁷

In 1942 President Franklin D. Roosevelt, using his authority as Commander-in-Chief, ordered that eight German soldiers who landed on the east coast of the USA that year should be tried by military commissions. The soldiers, who were planning acts of military sabotage, wore civilian clothes and thus violated the law of war. Roosevelt suspended the writ of habeas corpus

¹⁰ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, US Public Law 107-56, signed into law on 26 Oct. 2001. The act reinforced the powers of the agencies involved in counterterrorist activities and created new agencies and departments that would eventually constitute the new Department of Homeland Security, which was created in 2002.

¹¹ Bush, G., W., ‘Detention, treatment, and trial of certain non-citizens in the war against terrorism’, Military order, 13 Nov. 2001, Section 1(e).

¹² Since 11 Jan. 2002 c. 775 suspects have been detained at the Guantánamo Bay detention centre, reaching a peak of 680 detainees in the summer of 2003. Currently c. 255 are held there. Reynolds, P., ‘Guantanamo: black hole or vital tool?’, BBC News, 8 Jan. 2007, <<http://news.bbc.co.uk/2/6241123.stm>>; Tate, J. and Stanton, L., ‘Five years at Guantanamo Bay’, *Washington Post*, 1 Jan. 2007; and US Department of Defense, ‘Detainee transfer announced’, News release no. 736-08, 2 Sep. 2008, <<http://www.defenselink.mil/releases/>>.

¹³ See Silliman, S. L., ‘On military commissions’, *Case Western Reserve Journal of International Law*, vol. 36, no. 2/3 (2004), pp. 529–40; and Prescott, J. and Eldridge, J., ‘Military commissions, past and future’, *Military Review*, vol. 83, no. 2 (Mar./Apr. 2003), pp. 42–51.

¹⁴ US Supreme Court, Case no. 05-184, *Hamdan vs Rumsfeld et al.*, Opinion of the Court, 29 June 2006, p. 25. Articles I and II of the US Constitution relate to the Legislative branch and the Presidency, respectively. The most recent amended version of the UCMJ can be found in the *Manual for Courts Martial United States*, 2008 edn (US Army Publications Directorate: Washington, DC, 2008).

¹⁵ US Supreme Court (note 14), Opinion of Stevens, J., p. 32.

¹⁶ American Bar Association, Task Force on Terrorism and the Law, ‘Report and recommendations on military commissions’, 4 Jan. 2002, <<http://www.abanet.org/leadership/military.pdf>>, p. 3.

¹⁷ Silliman (note 13), p. 3. On the 3 types of military commission see also Bradley C. A. and Goldsmith, J. A., ‘The constitutional validity of military commissions’, *Green Bag*, vol. 5 (spring 2002).



for the defendants, giving himself the exclusive authority to review their detention and order their trial. The legal counsels assigned to the German soldiers challenged the establishment of the commissions, arguing that Roosevelt had acted beyond his constitutional powers. However, the Supreme Court upheld the President's authority in the ruling *ex parte Quirin*.¹⁸

The establishment of military commissions was also challenged in 1946 and 1950. In 1946, a petition for a writ of habeas corpus was filed on behalf of a Japanese Imperial Army general, Yamashita Tomoyuki, who had been charged with war crimes. The petition, *in re Yamashita*, argued that the military commission trying his case was not lawfully created and lacked authority and jurisdiction. The Supreme Court dismissed the petition. Justice Wiley Rutledge, one of two dissenting judges, argued that the 'system of military justice [should] not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that [the Supreme Court should] not fail in its part under the Constitution to see that these things do not happen'.¹⁹ In 1950, habeas corpus petitions were filed in US federal courts on behalf of 21 German nationals who had been detained and tried by a military commission at a US prison in Germany. The Supreme Court ruled in this case, *Johnson vs Eisentrager*, that aliens detained outside US sovereign territory could not invoke habeas corpus privileges in a US court.²⁰

Prior to 2001 the Supreme Court thus had a record of ruling in favour of the US Government's position whenever the jurisdiction of US military commissions was challenged.

