Laws, War, and the People Caught in Between:

The Legal Status of Guantánamo Bay Detainees during the Bush Administration and the Chance for Progressive Change Under the Obama Administration

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Following the devastating terror attacks on September 11, 2001, the Bush Administration embarked on its so-called "War on Terror" in order to seek and destroy terrorist safe-havens in the Middle East and elsewhere. This bizarre war on an abstract concept, produced an equally unusual problem: what to do with terrorist suspects – primarily al-Qaeda and Taliban insurgents – captured on the broad-ranging war front.

The Bush Administration crafted a controversial solution by detaining suspects at Guantánamo Bay, a US Naval Facility on a slip of land leased under duress from the Cuban government and supposedly beyond the reach of United States and international law. Since the first detainees arrived at Guantánamo Bay in January 2002 their legal status and humanitarian rights have stimulated a great deal of legal and scholarly debate. In the ensuing controversy, two important points surfaced and were thoroughly debated during the Bush Administration: firstly whether or not the detainees warrant Prisoner of War (POW) status under the Geneva Conventions, and secondly, whether or not detainees held outside of sovereign US territory maintain the right to challenge their detention in a US federal court, i.e., the right to *habeas corpus*.

On January 22, 2009, newly elected President Barak Obama signed an executive order signaling that Guantánamo Bay will be closed within a year (Wittes 2009). The difficult work of untangling the legal chaos evident at Guantánamo Bay now begins, especially when deciding which detainees are safe to release, where to release them, and how to credibly prosecute those that remain (Goldhaber 2009). This last point remains the most contentious, and in fact, warrants a fresh look at whether or not terrorist suspects are prisoners of war or criminals that should be tried in civilian federal courts.

This paper examines both sides of the POW debate that raged throughout the earliest stages of the War on Terror between many of President Bush's closest advisors and military justice experts who advocated for denial of POW status and those that encouraged the provision of POW status and strict adherence to the Geneva Conventions. In addition, the evolving legal status of Guantánamo Bay detainees will be reviewed as manifested by the legal "back and forth" between the US Supreme Court and the Republican-led Congress over habeas corpus rights. The "rights-enforcing" approach favored by the US Supreme Court and the inability of military commissions to successfully prosecute detainees suggests that President Obama needs to make a clean break from policies associated with President Bush and promote a greater balance between national security concerns and the humanitarian rights of detainees (de Londras 2008:36; Goldhaber 2009). In many respects the debate then returns to its point of origin: is it wise to accord terrorist insurgents POW status and rely upon the framework set by the Geneva Conventions—given their allegiance is to an ideology and not a nation-state, and given that ideologies are more rigid than wars between states? The answer to this question will inform President Obama's approach in whether or not to continue to a policy of "preventive detention," as some suggest, or to depend upon criminal trials (Goldhaber 2009; Roth 2008; Wittes 2009; Wittes et al. 2009). The criminal model has successfully prosecuted suspected terrorists captured on US soil and branding terrorists as criminals rather than "religious warriors" tarnishes the allure of engaging in violent activities (Roth 2008).

Shortly after the US military incursion into Afghanistan began, President Bush issued an Executive Order that outlined his position on handling individuals captured during the course of the conflict (Dahlstrom 2003; Fogarty 2005). Issued on November 13, 2001, the Order paved the way for the creation of military commissions to prosecute suspected terrorists and introduced the phrase "unlawful enemy combatant" into modern discourse. Borrowing from a 1942 US Supreme Court decision, *Ex Parte Quirin,* which recognized a class of "lawful combatants," the Bush Administration inferred that it was legally possible to recognize a class of "unlawful combatants" (Dahlstrom 2003:272; Rivkin Jr. and Casey [date not cited]).

The Executive Order came under immediate criticism. Legal expert Lawrence Tribe claimed that *Quirin* provided no basis for the military commissions established by the 2001

Executive Order and that any convictions would be discredited without legislative authorization (Dahlstrom 2003). Critics also pointed to the fact that the Order denied detainees the right to appeal the commissions' decisions in a civilian court, thus denying habeas corpus. The order also failed to address due process concerns such as the right to counsel and the standards for admissible evidence (Cutler 2008; Dahlstrom 2003; Fogarty 2005; Schneider 2004). Gerard P. Fogarty (2005) reports that top military justice experts at the Pentagon and senior staff at both the National Security Council and State Department learned the details of the Order only after it was issued, signaling that a small group of White House insiders provided most of the input.

