

Courts and the Making of Public Policy

The US Judicial Response to Post-9/11 Executive Temerity and Congressional Acquiescence

David E. Graham

The Foundation for Law, Justice and Society

in affiliation with

The Centre for Socio-Legal Studies,
University of Oxford

www.fljs.org



Executive Summary

- Following the al-Qaeda terrorist attacks on the United States of 11 September 2001, the US Administration chose to seize upon these events as an opportunity to effect the concept of the 'Unitary Executive': a sweeping expansion of presidential authority.
- Essential to the implementation of the Unitary Executive concept was the Administration's ability to structure post-9/11 US policies on the premise that these attacks initiated US involvement in a global 'War on Terrorism', triggering a broad array of presidential 'war-making' powers. While the US Congress has acquiesced in this approach, the US judiciary has been more reluctant to do so.
- In dealing with terrorism and terrorists in an 'armed conflict', Law of War context, the Administration has determined that members of al-Qaeda and all 'associated' terrorists are 'unlawful enemy combatants' and has established Military Commissions to try such individuals for violations of the Law of War.
- Individuals designated by the United States as 'unlawful enemy combatants' have been denied Geneva Convention protections and transported to Guantanamo Bay, Cuba for 'indefinite' detention. Some of these detainees have been subjected to coercive treatment and interrogation.
- In 2004, the US Supreme Court issued a trilogy of decisions significantly affecting Administration detainee policies based on the exercise of its Unitary Executive 'war powers'.
- In passing the 2005 Detainee Treatment Act, Congress attempted to sanction past Administration detainee policies and statutorily negate certain aspects of the 2004 Supreme Court decisions adversely impacting these policies.
- In the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court declared the Military Commissions established by the Administration to be unlawful.
- Congress, in passing the 2006 Military Commissions Act, sought to statutorily authorize the Administration's establishment of Military Commissions, as well as its policies concerning the treatment and interrogation of detainees.
- The Supreme Court, in recently choosing to hear the combined appeals of thirty-seven Guantanamo detainees, has once again served notice that, on the matter of the rights to which these detainees are entitled under US law, it will be the Court, rather than the president or Congress, that will have the last word. It will render a decision favourable to these detainees in the summer of 2008.

The US Judicial Response to Post-9/11 Executive Temerity and Congressional Acquiescence

Introduction

The 11 September 2001 al-Qaeda terrorist attack on the United States produced not only human and material loss; it also resulted in an apparent loss of the nation's traditional adherence to the rule of law. Sensing the physical and emotional fear of the American public, as well as the political timidity of Congress, the Administration seized upon the aftermath of 9/11 to foster its concept of the 'Unitary Executive': a sweeping expansion of presidential authority.

Essential to its desire to expand its Executive powers was the Administration's ability to convince both the American people and their elected representatives that, given the events of 9/11, the United States was now at 'war' with not only al-Qaeda, but with 'terrorism', writ large. Playing on this theme, it was said that the president must be imbued with all of a chief executive's 'war-making' authority and act accordingly. This attempt to deal with terrorists and terrorism in an armed conflict, Law of War context, and the Administration's subsequent misapplication of this body of law, has led to numerous legal challenges over the past five years. This policy brief will examine the most significant of these challenges and the emerging, and critically important, role of the US judiciary in responding to an unchecked Executive.

The Executive response to the 9/11 al-Qaeda terrorist attacks

A general consensus formed, post-9/11, that, though initiated by a non-state entity, the al-Qaeda strikes on the World Trade Center and the Pentagon constituted an 'armed attack' against the United States. It was reasoned that these acts represented simply the latest al-Qaeda action taken in what amounted to an 'ongoing armed attack', one dating

back to the initial bombing of the World Trade Center, the bombing of the US Embassies in Kenya and Tanzania, and the attack on the USS Cole in Yemen. A distinct difference of opinion existed, however, as to whether this latest al-Qaeda strike, given the scale of its destructive force, had served to signal the initiation of a 'war' between al-Qaeda and the United States.

On 12 September, the United Nations Security Council passed two resolutions, condemning the 'terrorist attacks' of 9/11 and recognizing the inherent right of any State to engage in self-defence against such 'terrorist acts'. Absent from these resolutions, however, was any recognition of the existence of an 'armed conflict' or 'war' between the US and al-Qaeda, triggered by the events of 9/11.

