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Treatment of Detainees and Unlawful Combatants

Selected Writings on Guantanamo Bay

Edited by

James Jay Carafano, Ph.D., Steven Groves, and Janice Smith

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Contributors

James Jay Carafano, Ph.D., is Assistant Director of the Kathryn and Shelby Cullom Davis Institute for International Studies and Senior Research Fellow for National Security and Homeland Security in the Douglas and Sarah Allison Center for Foreign Policy Studies at The Heritage Foundation.

Lee A. Casey is an attorney in the Washington office of Baker and Hostetler, LLP, and served in the Office of Legal Policy at the Department of Justice during the Administration of Ronald Reagan and in the Office of Legal Counsel under President George H. W. Bush.

Edwin J. Feulner, Ph.D., is President of The Heritage Foundation.

Nile Gardiner, Ph.D., is Director of the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.

Todd Gaziano is Director of the Center for Legal and Judicial Studies at The Heritage Foundation.

Steven Groves is Bernard and Barbara Lomas Fellow in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.

David B. Rivkin, Jr., is an attorney in the Washington office of Baker and Hostetler, LLP, and served during the Reagan and George H. W. Bush Administrations in the Office of the Counsel to the President in the White House and in the Departments of Justice and Energy.

Janice Smith is Special Assistant to the Vice President of Foreign and Defense Policy Studies at The Heritage Foundation.

Brian W. Walsh is Senior Legal Research Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation.

John Yoo is a law professor at the University of California, Berkeley, and a contributor to *The Heritage Guide to the Constitution.*

214 Massachusetts Avenue, NE
Washington, DC 20002–4999
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Introduction

James Jay Carafano, Ph.D.

Today, the United States is engaged in a global armed conflict. As a result of that conflict, the Department of Defense currently holds about 350 captured unlawful enemy combatants at military facilities in Guantanamo Bay, Cuba. The care and treatment of detainees remains one of the most important aspects of the global war combating transnational terrorism. This collection summarizes research by scholars at The Heritage Foundation on this critical and controversial issue. The findings of this research include the following:

- **The U.S. government has fulfilled its obligations under the Constitution, the Geneva Conventions, and U.S. law.** Regardless of where the detainees are held, the U.S. government has a dual responsibility to uphold the rule of law and protect the nation. Currently, the detention facilities at Guantanamo Bay are fully meeting those responsibilities. Just as enemies captured in wartime have traditionally been handled, these detainees are being held for the duration of hostilities or until the military is satisfied that they pose no further threat. Detaining these enemy combatants is important to national security for two significant reasons: They are valuable sources of intelligence, and they cannot return to the battlefield.
- **The U.S. military has fulfilled its mission.** The operations at Guantanamo Bay meet the letter of the law and are performed by the U.S. military in an exemplary manner. A legitimate tribunal process determines whether detainees are a threat to the United States. Each year, the tribunals reassess whether detentions should be continued. These reviews have led to the release of a number of detainees. Some have returned to their home countries or have been given asylum in other countries, and some have returned to the battlefield to wage war again against the U.S. and its allies or to kill civilians in suicide attacks. Others are awaiting release while the United States ensures that the countries receiving them will treat them in a humane manner. Still others will be tried as war criminals under a military commission process that is established and authorized by law.
- **The military detention facilities at Guantanamo Bay meet the highest international standards.** Despite the frequent claims of prisoner abuse at Guantanamo Bay, there is little evidence to back up those claims. The Pentagon spends $2.5 million each year on Korans, prayer rugs, and special meals for Muslim prisoners. Moreover, there are on average two lawyers for every detainee at Guantanamo, and detainees have challenged their status before the U.S. Supreme Court. By any measure, the U.S. government has extended our deadly enemies unprecedented legal rights.