The Military Order of 13 November 2001

President Bush's Military Order authorizing the use of military commissions to try suspected foreign terrorists invoked his powers as President and Commander-in-Chief and cited the congressional Authorization for Use of Military Force of 18 September 2001 and the UCMJ. At that time, Bush did not seek additional congressional approval. The Military Order states that the attacks of 11 September 2001 were carried out 'on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces'.²¹ It also states that 'individuals shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal'—a suspension of the writ of habeas corpus.²² Two memoranda of the US Government Office of Legal Counsel in December 2001 and January 2002 reinforced the Military Order by stating, respectively, that Al-Qaeda and Taliban members could not claim habeas

¹⁸ Stephens, O. H. Jr., 'Presidential power, judicial deference, and the status of detainees in an age of terrorism', eds D. B. Cohen and J. W. Wells, *American National Security and Civilian Liberties in an Era of Terrorism* (Palgrave Macmillan: New York, 2004), pp. 71–87.

¹⁹ See US Supreme Court, Case no. 327 US 1, *In re Yamashita*, Opinion of the Court, 4 Feb. 1946.

²⁰ See US Supreme Court, Case no. 339 US 673, *Johnson et al. vs Eisentrager et al.*, Opinion of the Court, 5 June 1950.

²¹ Bush (note 11), Section 1.

²² Bush (note 11), Section 7(b)2.



corpus privileges in a US court and were not protected by the Geneva Conventions.²³

The Guantánamo military commissions are composed of military officers and are directly subordinate to the Department of Defense. They are to try, according to the Military Order, non-US citizens with respect to whom the President determines that there is reason to believe that they are or have been members of al-Qaeda; have engaged in, aided or abetted or conspired to commit acts of international terrorism; or have harboured such people.²⁴ The Military Order has no ‘sunset clause’—it does not mention a date or conditions for its expiry. Between 2001 and 2006, the US Department of Defense supplemented the original Military Order with six orders and 10 instructions governing rules and procedures for the military commissions at Guantánamo Bay.²⁵

The 2001 Military Order and the detention of terrorist suspects at Guantánamo Bay provoked harsh criticism around the world

The Military Order and the detention of terrorist suspects at Guantánamo Bay have provoked harsh criticism from humanitarian agencies, lawyers, scholars and politicians around the world.²⁶ The range of criticisms is as broad as the range of critics and relates to, among others, accusations of torture and detention of minors, the suspension of habeas corpus, the body of rules and regulations applicable to the commissions, the practice of detention without charge and disregard of the Geneva Conventions.²⁷

The first legal responses

Legal action against the military commission policy was initiated in US federal courts shortly after the first terrorist suspects arrived at Guantánamo Bay, and the Supreme Court consented to hear the first case in November 2003. No military commission had yet been convened. The Guantánamo detainees did not have access to legal counsel. Nevertheless, between 2004 and 2006 several key lawsuits were brought before the Supreme Court in which the court ruled against the administration’s measures.

The Supreme Court heard the cases *Rasul et al. vs Bush* and *al-Odah vs United States* together in 2004. Petitions filed by relatives of the plaintiffs

²³ Bybee J., Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Re: application of treaties and laws to al Qaeda and Taliban detainees, US Department of Justice, Office of Legal Council, 22 Jan. 2002; and Philbin, P. F. and Yoo, J., Memorandum for William J. Haynes, General Counsel, Department of Defense, Re: possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba, 28 Dec. 2001.

²⁴ Bush (note 11), Section 2(a).

²⁵ See US Department of Defense, ‘Military commission orders’, 28 Sep. 2005, <http://www.defenselink.mil/news/Aug2004/commissions_orders.html>; and US Department of Defense, ‘Military commission instructions’, 27 Mar. 2006, <http://www.defenselink.mil/news/Aug2004/commissions_instructions.html>.

²⁶ See e.g. United Nations Economic and Social Council, ‘Economic, social and cultural rights, civil and political rights: situation of detainees at Guantánamo Bay’, Report to the Commission on Human Rights, E/CN.4/2006/120, 27 Feb. 2006; and Amnesty International, *United States of America: Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power* (Amnesty International: New York, 13 May 2005).

