

WHY IT WASN'T A GREAT VICTORY AFTER ALL

*Wietse Buijs **

Introduction

On 31 December 2011 president Obama signed and thereby enacted the National Defence Authorization Act (NDAA) for the Fiscal Year 2012.¹ This act is an annual bill which enables the military to function around the world with the appropriate means. It is also an opportunity for the government to expand its powers in the war on terror if necessary. An opportunity it seized because the NDAA text affirms by law the President's authority to detain, by means of the military...

a person who was a part of or substantially supported Al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.²

Since the beginning of the War on Terror in September 2001, President Bush has always claimed to have the authority to detain suspected terrorist indefinitely.³ As of 14 September 2001 the Authorization for Use of Military Force (AUMF) was the President's stringent but understandable reaction to the attacks on 9/11.⁴ It enabled him to act swiftly and retaliate to the horror done to his country. But little over a decade and a president later, not only are the indefinite detentions not over, the President even deemed it necessary to sign

** Wietse Buijs is lecturer in the section of Jurisprudence at the Erasmus School of Law (ESL) in Rotterdam. He acquired his master's degree in law at the Erasmus School of law. He wrote his thesis about the suspension of habeas corpus during wartime in the United States of America. Currently, besides his day job, he is an external PhD-student with the section of Jurisprudence of the ESL on the subject of torture and terrorism in the wake of 9-11-2001.*

¹ The National Defense Authorization Act (NDAA) for Fiscal Year 2012, at: <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1540enr/pdf/BILLS-112hr1540enr.pdf> (accessed on 30 December 2011).

² 112th Congress, 1st Session, H1540CR.HSE, at: "National Defense Authorization Act for Fiscal Year 2012." pp. 265-266 (accessed on 5 January 2012).

³ "[STATEMENT OF ADMINISTRATION POLICY](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf)" at: http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf (accessed on 5 January 2012).

⁴ The Authorization for Use of Military Force (AUMF), at: <http://news.findlaw.com/hdocs/docs/terrorism/sjres23.enr.html> (accessed on 5 January 2012).

an affirmation of the authority to detain suspected terrorists indefinitely, into law.⁵

I. Turf War

The fact that it is even possible for the President to affirm his authority is rather peculiar. It is peculiar because on 6 June 2008 the Supreme Court of the United States (hereafter The Supreme Court) issued its landmark case *Boumediene v. Bush*.⁶ This case should have made an end to a four year turf war with the executive and legislative branches of the government over detainee status and their rights in the war on terror. First off, I explain the existence of the turf war between the executive (hereafter the Bush Administration) and the Supreme Court. After this, in section II, I explain why *Boumediene* should have put an end to the turf war and why it did not. That leads to section III in which I describe the current status in the detainee litigation cases. After this, I discuss my conclusion in paragraph IV.

As I wrote in the introduction, on 14 September 2001, just three days after the brutal attacks on America, the Bush Administration instigated the AUMF.⁷ It was a joint resolution by the President and Congress that enabled the Commander in Chief (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.

It dramatically increased the President's power to deal with the new war on terror as he seemed fit. The implementation of the AUMF was very quick, and so was bringing war to the suspected terrorists and those nations who harboured them. President Bush already delivered an ultimatum to the Taliban on 20 September 2001 to turn over Osama Bin Laden and Al-Qaeda leaders operating in the country.⁸ The invasion would follow on 7 October 2001 and, soon after, people started to disappear, not just from the battlefield in Afghanistan, but also in countries all over the world. These people were

⁵ President Obama did express his reservations about several provisions. He was not adamant about increasing his authority in these matters, but was obliged to sign the bill in order to be able to pass the budget for the military.

⁶ *Boumediene et al v. Bush*, 553 U.S. 723 (2008).

⁷ The Authorization for Use of Military Force (AUMF) (2001), supra note 5, p. 1.