Despite its admirable record in dealing with the challenges posed by unlawful combatants, the U.S government has received unwarranted criticism. Human rights activists, media outlets, and critics of the Administration have derisively characterized the U.S. military detention facility at Guantanamo as the "gulag of our times."[1] Specifically, they argue that the detention of enemy combatants at Guantanamo Bay violates international law and that the U.S. is unlawfully denying detainees the right to habeas corpus.

Granting unwarranted legal rights to these detainees puts soldiers and civilians at risk by rewarding treachery with privilege. The detainees willfully violated the laws of war and are therefore classified as "unlawful" enemy combatants. Most of the detainees at Guantanamo were captured while fighting for the Taliban or al-Qaeda and wore no

1. Irene Khan, Secretary General, Amnesty International, Foreword to *Amnesty International Report 2005: The State of the World's Human Rights*, May 25, 2005, at *http://web.amnesty.org/report2005/message-eng*.

uniforms or insignia, refused to carry their arms openly, and—perhaps most important—represented no government and thus no military hierarchy.

Consequently, the detainees are not entitled to Prisoner of War (POW) status or the full protection of the Geneva Conventions, let alone unfettered access to U.S. courts. Summarily granting them these privileges would cripple the integrity of the laws of war.

Moreover, even if the detainees were granted POW status, the Geneva Conventions require that combatants be released from custody only "after the cessation of active hostilities."[2] The U.S. Supreme Court recently affirmed the principle that the detention of enemy combatants is a "fundamental and accepted…incident of war" and concluded that the President is therefore authorized to hold detainees for the duration of the conflict in Afghanistan.[3]

What is missing from critics' arguments for closing Guantanamo Bay is a sense of perspective. Any proposal to move detention operations must articulate how these detention operations can be performed more efficiently and effectively than they are being performed now. Arguing that the U.S. should close the facilities merely to placate criticisms of its detention policies is insufficient. The government's responsibilities will not change, and it is therefore unlikely that detention operations will be conducted in a significantly different manner in a different location. Merely closing the facilities at Guantanamo Bay is not likely to placate any of America's critics.

The research presented in The Heritage Foundation's Guantanamo Bay collection clearly indicates that Congress should not interfere with the U.S. military's policy of detaining unlawful alien enemy combatants at Guantanamo Bay. The United States is engaged in an ongoing armed conflict against al-Qaeda in Afghanistan and therefore has no obligation—legal, moral, or otherwise—to release captured enemy soldiers so that they may return to the battlefield.

Short-sighted legislation extending unprecedented rights to foreign terrorists and other enemy combatants undermines U.S. troops deployed in the field in Afghanistan and Iraq. These detainees should not be released until the cessation of hostilities in Afghanistan and elsewhere.

2. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Article 118.
3. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

Chapter 1

Dispelling Misconceptions

Guantanamo Bay Detainee Procedures Exceed the Requirements of the U.S. Constitution, U.S. Law, and Customary International Law

Steven Groves and Brian W. Walsh

Human rights activists, liberal media outlets, and Bush Administration critics have derisively characterized the U.S. military detention facility at Guantanamo Bay, Cuba, as the "gulag of our times,"[1] a "legal black hole,"[2] and a "stain on our nation's character."[3] One need not dig too deeply into the facts, however, to discover that the detainees held at Guantanamo receive the most systematic and extensive procedural protections afforded to foreign enemy combatants in the history of armed conflict, including unprecedented access to legal representation and U.S. courts. In order to unearth the reality from the layers of hyperbole, half-truths, and outright lies that have been heaped upon Guantanamo Bay, this paper corrects a few of the more persistent misconceptions relating to the situation.

Misconception #1: The U.S. must either put Guantanamo Bay detainees on trial or release them.

Certain Members of Congress and parts of the self-described "international legal and human rights community"[4] labor to spread the mistaken notion that the United States has only two viable and legitimate options for dealing with the detainees held at Guantanamo Bay: (1) charge the detainees with crimes and then try them or (2) simply release them from U.S. custody.[5] There is, however, at least one other option, which just happens to have the most venerable pedigree in U.S. history, that the Guantanamo critics ignore: hold the detainees until the end of active hostilities.