The use of the term "unlawful enemy combatant" provided the basis for the Bush Administration's denial of POW status. They reasoned that the Geneva Conventions were originally conceived in the context of war between two states. In 2002, White House Counsel Alberto Gonzales wrote a memo to President Bush detailing changes in armed conflict that "rendered part of the Conventions obsolete" (Ratner 2008:26). Then Defense Secretary Donald Rumsfeld argued that neither al-Qaeda nor the Taliban engaged in warfare according to the description of armed conflict contained within the Geneva Conventions: they lacked uniforms, hid their weapons, and tried to blend in with the civilian population (Fogarty 2005; Rivkin Jr. and Casey). The Taliban were not recognized as the legitimate government in Afghanistan and al-Qaeda was not fighting on behalf of any nation-state (Dahlstrom 2003). Ergo, they are *unlawful* enemy combatants and not POWs (Fogarty 2005; Rivkin Jr. and Casey).

The laws of war codified in the Geneva Conventions are not clear-cut when the conflict involves non-state actors (DoJ 2009c). Numerous scholars provide arguments that support the treatment of members of the Taliban and al-Qaeda as POWs. Relying upon definitions outlined in the Geneva Conventions, Daniella Schneider (2004) argues that captured Taliban members qualify as POWs since they were the "de facto" government of Afghanistan (p424). Fogarty (2005) concurs and cites the efforts made by former Secretary of State Colin Powell who was successful in convincing the Bush Administration to change course and accord Taliban members POW status. United Nations POW experts advocated that al-Qaeda members who fought on behalf of the Taliban should receive POW status, and posited that they might qualify as a militia in their own right (Fogarty 2005). Schneider (2004) supports this recognition of al-Qaeda as a "legitimate fighting force" given their structural organization and their visibility in distinction from other civilians (p426). Ratner (2008) likens al-Qaeda to the Vietcong guerilla forces that struggled for South Vietnam during the Vietnam War; they were not part of any formal army but were nonetheless afforded POW status by the US. Dahlstrom (2003) acknowledges that Article 4 of the Geneva Conventions' inclusion of groups aligned with a non-recognized authority provides grounds for recognizing al-Qaeda members as POWs, although their lack of adherence to the traditional laws of war may also preclude that recognition. Either way, where doubt exists captured combatants are presumed POWs until a "competent tribunal" decides otherwise (Schneider 2004:426). Granting POW status threatened to render President Bush's Executive Order in violation of the Geneva Conventions and against US domestic law.

By early 2002, more than 600 detainees resided at Guantánamo Bay and the legal challenges to their continued detention went before the courts (Dahlstrom 2003; Schneider 2004). In February 2002, the District Court for D.C. quickly dismissed the case of Rasul et al. v Bush *(Rasul)* since the detainees were in custody beyond the jurisdiction of the D.C. Court. The Court refused the plaintiff's argument that the US held "de facto" control and jurisdiction over Guantánamo Bay (Dahlstrom 2003:680). In 2004, the US Supreme Court overruled the District Court's decision on the basis that it was sufficient for the detaining authority (the US government) to exist within the Court's territorial jurisdiction (de Londras 2008). Therefore, the Guantánamo Bay detainees warranted a limited right to the writ of habeas corpus (Cutler 2008).

In response to the US Supreme Court's decision in *Rasul*, the Bush Administration established Combatant Status Review Tribunals (CSRTs) as a substitute for judicial proceedings to determine the validity of their claim that the detainees were enemy combatants (Cutler 2008; Rivkin Jr. and Casey). Rivkin Jr. and Casey contend that the CSRTs provide ample due process provisions for detainees suspected of terrorist acts against the US. de Londras (2008) asserts that the CSRTs are not adequate to address habeas corpus, in part because detainees accorded non-combatant status were not always released. She argues that the US Supreme Court fell short by not recognizing the "high degree of operational sovereignty" the US commands at Guantánamo Bay, which would have automatically conferred constitutional habeas rights to the detainees (constitutional rights cannot be circumvented via legislative action).

To codify the CSRTs, Congress enacted the Detainee Treatment Act (DTA) of 2005 (de Londras 2008; Rivkin Jr. and Casey). The DTA effectively denied any federal court from exercising jurisdiction to hear pending and future habeas cases (Cutler 2008; de Londras 2008). Congress intended for this law to apply to the influential Hamdan v. Rumsfeld *(Hamdan)* case before the US Supreme Court.