²⁷ See Shapiro, S. J. et al., Committee on Military Affairs and Justice, ‘*Inter arma silent leges*: in times of armed conflict, should the laws be silent? A report on the President’s Military Order of November 13, 2001 regarding “detention, treatment, and trial of certain non-citizens in the war against terrorism”’, *Record of the Association of the Bar of the City of New York*, vol. 57, nos 1–2 (winter/spring 2002), p. 66.



alleged that none of the plaintiffs had been ‘charged with any wrong-doing, permitted to consult with counsel, or provided access to the courts or any other tribunal’ and that their detention violated the Constitution, laws and treaties of the USA.²⁸ Both cases were construed as petitions for a writ of habeas corpus. They had been dismissed by the District Court and Court of Appeals for the District of Columbia on the grounds that, as Guantánamo Bay lies outside US sovereign territory and the defendants were not US citizens, US courts did not have jurisdiction.²⁹ In the 2004 cases, the Supreme Court rejected the Bush Administration’s argument, which cited *Johnson vs Eisentrager*, on the basis that the USA enjoyed ‘complete jurisdiction and control’ in Guantánamo Bay under the terms of the 1903 lease agreement with Cuba. Thus, in June 2004, the Supreme Court established that detainees at Guantánamo Bay had the right to challenge their detention in US courts.³⁰

In response, the Department of Defense established the Combatant Status Review Tribunals (CSRTs). In the CSRT hearings, which were held to determine whether individuals had been correctly identified as ‘enemy combatants’, detainees could challenge the factual basis of their detention. In the 572 tribunals held between August 2004 and 15 June 2007, 93 per cent of the detainees were confirmed as being ‘enemy combatants’.³¹ Later in 2004 the Administrative Review Board was established to conduct annual status reviews of those still detained. The board decides whether a detainee still poses a threat to the USA and its allies and should therefore still be held.

The first military commission trials were suspended when a habeas corpus petition filed by one of the accused in April 2004 was partly upheld by the District of Columbia District Court. The plaintiff was a Yemeni national, Salim Ahmed Hamdan, who was charged in July 2004 with offences including conspiracy to commit acts of terrorism. A CSRT hearing confirmed that he was an ‘enemy combatant’. However, Judge James Robertson of the DC District Court—to which the petition was referred following the *Rasul vs Bush* ruling—found that he could not be tried by military commission unless a hearing were held to establish that he was not a prisoner of war under the Geneva Conventions and until the rules for military commissions were amended to be consistent with the UCMJ.³² Another three military commission trials were also suspended indefinitely.

The legal advances made on behalf of the Guantánamo detainees were stalled, at least temporarily, by the passage of the 2005 Detainee Treatment

²⁸ US Supreme Court, Case no. 03-334, *Shafiq Rasul, et al. vs George W. Bush, et al.*, Opinion of the Court, 28 June 2004, p. 3.

²⁹ The status of the Guantánamo Bay naval base has long been a matter of controversy between the USA and Cuba. The USA leased Guantánamo from Cuba in 1903. Since the 1959 Cuban Revolution, Cuba has demanded that the USA abandon the base but the USA has refused to do so. The 1903 lease contract grants the USA ‘complete jurisdiction and control’ over the naval base but stipulates that Cuba retains ‘ultimate sovereignty’.

³⁰ US Supreme Court (note 28), Syllabus, p. 1. On the same day, the Supreme Court ruled that Yaser Esam Hamdi, a US citizen detained as an enemy combatant first at Guantánamo and then—after his US citizenship had been discovered—in a US naval brig, could not be denied the right to challenge his detention in a US court.

³¹ US Department of Defense, ‘Combatant Status Review Tribunal summary’, 2 Nov. 2007, <<http://www.defenselink.mil/news/Nov2007/CSRTUpdate-Nov2-07.pdf>>.

³² US District Court for the District of Columbia, Civil case 04-1519 (JR), *Hamdan vs Rumsfeld*, Memorandum opinion, 8 Nov. 2004.