As of May 2007, approximately 380 detainees were being held at Guantanamo Bay.[6] Only about 60 to 80 of them are expected to stand trial before military commissions for their individual criminal acts.[7] This list includes Khalid Sheikh

1. Irene Khan, Foreword to AMNESTY INTERNATIONAL REPORT 2005 (Amnesty Int'l 2005), *available at* http://web.amnesty.org/report2005/message-eng.
2. *Gitmo: Still a "legal black hole,"* THE LOS ANGELES TIMES, May 1, 2007, *available at* http://www.latimes.com/news/opinion/la-ed-gitmo1may01,0,7490666.story.
3. Press Release, Senator Tom Harkin, Statement of Senator Tom Harkin (D-IA) on Supreme Court Decision to Hear Terror Detainee Case (June 29, 2007), *available at* http://harkin.senate.gov/news.cfm?id=278179.
4. The relevant community for determining what is reasonable and customary under the laws of war is the community of nations. The community of nations does not adhere to the radical, outlandish "norms" promoted by the international legal and human rights community.
5. *See, e.g.,* Press Release, Senator Tom Harkin, Harkin Introduces Legislation to Close Guantanamo (May 23, 2007), *available at* http://harkin.senate.gov/news.cfm?id=274983; Press Release, Representative Jane Harman, It Is Time To Close The Guantanamo Bay Detention Facility (May 8, 2007), *available at* http://www.house.gov/list/press/ca36_harman/May_8_07.shtml; Press Release, American Civil Liberties Union, ACLU Welcomes Guantanamo Closure Bill (May 23, 2007), *available at* http://www.aclu.org/natsec/gen/29864prs20070523.html; and Press Release, Amnesty International, Abandon Military Commissions, Close Guantanamo (July 4, 2007), *available at* http://web.amnesty.org/library/Index/ENGAMR511182007 ("Those currently held in Guantanamo should be released unless they are to be promptly charged and tried in accordance with international standards of fair trial.").

Mohammed, the confessed mastermind of the September 11 attacks, and Ramzi Bin al-Shib, the so-called 20th hijacker. The remaining detainees are being held not because of any alleged criminal conduct but because (1) they fought against U.S. and Coalition forces in Afghanistan and (2) U.S. special military tribunals have determined that they are too dangerous to be released back into the world and would likely rejoin the fighting against U.S. and Coalition forces.[8]

The United States is engaged in an ongoing armed conflict in Afghanistan and therefore has no obligation—legal, moral, or otherwise—to release captured enemy soldiers so that they may return to the battlefield. Indeed, the Geneva Conventions require that combatants be released from custody only "after the cessation of active hostilities."[9] The U.S. Supreme Court recently affirmed the principle that the detention of enemy combatants is a "fundamental and accepted…incident of war" and concluded that the President is therefore authorized to hold detainees for the duration of the conflict in Afghanistan.[10]

The obvious rationale for the detention of enemy combatants is to prevent captured belligerents from returning to the battlefield to take up arms again against Americans and American allies. The premature release of enemy combatants from Guantanamo Bay would likely prove deadly to U.S. forces still fighting in Afghanistan: At least 30 of the approximately 395 detainees who have been released from Guantanamo Bay returned to Afghanistan to engage in further hostilities against Coalition forces.[11]

Other than calling for the immediate release of all detainees and closing Guantanamo, critics provide no solution for how to prevent these former belligerents from returning to the battlefield and killing U.S. and Coalition soldiers. The only sensible solution is the one that the United States and other nations have long employed: hold detainees until the cessation of conflict.

Misconception #2: The Guantanamo Bay detainees received inadequate due process when they were designated enemy combatants.