In its last ruling of the 2006 term, the US Supreme Court decided that the DTA was not explicitly retroactive and so delivered their decision on the *Hamdan* case (Cutler

2008). Their decision contained a number of points: 1) The 2001 Executive Order was not authorized by Congress, 2) the military commissions as proposed by President Bush were "structurally and procedurally deficient" and, 3) all detainees held at Guantánamo Bay (including al-Qaeda) are protected by the Geneva Conventions (Cutler 2008:36). The Supreme Court Justices agreed that Hamdan should be tried by a "regularly constituted court" that affords "judicial guarantees […] recognized as indispensable by civilized peoples" (Cutler 2008:38). They did not address the individual habeas claim but rather regulated the ability of the Executive branch to develop military commissions without Legislative action (de Londras 2008).

As a reaction to the *Hamdan* decision, Congress enacted the Military Commissions Act (MCA) of 2006 to codify how the Geneva Conventions are applicable to suspected terrorists and to establish new rules for military commissions for the prosecution of detainees (Cutler 2008). The MCA revoked the right of the US Supreme Court to enforce the Geneva Conventions and instead offered examples of what constituted a "grave [breach]" of the Conventions (Cutler 2008:43). The guidelines for military commissions used relaxed due process considerations concerning the admissibility of evidence. Hearsay and evidence obtained through coercion is admissible if the presiding judge affords it "probative value," and defendants are not allowed to hear classified evidence against them; rather they are provided with a "declassified summary of information" (Cutler 2008:40). The MCA also includes an explicit provision stripping federal courts of the jurisdiction to hear pending habeas cases (de Londras 2008).

Colonel Morris D. Davis (2007) defends the MCA and argues that the trials conducted exceed the standards set forth by other formal UN tribunals. Furthermore, the procedures utilized in military commissions meet the requirements outlined in the *Hamdan* decision. Davis (2007) concedes that some due process standards in the MCA are broader than those used in civilian courts, but the same rights afforded US citizens are not automatically warranted in the case of "alien unlawful enemy combatants" (p33).

In 2007, the US Court of Appeals for the D.C Circuit refused to grant a writ of habeas corpus in the case of Boumediene v. Bush *(Boumediene)* citing lack of jurisdiction under the MCA (Cutler 2008). Moreover since the detainees were foreign nationals held outside the US they lacked a constitutional right to habeas corpus. After initially refusing to consider *Boumediene*, the US Supreme Court unexpectedly altered their decision and granted a review (Cutler 2008). De Londras (2008) believes this occurred out of a new willingness to finally settle the issue of constitutionality concerning habeas rights. Indeed, in June 2008 the US Supreme Court granted Guantánamo Bay detainees the constitutional right to the writ of habeas corpus (DoJ 2008). In their decision, the Supreme Court rejected the Bush Administration's claim that the absence of US sovereignty negated the applicability of the Constitution (Boumediene v. Bush, 553 US 2008).

The US Supreme Court's decision necessitates close examination by the review panel President Obama has set up to determine the best course of action for closing the Guantánamo Bay facility within one year from the date he issued his Executive Order (January 22, 2009). As it stands, the Order leaves open the option of military commissions or some other trial mechanism, as well as the continued detention of some of the detainees (Wittes 2009).

Ongoing debate reveals an interesting twist: during the Bush Administration liberal scholars advocated for POW status and conservative "hawks" argued against it; now, conservatives tend to favor a continuation of the provision of POW status and an improved mechanism for onshore preventive detention and liberals are clamoring for the transfer of the remaining detainees into the civilian criminal justice system. Nonetheless, liberals and conservatives alike are inclined to agree that President Obama needs to make a clean break from policies associated with President Bush and promote a greater balance between national security concerns and the humanitarian rights of detainees (Goldhaber 2009).

President Obama appears to have taken steps to define a "new standard" for the detention of terrorist suspects and has revoked the phrase "enemy combatant" (DoJ 2009b). Individuals who "planned, authorized, committed, or aided" the attacks of September 11, 2001 will remain in detention, in addition to those who "harbored those responsible" (DoJ 2009c:1). Members of al-Qaeda and the Taliban who engage in attacks against coalition forces in Afghanistan or provide "substantial support" from elsewhere will also be detained (DoJ 2009c:7). The Department of Justice (2009c) has yet to define exactly what constitutes "substantial support," but for now it will be determined on an individual basis depending on the facts of each case.

The Obama Administration exhibits a greater willingness than the previous Bush Administration to ensure that the treatment of detainees is progressive with the nation's values. The long-term, indefinite nature of the "War on Terror" invites the question of whether a war-like or military approach is best suited for the task of managing terrorist suspects. It is on this point that the Geneva Conventions, once seized upon by liberal scholars in defense of Guantánamo Bay detainees, begins to fade in significance.

