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## UNITED STATES OF AMERICA

### Back to the bigger picture

Salim Hamdan sentenced after first military commission trial at Guantánamo

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As bad as the past six and half years of unlawful US detention and treatment, first in Afghanistan and then in Guantánamo Bay, have been for Salim Hamdan, yesterday his situation could have become even worse. Prosecutors had asked for a 30-year prison sentence for this Yemeni national convicted on 6 August 2008 by military commission of “providing military support for terrorism”. Instead, the six members of the commission handed down a sentence of five and a half years. This includes a 61 month and eight day credit for time already spent in detention in Guantánamo since Hamdan was first made eligible for trial on 3 July 2003 under the previous military commission system authorized by presidential order but overturned by the US Supreme Court in 2006.

Under any ordinary system of justice, Salim Hamdan would be released in a little under five months. This is no ordinary system, however, and no such guarantee is provided under the Military Commissions Act (MCA). As the military judge said, Hamdan’s future is unclear. After he has served his sentence, Judge Allred said, “I don’t know what happens”.

The day before Salim Hamdan was convicted, a Pentagon spokesperson had said that “even if he were acquitted of the charges that are before him, he would still be considered an enemy combatant and therefore would continue to be subjected to – subject to continued detention... [I]n the near term, at least, we would consider him an enemy combatant and still a danger and would likely still be detained for some period of time thereafter.”

Thus we return to the bigger picture: the assertion of executive power as overriding the rule of law. The pursuit of executive authority free of independent judicial scrutiny has been at the heart of the USA’s “war on terror”. The result has been multiple human rights violations, including secret detentions, enforced disappearances and torture and other cruel, inhuman or degrading treatment. Salim Hamdan was subjected to a number of such violations, including spending 10 months in solitary confinement in Guantánamo’s Camp Echo at a time when the government was apparently trying to coerce him into making a guilty plea under the previous military commission system. His trial leaves unanswered the question of when, if ever, the USA will hold those responsible for such abuses fully to account. Indeed, the commission system has been tailored to be able to tolerate the mass of unlawful government conduct that forms the backdrop to and foundation for this and forthcoming prosecutions. Such tolerance was evident during Salim Hamdan’s trial;<sup>1</sup> worse is likely to come.

The government will likely claim the Hamdan trial as a success and a vindication of its decision to bypass the ordinary courts for the trial of those foreign nationals it labels as “unlawful enemy combatants”. It has a vested interest in pursuing this line. After all, congressional approval of the MCA was obtained after President George W. Bush’s assertion that: “As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September 11, 2001, can face justice. We’ll also seek to prosecute those believed to be responsible for the attack on the USS Cole, and an operative believed to be involved in the bombings of the American embassies in Kenya and Tanzania. With these prosecutions, we will send a clear message to those who kill Americans: No longer – how long it takes, we will find you and we will bring you to justice.”

In such cases, the US government’s idea of “justice” is the pursuit of the death penalty, even as the crimes under international law of torture and enforced disappearance committed against these detainees go unpunished. These men were hidden away for years in secret US custody before being “reappeared” in September 2006 as pawns in the US administration’s bid to replace the military commission system thrown out by the Supreme Court a few weeks earlier.<sup>2</sup>

“Justice” under the MCA has so far consisted of the conviction of David Hicks after a guilty plea under an agreement that saw him returned to Australia to face a short sentence after five years in Guantánamo, and now Salim Hamdan’s conviction and sentence. But the prosecution of these individuals can be seen as little more than curtain-raisers for the main event, the trials of so-called “high-value” detainees accused of direct involvement in the attacks of 11 September 2001 and other crimes linked by the USA to *al-Qa’ida*. Firstly, however, the government is set to further test the system with proceedings against a few more “low-level” figures, including Omar Khadr and Mohammed Khadr, taken into custody when they were children. They face pre-trial hearings next week, with Khadr’s trial due to begin in October.

Salim Hamdan’s expressions of relief at his sentence were understandable, when one considers the threat against him of a further 30 years’ imprisonment, after already having been held more than six years in US custody. However, Amnesty International considers that the fact that these military commissions are ‘up and running’ is no cause for celebration. The organization has long called for the Guantánamo detainees, if they are not to be released immediately, to be brought to trial in proceedings that meet international fair trial standards. Military commissions under the MCA are not such trials.

The military commission system should be abandoned. Any trials should be conducted in the ordinary US federal criminal courts. Any detainee whom the USA does not intend to promptly charge should be released. The Guantánamo detention facility should be closed down.

<sup>1</sup> See USA: Trial and error: A reflection on the first week of the first military commission trial at Guantánamo, 30 July 2008, <http://www.amnesty.org/en/library/info/AMR51/084/2008/en>.

<sup>2</sup> See, e.g., USA: Way of life, way of death: Capital charges referred against five former secret detainees, 20 May 2008, <http://www.amnesty.org/en/library/info/AMR51/041/2008/en>. USA: Capital charges sworn against another Guantánamo detainee tortured in secret CIA custody, 2 July 2008, <http://www.amnesty.org/en/library/info/AMR51/071/2008/en>.