In violation of the Geneva Conventions and the customary laws of war, Taliban and al-Qaeda fighters in Afghanistan wear no uniforms or insignia. Unlike the soldiers of every nation that seeks the protections of the Geneva Conventions and other laws of war, Taliban and al-Qaeda fighters refuse to carry their arms openly. Such choices drastically increase the dangers of war to the civilians among whom Taliban and al-Qaeda forces hide.

These choices also make it more difficult for U.S. military personnel to determine whether, upon a combatant's capture, the combatant is in fact a member of the enemy force. To address the problem, the U.S. military established a system to screen each detainee to determine whether he is an enemy combatant. The result is that detainees at Guantanamo Bay have received more procedural protections ensuring the fairness of their detention than any foreign enemy combatant in any armed conflict in the history of warfare.

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6. Press Release, Office of the Assistant Secretary of Defense for Public Affairs, Detainee Transfer Announced (May 19, 2007) *available at* http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10898.
7. Mark Mazzetti, *Pentagon Revises Its Rules on Prosecution of Terrorists*, THE NEW YORK TIMES, January 19, 2007 (citing Pentagon officials), and Military Commissions Act of 2006, Pub. L. No. 109-366, § 950v (enumerating the specific crimes that may be tried by military commissions).
8. Additionally, as of June approximately 80 current Guantanamo detainees had been determined to be eligible for transfer, subject to ongoing discussions between the United States and other nations. Press Release, Office of the Assistant Secretary of Defense for Public Affairs, Detainee Transfer Announced (June 19, 2007) *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11030.
9. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118.
10. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).
11. *U.S. divulges new details on released Gitmo inmates*, Reuters, May 14, 2007, at http://www.alertnet.org/thenews/newsdesk/N14322791.htm, and Press Release, Office of the Assistant Secretary of Defense for Public Affairs, Detainee Transfer Announced (May 19, 2007), *available at* http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10898. Some detainees have been released to their countries of origin after the United States received assurances that they would not be allowed to reengage in hostilities or after they convinced U.S. authorities that they no longer posed a threat. Presumably, some of the least dangerous detainees were released after first agreeing to provide valuable intelligence regarding their pre-detention activities.

Under the Geneva Conventions, enemy combatants who have committed a belligerent act but whose detainee status is in question are entitled to have their status determined by a "competent tribunal."[12] In accordance with that provision of the Geneva Conventions, prior to the September 11 attacks the U.S. military established Army Regulation 190-8, Section 1-6, setting forth procedures for the operation of tribunals to make such determinations—that is, whether a combatant may be held as a prisoner of war.[13] The U.S. Supreme Court recently cited Army Regulation 190-8 as an example of a procedure which would satisfy the due process requirements for determining the status of the Guantanamo Bay detainees.[14] In response, the Department of Defense established special tribunals modeled on Army Regulation 190-8—Combatant Status Review Tribunals (CSRTs)—to determine the status of detainees at Guantanamo Bay.

Consistent with Army Regulation 190-8, the CSRT hearing provides each detainee with a hearing before a neutral panel composed of three commissioned military officers. The tribunals make their decisions on the detainee's status by majority vote, based on the preponderance of the evidence. The detainee has the right to attend all open portions of the CSRT proceedings, the opportunity to call witnesses on his behalf, the right to cross-examine witnesses called by the tribunal, and the right to testify on his own behalf.[15] These procedures go far beyond what most nations provide and what the Geneva Conventions require.