Act (DTA).³³ This act prohibited the inhumane treatment of detainees but also limited attorneys' access to detainees and detainees' right to file petitions in US federal courts.³⁴ The DC Court of Appeals now heard all appeals filed on behalf of detainees against the decisions of CSRTs or military commissions.

In 2006, in another important ruling, the Supreme Court rejected the legal basis of the Guantánamo military commissions and effectively overruled the DTA's denial of detainees' access to federal courts. This again concerned the case of *Hamdan vs Rumsfeld*. The DC District Court's earlier ruling had been overturned in the DC Court of Appeals in 2005. In the Supreme Court, Hamdan's lawyers again challenged the legal authority claimed for the establishment of the military commissions and argued that the principles and rules established for the commissions were not in line with the basic principles of military and international law. They also asserted that the Geneva Conventions could be enforced in a federal court. The Bush Administration moved to have the case dismissed, citing the DTA. However, on 29 June 2006 the Supreme Court denied the dismissal motion and ruled that the military commission to try Hamdan lacked 'power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions' and that the commissions in their current form were not authorized by the Authorization to Use Military Force or by the President's war powers.³⁵ This ruling outlawed military commissions as established by the Military Order, although it did not affect the detention of the terrorist suspects at Guantánamo Bay. *The Hamdan vs Rumsfeld* ruling presented the administration with a choice between operating the military commissions as regular courts martial or asking the Congress to give its approval for military commissions as set out in the 2001 Military Order.³⁶

The Military Commissions Act of 2006 and its aftermath

President Bush chose the latter course and presented a bill for a Military Commissions Act (MCA) to the Congress on 6 September 2006. At the same time, Bush announced the transfer to Guantánamo of 14 key terrorist suspects, including the alleged mastermind of the 11 September attacks, Khalid Sheikh Mohammed.³⁷ The MCA was given congressional approval and was signed into law on 17 October 2006, thus legalizing the establishment of the military commissions.³⁸ According to President Bush the MCA was 'one of the most important pieces of legislation in the war on terrorism'. Critics of the MCA claimed that the bill was rushed through the Congress in the

³³ The DTA constitutes Title X of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, US Public Law 109-148, signed into law on 30 Dec. 2005.

³⁴ Elsea, J. K. and Thomas, K., *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, Congressional Research Service (CRS) Report for Congress RL33180 (US Congress, CRS: Washington, DC, 26 Sep. 2006); and Suleman, A. M., 'Recent developments: Detainee Treatment Act 2005', *Harvard Human Rights Journal*, vol. 19 (2006), pp. 258–66.

³⁵ US Supreme Court (note 14), Syllabus, pp. 3–4.

³⁶ On legal cases relating to the detainees at Guantánamo Bay see the website of the Center for Constitutional Rights, <<http://ccrjustice.org/>>.

³⁷ 'Bush admits to CIA secret prisons', BBC News, 7 Sep. 2006, <<http://news.bbc.co.uk/2/5321606.stm>>.

³⁸ Military Commissions Act of 2006, US Public Law 109-366, signed into law on 17 Oct. 2006.



run-up to the November 2006 congressional elections and was not adequately debated.³⁹ Amendments to the bill with regard to habeas corpus privileges were rejected.

The 96-page MCA explicitly empowers the US President to authorize the establishment of military commissions—overcoming one of the main obstacles in the *Hamdan vs Rumsfeld* ruling—and provides procedural guidelines for the conduct of the commissions.⁴⁰ The MCA confirms that, in accordance with the Supreme Court ruling, Common Article 3 of the Geneva Conventions applies to military commissions. However, ‘as provided by the Constitution . . . and by this section [of the MCA], the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions’.⁴¹ The MCA also incorporates parts of the earlier military commission orders and instructions and clearly defines internationally debated terms such as ‘unlawful enemy combatant’.⁴²

Invoking the MCA, President Bush issued an executive order on 14 February 2007 establishing military commissions to try ‘alien unlawful enemy combatants’.⁴³ At the end of March 2007, David Hicks, an Australian citizen who had been imprisoned since 2002, became the first suspect to appear before a military commission under the MCA.⁴⁴ Following a plea bargain, Hicks was convicted of providing ‘material support to terrorism’.⁴⁵ He was sent back to Australia to serve a nine-month sentence. Also in March 2007, Khalid Sheikh Mohammed appeared before a CSRT.⁴⁶ He had already spent four years in US custody. During the hearing, he admitted involvement in the 11 September 2001 attacks and in another 30 attacks or plots.⁴⁷ His trial by a military commission started in June 2008.