⁸ G.W. Bush, Transcript of President Bush's address, at:

<http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/> (accessed on 6 January 2012).

designated as *enemy combatants* and were shipped to detention sites outside the United States. The most notorious of these detention sites is the Detention Centre at the Guantánamo Bay Naval Base in Cuba (GITMO). The first detainee arrived at GITMO the same day as the invasion in Afghanistan officially started.⁹ In order to eventually bring these enemy combatants to justice, President Bush issued an executive order to establish a military commission that would hold trials on the base.¹⁰ In order to try the detainees that were designated as enemy combatants, the President decided that all enemy combatants would not fall under the scope of the third Geneva Convention (“Relative to the Treatment of Prisoners of War”). This would make it easier and more effective to convict the terrorists. Perhaps it was more convenient to designate them as such, but it also generated a lot of criticism from around the world, especially from family members who in some cases didn’t even know where their loved ones were detained or even if they were still alive.

The first case that made it to the Supreme Court was that of *Rasul*.¹¹ Shafiq Rasul was detained at GITMO without trial and was not even given the possibility of being represented by a lawyer to challenge his detention. So his family, on behalf of Rasul, petitioned for a writ of habeas corpus to challenge his detention. This petition was denied in every lower court, so it finally reached the Supreme Court for consideration. The Court reversed the District Court decision to deny the writ of habeas corpus in a 6-3 decision.¹² They decided that the *suspension clause* in the Constitution which states that “the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it” would have extraterritorial scope and therefore could be applied to the enemy combatants at GITMO.¹³ The detainees had to be given the right to challenge their confinement in a court of law by means of a petition for a writ of habeas corpus. On the same day as the *Rasul case*, The Supreme Court issued another landmark case on the matter, *Hamdi v. Rumsfeld*.¹⁴ The central question to be answered before the Court in this case was whether the Bush Administration did indeed have the authority to detain suspects who were designated as enemy combatants indefinitely. The answer again was no. Eight of the nine justices of the Court agreed that the Bush Administration did not have the power to hold a U.S. citizen indefinitely without basic due process rights enforceable through judicial review.

⁹ ‘Names of the Detained in Guantanamo Bay, Cuba’, *The Washington Post* 2005, at: http://www.washingtonpost.com/wp-srv/nation/guantanamo_names.html, (accessed on 6 January 2012).

¹⁰ G.W. Bush, Military order of 13 November 2001, at: <http://www.fas.org/irp/offdocs/eo/mo-111301.htm> (accessed on 6 January 2012).

¹¹ *Rasul et al v. Bush*, 542 U.S. 466 (2004).

¹² The Supreme Court of the United States consists of nine justices who are appointed by the president for life. Every ruling the Court issues, is a result of individual voting of the members of the Court. The majority of a voting results in the Court’s decision.

¹³ United States Constitution article 1, section 9: Limits on Congress.

¹⁴ *Hamdi et al v. Rumsfeld*, 542 U.S. 507(2004).

Both cases were a slap in the face of the Bush Administration. The decisions were not at all what the Bush Administration expected. Challenging detainment through a petition of *habeas corpus* and granting (U.S.) detainees' due process rights would seriously hamper any effectiveness in capturing terrorists in the War on Terror, or so the Administration deemed it. An additional law was necessary. The Administration's reaction again was swift and decisive. Just a few months later (the average bill takes years to pass) President Bush signed the Detainee Treatment Act (DTA).¹⁵ Although the title of the act suggests, and it actually is for a part, that the act is about the treatment of detainees, it also is a direct reaction to the Supreme Court cases stated above. It prohibited inhumane treatment of detainees, including those at GITMO and it required military interrogations to be performed according to the U.S. Army Field Manual for Human Intelligence Collector Operations. But it also stripped all federal courts (but one the D.C. Circuit Court of Appeals) of any jurisdiction to consider habeas corpus petitions filed by detainees at GITMO, or other claims asserted by detainees against the US government. So the new DTA negated, at least in its intentions, the Supreme Court rulings deciding otherwise.