Because unlawful enemy combatants violate the laws of war by employing deception to hide or confuse their identities and affiliations, the CSRT hearings were designed not just to meet but to exceed the due process protections provided by hearings conducted pursuant to Army Regulation 190-8. Specifically, Guantanamo Bay detainees are given the following rights as part of their CSRT hearings:

- A military officer is appointed to serve as the detainee's personal representative and explains the CSRT process to the detainee, assists in the collection of relevant information, and helps prepare for the hearing.
- In advance of the hearing, the detainee is given a summary of the evidence supporting his designation as an enemy combatant.
- A member of the tribunal is required to search government files for any evidence suggesting the detainee is not an enemy combatant.
- The decision of every CSRT hearing is automatically reviewed by a higher authority in the Department of Defense who is empowered to order further proceedings.[16]

There would be little or no doubt whether detainees are members of the Taliban or al-Qaeda if such forces simply followed the Geneva Conventions and wore uniforms, displayed insignias, and carried their arms openly. The resulting irony is that unlawful enemy combatants detained at Guantanamo Bay have been given heightened due process despite, and as a direct result of, their repudiation of the laws of war.

Misconception #3: The Guantanamo Bay detainees are entitled to habeas corpus relief.

The U.S. Supreme Court ruled over 50 years ago that non-citizen enemy combatants imprisoned outside of the United States during wartime do not have a right to the extraordinary writ of habeas corpus—a legal cause of action brought by a person who alleges he is unlawfully imprisoned. That case, *Johnson v. Eisentrager*, involved 21 German nationals who had been convicted of espionage by U.S. military commissions convened in China and then transferred

12. Geneva Convention Relative to the Treatment of Prisoners of War, art. 5.
13. U.S. Dep't of Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6, October 1, 1997, *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf.
14. Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004).
15. Memorandum from the Deputy Secretary of Defense, to the Secretaries of the Military Departments et al., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained as U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf. *Cf.* U.S. Dep't of Army, Reg. 190-8, § 1-6.
16. Memorandum from the Deputy Secretary of Defense, to the Secretaries of the Military Departments et al., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained as U.S. Naval Base Guantanamo Bay, Cuba.

to U.S. detention facilities in Allied-occupied Germany. Once in Germany, they petitioned a U.S. federal court to release them under a writ of habeas corpus, alleging that they had been wrongfully imprisoned. The Supreme Court ruled that the German prisoners did not have a right to be released under habeas corpus because they "at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[17]

The large majority of Guantanamo Bay detainees today are in the same shoes as the German prisoners were 50 years ago. They are being held outside of the United States[18] for acts committed in Afghanistan, the location of most combatants' capture. As such, the detainees have no right to the extraordinary writ.

In 2004's *Rasul v. Bush*, the Supreme Court chose largely to ignore its own precedent[19] when it extended statutory (not constitutional) access to habeas corpus review to the detainees at Guantanamo Bay. Thereafter, Congress rightly "overruled" the Supreme Court by changing the statutory law to revoke federal court jurisdiction over habeas corpus actions filed by Guantanamo Bay detainees.[20] It is that legislation that Guantanamo Bay critics now seek to undo with yet another round of legislation.

Finally, to assert that the Guantanamo detainees deserve habeas hearings is to assert that the CSRT hearings that have been provided to each and every detainee have been fundamentally inadequate.[21] They have not. The CSRT hearings exceed the requirements for determination of combatant status under the Geneva Conventions and U.S. military regulations.

Recommendations for Congress. Congress should not interfere with the U.S. military's policy of detaining alien enemy combatants at Guantanamo Bay for the duration of the war on terrorism. These detainees should not be released until the cessation of hostilities in Afghanistan and elsewhere or until such time that the detainees are no longer a threat to U.S. and Coalition forces. Calls by Members of Congress and the "international legal and human rights community" to release the approximately 380 detainees remaining in Guantanamo are reckless in the extreme and not supported by the U.S. Constitution, U.S. laws, the Geneva Conventions, or customary international law.