While the Bush Administration proceeded with its military commission policy, new attempts were made to re-establish detainees’ right to petition for a writ of habeas corpus. Senators Arlen Specter (Republican–Pennsylva-

³⁹ Zernike, K., ‘Senate approves broad new rules to try detainees’, *New York Times*, 29 Sep. 2006.

⁴⁰ For an analysis of the MCA see Elsea, J., *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice*, Congressional Research Service (CRS) Report for Congress RL33688 (US Congress, CRS: Washington, DC, 12 Oct 2006).

⁴¹ Military Commission Act of 2006 (note 38), Section 6(3)a. Bush promulgated an interpretation of Common Article 3 of the Geneva Conventions in the context of detention and interrogation of foreign terrorist suspects in July 2007. Bush, G. W., ‘Interpretation of the Geneva Conventions Common Article 3 as applied to a program of detention and interrogation operated by the Central Intelligence Agency’, Executive order, 20 July 2007.

⁴² On the military commission orders and instructions see note 25. On 18 Jan. 2007, the Department of Defense (DOD) published a manual on the conduct of military commissions. US Department of Defense, *Military Commission Manual* (DOD: Washington, DC, 2007), <<http://www.defenselink.mil/news/commissionsmanual.html>>.

⁴³ Bush, G. W., ‘Trial of alien unlawful enemy combatants by military commission’, Executive order, 14 Feb. 2007.

⁴⁴ No military commission hearings took place between the end of 2004 and the adoption of the MCA.

⁴⁵ Australian Associated Press, ‘Charge sheet: allegations against Hicks’, *The Australian*, 2 Mar. 2007; and ‘Guilty plea from detainee Hicks’, BBC News, 27 Mar. 2007, <<http://news.bbc.co.uk/2/6494281.stm>>.

⁴⁶ US Department of Defense, American Forces Press Service, ‘Administrative tribunals to begin for high-value Guantánamo detainees’, Press release, 6 Mar. 2007, <<http://www.defenselink.mil/news/newsarticle.aspx?id=3283>>.

⁴⁷ See US Department of Defense, Verbatim transcript of Combatant Status Review Tribunal hearing for ISN 10024, 10 Mar. 2007, <http://www.defenselink.mil/news/transcript_ISN10024.pdf>.



nia) and Patrick Leahy (Democrat–Vermont) introduced a bill, provisionally called the Habeas Corpus Restoration Act, to counter the restrictions imposed by the MCA. This initiative was blocked in the Congress on 19 September 2007.⁴⁸ Another, more successful, attempt was made through the Supreme Court. In March 2007, lawyers acting for several Guantánamo detainees petitioned the Supreme Court to rule on the detainees' right to challenge their detention in US federal courts, as provided by the *Rasul vs Bush* ruling but denied by the DTA and the MCA. The two cases of *Boumediene vs Bush* and *Al Odah vs United States* were eventually heard together in December 2007. The court ruled on 12 June 2008 that 'these petitioners do have the habeas corpus privilege'. It further found that procedures of review provided by the DTA 'are not an adequate and effective substitute for habeas corpus' and that the MCA 'operates as an unconstitutional suspension of the writ'.⁴⁹ Thus, for the third time the Supreme Court restricted the Bush Administration's policy regarding Guantánamo. In doing so, the court for the first time 'declared unconstitutional a federal law enacted by Congress and signed by the President on an issue of military policy in a time of armed conflict'.⁵⁰ The ruling did not address the detention itself and those cases whose proceeding in front of military commissions had already begun.

