THE FUTURE OF GUANTANAMO BAY AND THE GUANTANAMO BAY DETAINEES

INTRODUCTION

The President-elect of the United States, Barack Obama, has made a broad commitment to close Guantanamo Bay. But many questions remain: When will Guantanamo Bay be closed? Where will the detainees be detained once Guantanamo Bay is closed? What body will try the detainees? And what will happen to those detainees who are cleared for release due to a lack of evidence or who are found guilty and then released after serving a period of imprisonment?

There is still some time for these questions to be resolved, as Obama does not take his place in the White House until the 20th of January 2009.

In the meantime, however, the United States courts have taken it upon themselves to decide the future of at least some of the detainees. In October 2008, Judge Urbina, a District Court judge, made history by ordering the release of 17 Chinese Muslims from Guantanamo Bay into the United States. Then, in November, another District Court judge, Judge Leon, ordered the release of five Algerians from Guantanamo Bay. None of the 22 detainees involved in these two District Court cases has yet been released. The District Courts' orders have been stayed until appeals by the United States Government are decided.

This is unlikely to occur before Obama takes his place in the White House next year. It will therefore be necessary for Obama and his legal team to decide whether to continue these appeals. It would be difficult for Obama to reconcile his commitment to close Guantanamo Bay with their continuance.

Just six months ago, orders like those made by the United States District Courts would have been unthinkable. It was a decision of the United States Supreme Court in only June

this year that made these orders possible. That case was *Boumediene v Bush*. To understand the significance of this decision, it is useful to give a history of Guantanamo Bay and the relevant case-law.

ESTABLISHMENT OF GUANTANAMO BAY

In 2001, the United States Congress passed the Authorisation for the Use of Military Force, which authorised the President to 'use all necessary and appropriate force' against those nations, organisations or persons involved in the 9/11 terrorist attacks. In *Hamdi v Rumsfeld* in 2004, the United States Supreme Court found that this authorised the President to detain an 'enemy combatant' – that is, 'an individual who was part of or supporting Taliban or Al Qa'ida forces, or associated forces, that are engaged in hostilities against the United States or its coalition partners'.

By executive order, persons who fell within this definition were transferred to Guantanamo Bay, a United States military facility located in Cuba. In total, since 2001, about 750 people have been detained at Guantanamo Bay. About 250 people remain in detention there. In some cases, these remaining detainees have been in detention for over six years.

The lawfulness of detention at Guantanamo Bay has been controversial from the start. And there are two primary reasons for this. First, many of the detainees claim they were wrongly classified as 'enemy combatants'. Second, criticism has been leveled at the conditions of detention in Guantanamo Bay on human rights grounds. Guantanamo Bay has been described by a United States Senator as 'absolutely one of the best run prisons in the world'. On the other hand, many current and former detainees at Guantanamo Bay, including Australian David Hicks, claim that they were mistreated and even tortured (both psychologically and physically) whilst in detention.

For many years, there was no opportunity for Guantanamo Bay detainees to air their complaints about either of these topics in the United States courts. Why? The reason is simple. Guantanamo Bay was a ‘legal black hole’.

Guantanamo Bay is not within the United States. Since 1903, this area has been leased by the United States from Cuba. The lease agreement provides that Cuba, and not the United States, has ‘sovereignty’ over Guantanamo Bay. However, the United States exercises ‘complete jurisdiction and control’. Furthermore, under a 1934 treaty between the United States and Cuba, Cuba is not permitted to exercise any sovereign rights in relation to Guantanamo Bay until either the lease agreement is modified or the United States abandons the base.

The United States Government took the position that the United States Constitution and United States laws did not apply in Guantanamo Bay. This is because, under the lease agreement, formal sovereignty lies with Cuba.

One of the consequences of the United States Government’s position was that Guantanamo Bay detainees were not entitled to seek writs of habeas corpus in the United States courts. ‘Habeas corpus’ literally means ‘to deliver the body’. Its effect is to allow a person to challenge the lawfulness of their detention and it gives the courts the power to order their release from unlawful detention. As at 2001, there were two sources of habeas corpus rights in the United States. First, a constitutional right to habeas corpus in what is known as the ‘Suspension Clause’ of the United States Constitution (Article 1, paragraph 9, clause 2). Second, a statutory right to habeas corpus. United States legislation gave United States courts the power to grant habeas corpus ‘within their respective jurisdictions’. However, the United States Government maintained that neither of these rights extended to foreign nationals captured and detained outside the United States.

THE STATUTORY RIGHT TO HABEAS CORPUS

This was the unfortunate situation from January 2002, when the first detainees were brought to Guantanamo Bay, until 29 June 2004. On this day, the United States Supreme Court handed down its decision in *Rasul v Bush*. This decision considered the scope of the statutory right to habeas corpus, in particular, the meaning of the phrase 'within their respective jurisdictions'.