The next round in the turf war presented itself in 2006. Another case was accepted by the Supreme Court for review. On 29 June 2006 *Hamdan v. Rumsfeld* was decided by the Court.¹⁶ By means of *Hamdan*, the Court reacted to the DTA. The central question to be answered in this case was whether military commissions had the jurisdiction to try *Hamdan*, who was detained at GITMO and whether The Geneva Conventions should apply to the enemy combatants held in detention. Before answering these questions, Justice Stevens, for the majority of the Court, first denied a motion to dismiss the case by the Bush Administration. The Administration in its motion relied on the DTA which stated under section 1005 that the D.C. Circuit Court of Appeals had the 'exclusive' jurisdiction to review decisions in detainee cases tried before military commissions. The Supreme Court would not be denied the jurisdiction to review any legal case. In answer to the questions in dispute before the Court, the Court held that military commissions lack the authority to proceed because they were in violation of both the Uniform Code of Military Justice and common article three of the Geneva Conventions.¹⁷ So in return the Supreme Court decision negated the DTA in this case.

Once again an answer from the Administration did not take very long. In repetition of his reaction in the previous round of the turf war, President Bush

¹⁵ Detainee Treatment Act of 2005 (DTA 2005), at: <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php> (accessed on 6 January 2012).

¹⁶ *Hamdan et al v. Rumsfeld*, 548 U.S. 557(2006), at: <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf> (accessed on 6 January 2012).

¹⁷ *Hamdan et al v. Rumsfeld.*, 548 U.S. 557, supra note 16.

signed a new act countering the Supreme Court decision, The Military Commissions Act (MCA) of 2006. This time the entire new law was a reaction to the Court's decision. The turf war became even grimmer. In a message to Congress in consideration of passing the law, President Bush wrote:

I transmit for the consideration of the Congress draft legislation entitled the "Military Commissions Act of 2006." This draft legislation responds to the Supreme Court of the United States decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), by establishing for the first time in our Nation's history a comprehensive statutory structure for military commissions that would allow for the fair and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants. The Act also addresses the Supreme Court's holding that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda by providing definitions rooted in United States law for the standards of conduct prescribed by Common Article 3.¹⁸

The new act had the sole purpose of thwarting *Hamdan*. This time the law clearly gave jurisdiction to the military commissions by bringing it under the scope of the Uniform Code of Military Justice. Even worse, section 948b, under f stated that "no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." A Convention I might add, the United States was and is a signing party to.

The accumulation of the turf war came, as I discussed in the beginning in this paragraph, in 2008 with *Boumediene*. The Court held in a narrow 5-4 decision that the detainees had a right to a writ of habeas corpus under the Constitution and that the MCA was an unconstitutional suspension of that right. Because of the fact that the United States have complete and utter control and jurisdiction, and thereby 'de facto' sovereignty over GITMO, detainees held there have the right to protection under the Constitution. On these grounds *Boumediene* should have been 'a great victory.'¹⁹ It was meant as a definitive answer from the Supreme Court on how to interpret the Constitution in detainee cases.

¹⁸ G.W. Bush., Military Commissions Act of 2006, Message from President Bush, at: http://www.loc.gov/rr/frd/Military_Law/pdf/message.pdf (accessed on 6 January 2012).

¹⁹ R. Dorkin, *Why it was a great victory*, New York Review of Books, 14 August 2008.

III. The D.C. Circuit Court of Appeals takes over

It looked like a definitive case, except for the fact that it was not. *Boumediene* of course was sent for remand to the Court of Appeals of the D.C. Circuit Court. It is this Court that would turn out to be the Court in control of the detainee cases. The DTA and the MCA both appointed the D.C. Circuit Court as the only Court allowed to review any of the detainee cases. But contrary to the slim, progressive left wing majority in the Supreme Court (only in the instance of *Boumediene* by the way), the D.C. Circuit Judges were and are mostly conservative. And in some cases extremely conservative. It is fair to say that these judges weren't really keen on implementing the new precedent. Some judges were not even very subtle in their criticism towards the Supreme Court. Senior D.C. Circuit judge Randolph even held public speeches called 'The Guantanamo mess' referring to the *Boumediene* precedent.²⁰