In August 2008 the first full military commission trial was decided: Salim Ahmed Hamdan was sentenced to five-and-a-half years in prison for providing material support for terrorism. At the end of November 2008 Hamdan was transferred to Yemen to serve the remainder of his sentence, and in January 2009 he was released.⁵¹

III. Conclusions

Unlike previous US military commissions, those authorized by the Bush Administration did not enjoy wide domestic support. In an unprecedented series of rulings, the highest court of the USA opposed and even curtailed these military policies of a US Government even in a time of conflict. Repeatedly, the Bush Administration responded by shoring up its military commissions policy rather than addressing the substance of the concerns raised by the Supreme Court. However, at the end of the Bush presidency, the detainees' right to habeas corpus privileges had been re-established by the Supreme Court.

The Bush Administration shored up its own chosen policies rather than addressing the substance of the concerns raised by the Supreme Court

The problems associated with the Bush Administration's military commissions policy go beyond the legal basis for suspension of habeas corpus privileges, on which the Supreme Court rulings focused. In earlier cases, detainees were tried by military commission within a reasonable time and have had access to legal counsel. Neither was true of the commissions at Guantánamo Bay. Another key difference was the context of the commissions. The earlier commissions were convened during or immediately after a war, most recently World War II. Even though the USA is currently engaged

⁴⁸ Weisman, J., 'GOP blocks bid on rights of detainees', *Washington Post*, 20 Sep. 2007.

⁴⁹ US Supreme Court (note 2), pp. 1–2.

⁵⁰ Cole, D., 'Closing the law-free zone', *The Guardian*, 13 June 2008.

⁵¹ Reuters, 'Osama Bin Laden driver Salim Hamdan released from jail in Yemen', *The Australian*, 12 Jan. 2009.

in armed conflicts in Iraq and Afghanistan, the nature of the ‘global war on terrorism’, which the Bush Administration used to justify its military commissions policy, is at best controversial.

The future of the Guantánamo Bay detainees is now in the hands of the Obama Administration. Obama has ordered the closure of the detention facilities at Guantánamo within a year and the immediate suspension of the ongoing commission trials. His administration will now have to work out what to do with the remaining detainees. The Defense Department recently stated that about 80 of the 275 detainees then held at Guantánamo were expected to appear before military commissions.⁵² This might be a good indication of the number who will finally need to face trial. However, the Obama Administration will still have to deal with the question of detainees who have been identified as posing too great a threat to the USA or its allies to be released, but against whom there is insufficient admissible evidence. Such detainees might well succeed in a habeas corpus review in a federal court. One idea that has been discussed is the establishment of new ‘security courts’. These would be somewhere between military commissions and regular criminal courts and could potentially address national security concerns and the legal complications around the detention of some defendants for up to seven years without trial.⁵³

Questions also remain about what to do with detainees cleared for release. Already, between 50 and 60 former detainees are awaiting a decision on their future because their home countries cannot guarantee their safety. Thus, the USA is having to search for states that will offer asylum to people it has formerly branded as enemy combatants and suspected terrorists. Ironically, the transfer of 17 Uighur Chinese nationals, who are judged to be at risk of torture if repatriated to China, is being held up by appeals against the order of a US federal judge of October 2008 allowing them to enter the USA.⁵⁴

Guantánamo Bay is just one of the sensitive and highly complex challenges inherited by the Obama Administration. Obama will need to balance his commitment to close the detention facilities against national security concerns, the need to bring justice for the victims of terrorist attacks such as those of 11 September 2001, and the imperative to sustain due process of law after seven years of detentions at Guantánamo Bay. Whichever course he chooses, he will be intensely, and critically, scrutinized from many sides.

Abbreviations

CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act
MCA	Military Commissions Act
UCMJ	Uniform Code of Military Justice

⁵² US Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), ‘Military commissions charges referred’, News release no. 110-08, 8 Feb. 2008.

⁵³ Goldsmith, J. K. and Katyal, N., ‘The terrorists’ court’, *New York Times*, 11 July 2007.

⁵⁴ ‘Guantanamo Uighur release blocked’, BBC News, 9 Oct. 2008, <<http://news.bbc.co.uk/2/7660399.stm>>



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