On 18 September, President Bush signed into law a Joint Congressional Resolution authorizing the use of all necessary and appropriate armed force against any nations, organizations, or persons that had planned, authorized, committed, or aided the 9/11 terrorist attacks, or had harboured such organizations or persons, in order to prevent future 'acts of international terrorism'. Again, however, this resolution contained no reference to a congressional declaration or acknowledgement of the existence of an ongoing 'armed conflict' with al-Qaeda. Nevertheless, on 20 September, President Bush, in an appearance before a Joint Session of Congress, referred to the 9/11 attacks as an 'act of war', and declared that the United States was, henceforth, 'at war with terrorism'. This statement clearly reflected that the Administration had already made the decision to frame all future Executive branch actions taken in connection with 9/11 in the context of presidential 'war-making' powers.

Status of individuals seized during US military action in Afghanistan

In response to the sanctuary and support afforded the al-Qaeda organization by the Taliban government of Afghanistan, the United States and several allied states initiated military action against Afghanistan, and al-Qaeda personnel within Afghanistan, on 7 October 2001. It was assumed that this conflict was international in nature, one to which the full range of both the codified and customary Law of War applied, to include the 1949 Geneva Conventions, and specifically, the provisions of the Third Geneva Convention Relative to the Treatment of Prisoners of War. Acting on this premise, US military personnel were prepared to apply the provisions of the Third Convention to captured personnel, to include, when necessary, conducting tribunals to determine whether certain detainees were to be accorded prisoner of war (POW) status. This was not to be.

Acting on advice issued by the US Department of Justice (DOJ), the president initially determined that the United States would neither apply the 1949 Geneva Conventions to the conflict with Afghanistan, in general, nor the Third POW Convention to either Taliban or al-Qaeda captured personnel, in particular. The legal rationale for this presidential determination was contained in just the first of a series of DOJ opinions that appeared to either misconstrue, or simply ignore, both the US constitutional and international law applicable to individuals seized in the Administration's metaphorical 'war on terrorism'. In this case, the president had been advised that, acting under his inherent Article II constitutional authority, he could unilaterally suspend a part, or all of, any international agreement, including the Geneva Conventions.

This presidential determination met with harsh international and domestic criticism. To international lawyers, both within and outside the government, it was clear that the conflict with Afghanistan was one to which the full scope of the Law of War applied. Following several weeks of debate, the chairman of the joint chiefs of staff, supported by Secretary of State Colin Powell, met with the president and

advised him that his decision to suspend the applicability of the Geneva Conventions to the hostilities in Afghanistan would have a potentially devastating impact on the well-being of US service members involved in future conflicts.

At this juncture, the president issued a 7 February 2002 memorandum detailing the manner in which al-Qaeda and Taliban detainees were to be treated and the legal basis for such treatment. Citing the previously noted DOJ opinion and a 1 February letter from the US Attorney General, he concluded that the relevant provisions of the Geneva Conventions did not apply to the 'conflict' with al-Qaeda in Afghanistan or elsewhere, as al-Qaeda was not a party to the Conventions. He additionally asserted that, though he possessed the constitutional authority to suspend the applicability of the Conventions to the Afghan conflict, as a whole, as a matter of policy, vice law, he would not do so.

Nevertheless, again acting on legal reasoning contained in another recently issued DOJ memorandum, he stated that, having carefully applied the Geneva Conventions, he had determined that none of the Taliban captives met the Third Convention requirements necessary to be afforded POW status. As a result, all al-Qaeda and Taliban personnel were to be considered 'unlawful combatants', devoid of any Geneva protections. Finally, he concluded with a statement that could well be viewed as the 'proximate cause' for many of the faulty decisions later made with respect to the treatment and interrogation of these individuals. He noted that, 'as a matter of policy', the US Armed Forces would continue to treat detainees humanely, in a manner 'consistent with' the principles of Geneva, but only 'to the extent appropriate and consistent with military necessity'.

The presidential Military Order of 13 November 2001: Military Commissions

In another exercise of the asserted authority of the Unitary Executive, the president had earlier presaged the inevitability of his ultimate decision regarding the status of al-Qaeda and Taliban personnel

captured in Afghanistan by issuing a 13 November 2001 Military Order dealing with the detention, treatment, and trial of certain 'non-citizens' in the 'war against terrorism'. A key aspect of this document was the establishment of Military Commissions to try individuals subject to this order. In turn, the definition of individuals subject to the order was so broad that it encompassed, in addition to all members of al-Qaeda, any 'terrorist', worldwide, deemed to pose a threat to US interests, as well as any individual who may have harboured such persons.