Four members of the Court found that it is not necessary that the detainees be within the United States. The writ of habeas corpus is directed to the custodian of the detainee and therefore it is enough that the custodian – being the United States executive government – is within the United States. The fifth member of the majority, Justice Kennedy, adopted a different processing of reasoning, focusing on the place of detention. He held that Guantanamo Bay detainees have a right to seek writs of habeas corpus because Guantanamo Bay is, in every practical respect, a United States territory.

The three minority judges rejected both of these approaches. They upheld the United States Government's position. That is, the right to habeas corpus only applies in *sovereign* United States territory, or, even if it extends beyond that, it applies only to United States citizens.

Legislative rights are not inviolable. By this I mean that the United States legislature has the power to modify or even completely exclude such rights. And this is unfortunately what happened. The right to habeas corpus was soon replaced with a far more limited process of review.

In *Hamdi v Rumseld*, the Supreme Court held that detainees must be given a meaningful opportunity to contest the factual basis for their detention. In purported compliance with this decision, Combatant Status Review Tribunals (CSRTs) were established by executive order, along with a set of standards and procedures governing them. The jurisdiction of the CSRTs is narrow – to review the classification of Guantanamo Bay detainees as 'enemy combatants'. There are also severe constraints on a detainee's ability

to rebut the evidence on which the Government relies to classify him as an 'enemy combatant'. I'll give you three examples of this.

1. The detainee does not have the assistance of counsel in proceedings before a CSRT. He is allocated a 'Personal Representative' but the executive order makes it clear that he or she is not the detainee's lawyer or even his advocate;
2. The detainee may access only the unclassified portion of the Government's evidence. He therefore may not be aware of the most critical allegations on which the Government relies; and,
3. Hearsay evidence is admissible before the CSRT. For example, a witness may give evidence that: 'X told me that the defendant trained with the Taliban in Afganistan'. It would be difficult for a detainee to challenge such claims.

In 2005, the *Detainee Treatment Act* was passed. This Act gave detainees a right of review from the CSRTs to the United States Court of Appeals for the District of Columbia. This Act, in combination with the *Military Commissions Act* of 2006, made it clear that this is the only avenue of appeal for detainees at Guantanamo Bay. They no longer had a right to seek habeas corpus in the United States courts. Any applications for habeas corpus already filed in the United States courts were effectively dismissed.

THE CONSTITUTIONAL RIGHT TO HABEAS CORPUS

Unlike the statutory right to habeas corpus, however, the constitutional right to habeas corpus *is* inviolable. It is *not* subject to modification or exclusion by the United States legislature. This is why the Supreme Court's decision in July this year in *Boumediene* is so significant. In that case, the Court recognized that the United States Constitution, and the right to habeas corpus in it, extends to detainees at Guantanamo Bay. As in *Rasul*, the Supreme Court rejected the United States Government's argument that habeas corpus only extends to territories over which the United States has legal and technical sovereignty. Instead, the Court said that it depends on the particular circumstances of the case.

1. The status of the detainees had been determined only by executive order and not by a rigorous adversarial process;
2. The United States has ‘absolute’ and ‘indefinite’ control over Guantanamo Bay; and,
3. The United States Government had presented no evidence that the military operation at Guantanamo Bay would be compromised if habeas corpus rights were extended to detainees.

The *Detainee Treatment Act* and the *Military Commissions Act* were therefore invalid, unless the CSRT review process established by the *Detainee Treatment Act* was an adequate substitute for habeas corpus. The Court found that it was not. It noted the limitations on the CSRT process which I have already discussed, as well as the limited jurisdiction of the Court of Appeals. In relation to the latter, the main point made by the Supreme Court was that there is no opportunity for a detainee to present, and the Court of Appeals to consider, exculpatory evidence that emerged after the close of the CSRT proceedings.

It is important to keep in mind that the Supreme Court did not find that detention at Guantanamo Bay was unlawful. It merely gave detainees at Guantanamo Bay the opportunity to make this case for themselves. And this is exactly what happened in the two cases before the United States District Courts. For example, the District Court accepted that that there was not a ‘preponderance of evidence’ to justify the classification of the five Algerian men as ‘enemy combatants’. This was because the only evidence was in a classified document from an unknown source – therefore, neither the CSRT nor the District Court could evaluate the credibility or reliability of the evidence.

[Talk about the issue of remedies if there is time. This is where the real dispute between the United States courts and the United States Government arose. Should the power to allow aliens into the United States rest solely in the hands of the United States Government? Were the United States courts usurping the role of the Government? The

District Court in *Kiyemba* concluded that, for habeas corpus to be effective, the courts must have the power to order the release of the detainees from Guantanamo Bay?]