As previously noted, the Geneva Conventions were conceived in the context of two state actors in conflict. Al-Qaeda and deposed Taliban forces are non-state actors, meaning

that their primary allegiance is to an ideology rather than a nation. Policy makers should recognize that the combat situation in Afghanistan is not a war; it is an occupation designed to root out ideological insurgents in order to prevent them from launching attacks on the US and further destabilizing the region. The occupation combines 'nation-building' development projects and a type of terrorist 'policing,'

Scholars that argue for an improved system of preventive detention claim that the criminal justice system is not flexible enough to detain individuals on the basis of their perceived threat to the US. They assert that it requires a standard of admissible evidence higher than the present situation allows (i.e. evidence collected using questionable interrogation techniques) (Goldhaber 2009; Wittes et al. 2009). Law Professor David Cole (in Wittes et al. 2009) counters that preventive detention is too great a burden on fundamental human rights. He concedes, however, that detainees deemed too dangerous to release should be held as POWs but only as long as the war against the Taliban and al-Qaeda in Afghanistan endures. In the past, POWs were detained until the two states were no longer at war, the rationale being that at that point the POWs would have no reason to fight against the detaining power. There is little indication that this pattern will hold for those who fight on behalf of an ideology, and there is some evidence to suggest that former detainees will resume terrorist activities (Goldhaber 2009). This suggests that terrorist suspects captured during an indefinite, ideologically-based conflict should be detained for criminal trial rather than simply being held until combat activities cease.

Kenneth Roth (2008), the Executive Director of Human Rights Watch, is a strong advocate for using the criminal justice system, which has successfully prosecuted suspected terrorists in the past. In contrast to President Bush's military commissions which convicted two people, 91% of the 160 terrorists tried in US criminal courts between September 2001 and November 2007 were convicted (Bario 2008; Goldhaber 2009). Moreover laws pertaining to conspiracies and the provision of material support to terrorist organizations are suited to the task of prosecuting individuals that have planned but not yet carried out their threat (Roth 2008). David Bario (2008) cites four cases presented to the courts between 2003 and 2005 where each of the suspects received sentences equal to or greater than 20 years despite the fact that they never carried out their plans. These facts refute two of the major arguments put forth by opponents that the criminal justice system is structurally incapable of successfully prosecuting high-level terrorists or defending the nation from future threats. While the rights of Guantánamo Bay detainees captured the nation's attention, the government amassed a credible record of convicting US citizens and immigrants charged with terrorism-related crimes abiding by all due process concerns incumbent upon US courts (Bario 2008). It is reasonable to believe that the same record will hold in the prosecution of suspected terrorists captured on non-US soil.

Lastly, Roth (2008) points out that criminalizing terrorist activities eliminates suspects' ability to portray themselves as soldiers engaged in a holy war. Publicizing the wanton murderousness of terrorism not only increases the stigma associated with their actions, but might also reduce the level of support their actions receive (Roth 2008) and reduces the likelihood that others will follow in their criminal footsteps.

For eight years the US government has detained enemy combatants at Guantánamo Bay in a state of legal limbo. It is now clear that no US President can attempt to circumvent due process by detaining terrorist suspects in a location removed from US territory; Courts have shown their readiness to grant both statutory and constitutional rights to habeas corpus. A recurring theme in the literature involves the concern that the US, in its detention and treatment of Guantánamo Bay detainees, has compromised its own ideals and made the world a less safe place; in particular for US soldiers captured abroad (Fogarty 2005; Ratner 2008; Schneider 2004). Michael D. Goldhaber (2009) stresses that the Obama Administration must curtail the perception of detainee mistreatment that acts as a motivating force in the terrorist ranks. Conducting open adversarial trials with a full complement of due process provisions would go a long way towards achieving this. Evidence suggests that such trials are feasible.

In the first moments of his presidency, "President Obama rejected as false 'the choice between our safety and our ideals'" (Goldhaber 2009). To honor this principle President Obama must show that he is willing to reconsider some of the underlying beliefs about what the War on Terror actually are and adjust policies in detainee treatment. Deconstructing the popular perception of the war in Afghanistan and exposing it as an ongoing occupation to combat terrorism and locate those responsible for insurgent attacks may at first sit uncomfortably in the American publics' collective mind. Public support for the Afghan endeavor is already dropping; removing the label "war" may facilitate this drop even further. Nonetheless, President Obama and his detainee review panel must display honesty and integrity in their assessment of the combat situation. Terrorist action against the US will likely continue after the Afghan occupation ends—as will the policing of global terrorists. It is imperative that the criminal justice system is prepared to prosecute the cases of suspected terrorists captured on non-US soil.

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