Acting against the advice of senior military attorneys, the decision was made to promulgate Commission procedures and rules that fell far short of what many within both the United States and international legal community considered to be a fair and equitable Commission process. These shortfalls would become the driving force behind a future US Supreme Court decision dealing with the legitimacy of the manner in which these Military Commissions were structured.

The Guantanamo detainees: applicable law?

Hundreds of captured al-Qaeda and Taliban personnel were transported to the US Naval Base at Guantanamo Bay, Cuba, a site selected specifically for the reason that US courts had consistently viewed Guantanamo as beyond their judicial jurisdiction. Immediately, the question arose: what legal principles would dictate the manner in which these 'unlawful combatants' devoid of any protections or rights under the Geneva Conventions, were to be treated and interrogated?

While a number of customary and codified legal concepts arguably served to dictate a minimal standard of treatment to be afforded the Guantanamo detainees, the Administration focused almost exclusively on interrogation methods that might legitimately be taken under the provisions of the US statutory implementation of the 1984 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment. This analysis led to the issuance of the now infamous 2002 DOJ 'torture

memorandum', a document that defined torture in such an extreme manner that it served as the legal justification for abusive 'alternative' treatment and interrogation techniques employed against a number of US detainees. When the use of these techniques became public in 2004, they were universally condemned, and the DOJ opinion was withdrawn.

The US judicial response to Executive branch excess

In the summer of 2004, as reports of the abusive treatment of detainees by US personnel were making headlines, the US Supreme Court issued three decisions that served to substantially rein in an Executive branch that had yet to have any of its 'war powers' actions challenged by a compliant Congress.

In *Rumsfeld v. Padilla*, the Court considered the government's assertion that it possessed the authority to seize a US citizen in the United States (as he was exiting a plane at Chicago's O'Hare Airport), designate him an 'unlawful combatant', without affording him an opportunity to contest this designation, and to confine him, indefinitely, in a Navy brig in Charleston, South Carolina. While the Court dismissed Padilla's habeas action challenging such Executive authority, it did so on purely technical grounds and declined to accept the asserted Executive power, leaving this matter for consideration in a clearly available habeas action that might later be filed in an appropriate US District Court. Two years later, just as the Court was determining whether to consider a habeas challenge to the legality of Padilla's continued military detention, he was transferred to civilian custody and later tried and convicted of 'conspiracy to commit terrorism' in a US District Court in Miami.

In *Hamdi v. Rumsfeld*, the Court considered the due process protections to be afforded a US citizen, of Saudi Arabian origin, seized in the Afghanistan theater of war, declared an 'unlawful combatant', and, again, indefinitely confined in the Navy brig at Charleston. During over two years of confinement, Hamdi had been denied access to an attorney, as well as the right to have the validity of his status

reviewed. In an 8–1 decision, the Court ruled that, though, under the 2001 Authorization for Use of Military Force, Congress had implicitly ‘authorized the detention of combatants in the narrow circumstances alleged’, due process demanded that a US citizen held in the United States as an ‘enemy combatant’ be afforded access to an attorney and the right to contest the factual basis for his status determination before a ‘neutral decision-maker’.

Following the *Hamdi* decision, the US government unilaterally initiated the conduct of ‘Combatant Status Review Tribunals’ (CSRTs) at Guantanamo, theoretically complying with what the *Hamdi* decision had stated the Due Process Clause required for a US citizen in such a context. Despite appearing to accede to the demands of the Court, however, the sufficiency of the CSRT procedures would prove to be an issue that would also later find its way to the Court. Moreover, the government avoided further judicial rulings on the specific judicial procedures to be afforded Hamdi, given his certain return to the courts, by reaching an agreement that, in exchange for the forfeiture of his US citizenship, he would be released and returned to Saudi Arabia.

Finally, in *Rasul v. Bush*, a case involving a British citizen captured in Afghanistan and held as an ‘enemy combatant’ for over two years at Guantanamo, the Court, in a 6–3 decision, ruled that US courts did, in fact, possess the jurisdiction to consider habeas challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. An essential aspect of the Court’s ruling centred on its view that the United States exercised complete jurisdiction and control over the Guantanamo Base. Consequently, the government’s rationale for its choice of Guantanamo as the site for its indefinite detention of foreign nationals designated as ‘enemy combatants’ – the fact that habeas writs could not be filed in US courts by such detainees – was gone.