THE LONG TERM FUTURE OF THE GUANTANAMO BAY DETAINEES

Boumediene provided the United States District Courts with the power to order the release of Guantanamo Bay detainees. In addition to the two cases already decided, 114 more cases (involving more than 200 detainees) are currently before the District Courts.

Ultimately, however, the long-term future of the Guantanamo Bay detainees (as a group) rests in the hands of the United States executive government and legislature. As I mentioned at the beginning of this paper, this raises many complex questions. I would like to discuss two of these questions in more detail.

What body will try the detainees?

The central question that Obama will have to grapple with in choosing between the various options is where the balance should lie between protecting the rights of the defendants and securing convictions.

The first option is that the existing military commission system could be retained. However, a cloud of doubt surrounds whether this system violates the United States Uniform Code of Military Justice, the Geneva Conventions and the United States Constitution. The two greatest concerns are that: the United States Government is prosecution, judge and jury; and, information obtained by coercion may be admitted into evidence (although information obtained by torture may not). It is not enough to say, as Phillip Ruddock did in 2006: ‘I mean the fact is that what we’re talking about is a response to some of the most dastardly acts that we have ever seen’. Even the worse criminals have the right to a fair trial and to a determination of their guilt or innocence by the courts. This is what it means to live under the rule of law.

Another ground on which the military commissions have been criticized is for their slowness in prosecuting detainees for terrorism offences. Only 23 people have been charged. And only two people have been convicted (with the trials of several more to commence in the new year).

Second, the detainees could be prosecuted in United States civilian courts. According to some, there is a conceptual problem with this. It risks treating terrorism as a 'mere crime' when in fact terrorism is not like other criminal offences. It strikes at the heart of the government of a State and aims to cause mass destruction to person and property. There is also a practical problem with this approach. It would give Guantanamo Bay detainees the same legal rights as United States citizens, making successful prosecution far more difficult. Colonel Morris Davis, the former Chief Prosecutor of the military commissions, said that a detainee could complain that his right to a speedy trial was violated, he was not read his Miranda rights, the evidence did not go through a proper chain of custody and that confessions were gleaned through coercive interrogations. Any of these, according to David 'could jeopardize the prospect of a conviction'.

This is demonstrated by the trial of Khalid Sheikh Mohammed, the alleged mastermind of the 9/11 bombings, which was due to start this week. The CIA has admitted to 'waterboarding' Mohammed, a technique that simulates drowning. Evidence obtained using this method would not be admissible in a civilian court and therefore it would be difficult to try him in this forum.

Third, the authorities could use the United States military's court-martial system (which has been around for about 56 years). Such courts maintain a higher standard of evidence than do the military commissions and accord the other due process rights required under federal law. Therefore, they give rise to some of the same perceived problems as use of the United States courts. Although one difference is that courts-martial could be held outside the United States.

Finally, a new court system with a new procedural framework (positioned somewhere between the United States civilian courts and the military commissions) could be established to try the Guantanamo Bay detainees. Recent media reports suggest that this is an option which Obama's legal team is seriously considering. However, establishing such a system would require a lengthy legislative process and the Guantanamo Bay detainees would remain in limbo for some time.

What will happen to those detainees who are cleared for release due to lack of evidence or who are found guilty and then released after serving a period of imprisonment?

About 50 of the remaining detainees at Guantanamo Bay have been cleared for release by the United States authorities. However, in many cases, these people are unable to return to their home countries because of a threat of persecution, torture or even execution. This is the situation in which the 17 Chinese Muslims I have previously referred to found themselves. The United States Government had accepted (in some cases, for the past four years) that they were not 'enemy combatants'. However, it was unable to return them to their home country because of the crushing campaign of religious repression engaged in by the Chinese Government. This campaign allegedly involved acts ranging from closing mosques to forcible abortions to the removal of land to the detention and execution of thousands of people every year.

Even where no such threat exists, repatriation of detainees has been difficult because of the Bush administration's insistence that the home countries of released detainees impose restrictions on them to prevent any future threat to the United States. Saudi Arabia, for example, has imprisoned some former detainees, limited the travel of others and put still more into a 'de-radicalisation' program. Yemen, by contrast, is reluctant to be seen to be assisting the United States. This is extremely problematic because Yemenis make up the largest group of detainees at Guantanamo Bay.

In the event that the detainees are unable to return to their home countries, the only option is to find a third country who will accept the detainees or to release them into the United States. For obvious reasons, release into the United States is likely to be politically unpopular with United States voters. In my view, this will be one of the biggest challenges that Obama will have to overcome.