So after *Boumediene* most detainees sought their way, again, to the Courts in order to obtain a release order for their detention. But they eventually would reach the D.C. Circuit Court of Appeals in their appeal. The Court of Appeals for their part refused to release a detainee in every single detainee case that reached it. In their quest to overturn the *Boumediene* precedent they used a remarkable method, they used another Supreme Court ruling against the *Boumediene* precedent. As faith would have it, it was a case that was decided on the same day as *Boumediene*. *Munaf v. Geren* was a case where the court unanimously concluded that *habeas corpus* extends to U.S. citizens held overseas by American forces subject to an American chain of command, even if acting as part of a multinational coalition. It did not differ much from the view set out in *Boumediene*. But the Court also found that *habeas corpus* provided the petitioners with no relief holding that "*Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them.*"²¹ So the *Boumediene* case, dividing the Court 5-4, gave GITMO detainees, for the first time, a constitutional right to go to court to challenge their detention. But the unanimous *Munaf* decision, which had nothing in it explicitly about GITMO, held that federal courts could not control the U.S. military's decision, in Iraq, to hand over to the Iraqi government American citizens who had allegedly committed crimes in that country. What the judges so cleverly did was use the broad interpretation of the *Munaf* decision to increase the executive power of the, by now Obama, Administration and diminish the precedent set out in the *Boumediene* case. The Circuit Court flatly ordered the District judges not to 'second-guess' the Executive's call on what to do with detainees, even those who had won release orders. So the result of this decision was that the Circuit Court of Appeals in no case approved an actual release.

²⁰ A. Raymond Randolph., 'The Guantanamo Mess,' at: <http://www.heritage.org/events/2010/10/guantanamo-mess> (accessed on 6 January 2012).

²¹ *Munaf et al v. Geren*, 553 U.S. 674 (2008).

The logical step to take for the numerous defence lawyers of the detainees was to appeal to the Supreme Court for its consideration in these matters. And so they did. Just last year alone eight cases, for the most part consolidated cases regarding more than one detainee, reached the Court asking a writ of certiorari.²² All eight were dismissed. The Supreme Court did in all instances discuss the case but, in majority at least, did not see the need to grant certiorari. In consideration of the reason why the Court sees no need for further review of these cases, the Justices provide no definitive answer. There is certainly a great need to further explain the Court's view in both *Boumediene* and *Munaf*, notwithstanding the fact that the D.C. Circuit Court has created a remarkable way of interpreting both precedents.

It seems that a major reason or perhaps the only reason that the Supreme Court did not grant certiorari to any of the detainee cases is that there was, and still is, no majority for a coherent decision to be found. During Obama's first term in office, two justices retired. Justices Souter and Stevens were replaced by Sotomayor and Kagan. As both Justices Souter and Stevens were fairly liberal justices and so are Sotomayor and Kagan, no change in balance in detainee matters would have been expected, except for the fact that justice Kagan was a Solicitor General of the United States prior to her appointment to the bench. As a Solicitor General she was directly involved in some of the cases she now had to judge. The consequence of course was that she had to recuse herself on all those cases. With justice Kagan out of the picture in detainee cases, the 5-4 split in *Boumediene* in favour of detainee rights would then be a 4-4 stalemate. In case of a 4-4 split, no decision is made and the initial ruling by the D.C. Circuit Court of Appeals stands, therefore the Supreme Court grants no certiorari in any of the detainee cases. Because of that, the D.C. Circuit Court of Appeals is in control over all detainee matters, a control that, for the moment, translates in ever diminishing rights for the persons held in indefinite detention.

IV. Conclusion

In this light, the enactment of the NDAA for the Fiscal Year 2012 with its affirmation of the President's power to hold detainees indefinitely without trial, could not come at a worse time. The Obama Administration, and their predecessors in the White House, never made it a secret that they did not want the judiciary to interfere with their detainee policy in the war on terror. No matter the many detainees still waiting to be charged or tried. But the D.C. Circuit Court of Appeals turns out to be a fierce ally of the Obama Administration in their quest for full and unchecked control over detainee matters. So if the D.C. Circuit Court of Appeals is not going to stop thwarting any injunction for release of a detainee and the Obama administration is still seeking more means (even with a reluctant President) to indefinitely detain those they see as suspects of terrorism, what is to become of the detainees?

²² A writ of certiorari is the formal American term for granting review to a case by the Supreme Court.

This would be the moment that the Supreme Court should perhaps step in and at least clarify its view on these matters. Otherwise it may become too late to stop another shameful period, the first of which they sought to end with *Boumediene*.

- The Amsterdam Law Forum is an initiative supported by the VU University Library -