In rendering this trilogy of decisions, the Court acted to fill the ‘checks and balances’ void created by a supplicant Congress and, in the process, substantially

diminished the asserted authority of the Unitary Executive. Shortly thereafter, Congress, reacting to both the publicly revealed abuse of detainees held at Abu Ghraib, as well as the recent Court decisions, passed legislation dealing with a number of the more significant detainee-related matters in play.

The 2005 Detainee Treatment Act

The Detainee Treatment Act (DTA), Pub. L. No. 109-148 (2005), establishes a finite standard of detainee treatment and interrogation for all individuals detained by the US Department of Defense (DOD). It stipulates that no person under DOD control can be subjected to any treatment or interrogation technique not authorized by a specific US Army Field Manual dealing with these matters.

Secondly, the DTA prohibits the ‘cruel, inhuman, or degrading treatment or punishment’ of any individual subject to the control of any non-DOD US agency, although Congress, at the urging of the Administration, chose to define ‘cruel, inhuman, and degrading treatment’ as only that form of ‘cruel, unusual, and inhumane treatment’ prohibited by the Fifth, Eighth, and Fourteenth Amendments to the US Constitution. As reflected in US case law, this definition embodies a standard that poses this consideration: given the totality of the circumstances surrounding the treatment in issue, does this treatment ‘shock the conscience of the court’? An exceptionally broad standard, this has been liberally interpreted in a manner that has enabled US agents to engage in detainee treatment practices specifically prohibited for use by DOD personnel.

Also at the urging of the Administration, Congress acted to grant immunity from future prosecution or civil action in US courts to all US personnel who had engaged in specific ‘operational practices’ determined to be lawful at the time of their use. Additionally, in an effort to limit the future role of the US judiciary in dealing with detainee-related issues, Congress legislatively prohibited US courts from entertaining writs of habeas corpus filed by aliens detained by the US as a result of its ‘war on terrorism’.

Finally, Congress imbued the US Court of Appeals for the District of Columbia Circuit (DC Circuit Court) with the exclusive jurisdiction to review both the validity of any final decision made by a CSRT adjudging whether an alien was being properly detained as an 'enemy combatant' at Guantanamo, as well as all final decisions made in connection with the trials of alien detainees before Military Commissions.

Shortly after passage of the DTA, the Administration was confronted with the most significant judicial challenge, to date, of its Unitary Executive philosophy and resultant detainee policies.

Hamdan v. Rumsfeld

Hamdan, a Yemeni national, was captured in 2001 during hostilities in Afghanistan by militia forces, turned over to the US military, transported to Guantanamo, and, in 2003, charged with conspiracy, 'to commit offenses triable by Military Commission'. In a habeas petition, Hamdan challenged the authority of a Military Commission to try him. While a US District Court granted habeas relief and stayed the Commission's proceedings, the DC Circuit Court reversed, ruling that the Geneva Conventions were not judicially enforceable and that the trial of Hamdan before a Military Commission would not violate the US Uniform Code of Military Justice (UCMJ).

Brushing aside the supposed DTA legislatively imposed limitation on its jurisdiction to review the decision rendered by the DC Circuit Court, the Supreme Court stunned the Administration by ruling that the Military Commission process constituted by the president violated both the UCMJ and Common Article 3 of the 1949 Geneva Conventions. Significantly, this decision posed potential ramifications that went far beyond the Court's nullification of the president's unilateral authority to dictate the Military Commission process.

In ruling that individuals captured and detained in the 'conflict' with al-Qaeda were entitled to the protections embodied in Common Article 3, of which one is a prohibition against 'outrages upon personal dignity, in particular, humiliating and degrading

treatment', the Court's decision subjected US agents who had violated Article 3 in dealing with detainees to criminal prosecution. This resulted from the fact that the 1997 War Crimes Act provided US District Courts with the jurisdiction to try cases against any US national charged with the commission of a 'war crime,' which were defined, in part, as violations of Common Article 3.

Recognizing the necessity for a statutory basis for the constitution of Military Commissions, as well as the vulnerability to criminal prosecution of US representatives who had arguably violated Common Article 3 by engaging in or sanctioning 'alternative interrogation techniques', the Administration again turned to a compliant Congress.

The 2006 Military Commissions Act

Following only minimal public debate and faced with approaching November elections that were almost certain to change the congressional landscape, Congress acted swiftly to meet the demands of the Administration. The result was The Military Commissions Act (MCA). Pub. L. No. 109-366 (2006).

Significantly, the MCA reaffirms the prior DTA legislative stripping of the jurisdiction of federal courts to hear habeas appeals from individuals who have been detained in the 'war on terrorism'. The MCA definition of an 'unlawful enemy combatant' is so broad that it subjects countless individuals who have never committed a belligerent act against the United States to seizure and trial before a Military Commission. The Act also reaffirms the dual detainee treatment and interrogation standards, established by the DTA, employed by the US DOD and other US government agencies, legitimizing the ability of non-DOD US personnel to engage in 'enhanced' interrogation techniques, as long as these practices do not 'shock the conscience' of a US court.

Additionally, the Act specifically sanctions the use of a detainee's coerced testimony before a Military Commission – the first time Congress has legislatively endorsed the maltreatment of US-held

detainees. The immunity from prosecution for the past coercive treatment and interrogation of detainees by US personnel is also reaffirmed. And, most consequentially, the MCA amends the 1997 War Crimes Act, legislatively immunizing from prosecution those who have sanctioned or engaged in violations of that provision of Common Article 3 prohibiting 'outrages upon personal dignity'.

Recent US judicial actions

Shortly following passage of the MCA, in April 2007, the Supreme Court declined to hear the appeals of uncharged Guantanamo detainees who, held for more than five years, were now challenging the constitutionality of the habeas-stripping provision of the MCA, their designation as 'enemy combatants,' and their indefinite detention. In an unusual development, however, Justices Stevens and Kennedy issued a separate concurring opinion. While affirming the need for the appellants to exhaust available remedies as a precondition to the Court accepting jurisdiction over habeas writs, these Justices cautioned that should the government 'unreasonably delay' the pending proceedings or subject the detainees to some other 'ongoing injury', they would be open to a renewed appeal.

Two events then occurred. Firstly, an Army officer who had participated as a panelist in forty-nine CSRT proceedings came forward and very publicly challenged the fairness of the CSRT process. Secondly, on 4 June, two Military Commission judges, in the first cases brought before Military Commissions, dismissed all charges levied against two Guantanamo detainees. In doing so, both judges ruled that, while Congress had authorized Military Commissions to try charges lodged against 'unlawful enemy combatants', CSRTs had determined that the two detainees before the Commissions were simply 'enemy combatants'. These highly technical dismissals portended the need for what was certain to be a protracted appeal process mandated by the MCA, beginning with an initial appeal of the judges' rulings to a Court of Military Commission Review, a court that the government had surprisingly failed to establish.

The judicial way ahead

Perhaps now viewing these recent developments as an 'unreasonable delay' in the Military Commission proceedings and as an 'ongoing injury' to the Guantanamo detainees in issue, the Supreme Court, on 29 June, took the relatively unprecedented step of granting a petition for a rehearing of its earlier denial of certiorari.

Oral argument before the Court in the joined cases of thirty-seven detainees, *Boumediene v. Bush* and *Al Odah v. United States*, occurred in early December. Critical constitutional issues involving the separation of powers, to include the extent of Executive and, in this case, perhaps congressional authority, are again at issue. The essential question before the Court is whether the habeas-stripping provision of the MCA is valid in light of the Article I, Section 9 Constitutional prohibition against suspending 'the privilege' of habeas corpus, 'unless when in cases of rebellion or invasion the public safety may require it'. While these conditions for the suspension of habeas obviously have not been met, the matter before the Court is far more nuanced.

More recent Supreme Court decisions, in interpreting the 'suspension clause', have held that habeas corpus need not be available in a formal sense, as long as prisoners are provided an 'adequate and effective' substitute for challenging the validity of their detention. The government's contention is that the CSRTs, those panels of military officers who review the validity of the initial determination of a detainee as an 'enemy combatant', represent more than an adequate substitute for habeas proceedings. Indeed, in making this argument, the government insists that the CSRTs, and the ability to appeal CSRT determinations to the DC Circuit Court as provided for in the DTA, afford rights to these 'enemy combatants' never granted enemy Prisoners of War in any past 'conflicts' in which the United States has been engaged.

In countering this contention by the government, the petitioners have argued that the matter of the lack of rights afforded POWs in US courts

bears no relevance to the case before the Court. The government has consistently stated that the detainees in issue are not POWs, designating them, instead, as 'unlawful enemy combatants'. Moreover, they contend that the CSRT process is completely inadequate, failing to offer even the most elementary aspects of an independent adversarial proceeding in which a detainee might challenge his designation as an 'enemy combatant' under an overly broad US definition of this term that finds no support in international law.

The government's response: detainee complaints regarding the CSRT procedures are irrelevant; the MCA has rendered moot the Court's decision in the 2004 *Rasul* case that, due to the exclusive and complete US exercise of control and jurisdiction over Guantanamo, federal judges could hear writs of habeas filed by Guantanamo detainees. The *Rasul* ruling simply interpreted the federal habeas statute as it then existed, prior to the MCA amending the statute to withdraw federal court jurisdiction.

It is this government argument that persuaded the DC Circuit Court to decide that the MCA had, in fact, statutorily succeeded in stripping the federal courts of habeas jurisdiction, ruling that the detainees not only had no constitutional right to habeas; they had no constitutional rights of any kind. In rendering its decision on this basis, however, the Court did not rule on, or give any detailed consideration to, the congressionally established procedures available to detainees to challenge their designation as 'enemy combatants'. And it is this DC Circuit Court decision, one that did not go to a number of the issues heard before the Supreme Court in *Boumediene*, that is currently the subject of review by that Court.

A 5-4 Court seeks a balanced approach

It now appears that, in a 5-4 decision, the Court will determine that the detainees held at Guantanamo have some form of constitutional right to challenge their indefinite detention as 'enemy combatants'. Far less clear is what happens next, both procedurally and substantively.

Using the same reasoning evidenced in the *Rasul* decision, the Court will likely conclude that, given the exclusive and complete exercise of US jurisdiction and control over Guantanamo, the US judicial system represents the only existing avenue of an appeal centred on unlawful detention available to the detainees. These individuals, quite literally, have nowhere else to turn. With the Court having made the determination that these detainees have a constitutional right to challenge their designated status as 'enemy combatants', which compels their indefinite detention, the pivotal question then becomes whether the CSRT process and the statutorily limited review of CSRT determinations by the DC Circuit Court constitute an adequate substitute for habeas proceedings.

It is most probable that the Court will find that the existing CSRT process and DC Circuit Court review of CSRT decisions do not sufficiently represent such a substitute. Having reached this conclusion, the Court will then very likely structure the relief that it grants detainees in the form of guidance for the DC Circuit Court to follow in expanding the procedural protections available to the detainees in challenging their designated status as 'enemy combatants'.

At this juncture, however, only one thing is certain. On the fundamentally important issue of the rights to which the detainees held at Guantanamo Bay are entitled under US law, it will be the Supreme Court, not the president or Congress, that will have the last word.

Cases cited

Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006)

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

Rasul v. Bush, 542 U.S. 466 (2004)

Rumsfeld v. Padilla, 542 U.S. 426 (2004)

The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

Courts and the Making of Public Policy

In the last fifty years, courts have emerged as key participants in the public policymaking process, exercising discretion to make decisions which have far-reaching consequences in terms of the distribution of benefits and burdens within society. The *Courts and the Making of Public Policy* programme seeks to provide a critical assessment of the role of courts in policymaking from both empirical and theoretical perspectives, assessing their level of influence and scrutinizing the efficacy and the legitimacy of their involvement. The programme considers a range of issues within this context, including the relationship between courts, legislatures, and executives; how judicial policymaking fits within a democratic society; what training and qualifications judges have for policy decisions; and how suitable the judicial forum is for handling the information that is needed for informed policy choices.

David E. Graham is the Executive Director of The Judge Advocate General's Legal Center and School, US Army. He earned his BA from Texas A&M University, his MA in International Affairs from The George Washington University, and his JD from the University of Texas. He served in the US Army as a Judge Advocate for thirty-one years, specializing in International and Operational Law. This brief was prepared in his personal capacity and does not purport to reflect the views of the US Department of Defense, the US Army, or the Army's Judge Advocate General's Legal Center and School.

For further information please visit
our website at www.fljs.org
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD
T · +44 (0)1865 284433
F · +44 (0)1865 284434
E · info@fljs.org
W · www.fljs.org