Congress should decline to take the extraordinary step of providing the writ of habeas corpus to the unlawful enemy combatants held at Guantanamo Bay, none of whom are U.S. citizens or legal residents. Even if granting non-citizens who are unlawful enemy combatants the right to habeas corpus were the right decision for this war—and it decidedly is not—it would set a dangerous precedent for America's ability to fight future wars, including conventional wars in which enemy combatants are affiliated with nation-states. In any future conflict, the international community, including the United Nations, would surely demand that prisoners of war held by U.S. forces have access to U.S. courts to try their claims that they are being held unjustly. Further, granting the writ of habeas corpus to non-citizens who are unlawful enemy combatants is almost certain to embolden liberal and progressive jurists to "discover" new constitutional rights for U.S. enemies to access U.S. courts to try their claims. Finally, extending habeas corpus to Guantanamo Bay will impede the effectiveness of military operations and place an unnecessary burden on U.S. military forces in the field.[22]

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17. Johnson v. Eisentrager, 339 U.S. 763, 778 (1950).
18. In his solo opinion concurring in the judgment in *Rasul v. Bush*, Justice Kennedy asserts that Guantanamo Bay "is in every practical respect a United States territory." 542 U.S. 466, 487 (2004) (Kennedy, J., concurring). However, in addition to this assertion's being unpersuasive in light of the fact that the lease between Cuba and the United States for Guantanamo Bay expressly states that the base remains under Cuba's "ultimate sovereignty," Kennedy did not provide the deciding vote in the 6-3 decision and the assertion has no force of law.
19. *See, e.g.*, *id.* at 493–94 (Scalia, J., dissenting) (examining the convoluted logic the majority used to reach a holding otherwise foreclosed by the Court's on-point precedent in *Eisentrager*).
20. Detainee Treatment Act of 2005, P.L. 109-148, and Military Commissions Act of 2006, P.L. 109-366.
21. Moreover, this assertion necessarily implies that each of the hundreds of thousands of prisoners of war held by the United States in World Wars I and II—as well as the Civil War, the Korean Conflict, and every other war in which the United States has ever engaged—were denied a fundamental right to which they were entitled. No POW in any of those wars was granted anything approaching the systematic and extensive process that has been afforded to the non-citizen, unlawful enemy combatants held in Guantanamo Bay.

Conclusion

While U.S. troops are deployed in the field in Afghanistan and Iraq, Congress should focus its efforts on strengthening their ability to succeed. Congress should not hamper our troops' efforts with shortsighted legislation extending unprecedented rights to foreign terrorists and other enemy combatants. Rewarding or releasing captured Taliban and al-Qaeda fighters is not any way for legislators on the home front to support U.S. troops fighting abroad.

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22. James Jay Carafano, Ph.D., *The War on Terrorism: Habeas Corpus On and Off the Battlefield*, Heritage Foundation WEBMEMO No. 1535, July 5, 2007, *available at* http://www.heritage.org/Research/LegalIssues/wm1535.cfm. Reprinted below.

Chapter 2

The War on Terrorism: Habeas Corpus On and Off the Battlefield

James Jay Carafano, Ph.D.

Congress is considering legislation to extend habeas corpus rights (i.e., the ability to challenge the legality of detention in a civil court) to unlawful enemy combatants. Granting terrorists rights to which they are not entitled will not make the world a safer place and will not win over America's enemies and critics.[1] Worst of all, it will make armed conflicts more dangerous for soldiers and civilians.

The current legal framework allows U.S. armed forces to do their job without adversely affecting military effectiveness or going against standards of international law. Congress should not undermine the United States' ability to detain unlawful combatants and, if appropriate, try them for war crimes.

Soldiers and the Laws of War

Separate laws regarding the conduct of war were established for a reason: The environment of armed conflict differs significantly from everyday civil society. Soldiers must be able to accomplish the mission and obey rules of conduct while under stressful, chaotic, and dangerous conditions. The laws of war also give soldiers the legal means to deal with enemy soldiers, civilians, and unlawful combatants who intentionally ignore the rules.

Encouraging Lawlessness in Armed Conflict

Granting unwarranted legal rights puts soldiers and civilians at risk by rewarding treachery with privilege. Unlawful enemy combatants—individuals who do not adhere to the traditional laws or customs of war—are not entitled to Prisoner of War (POW) status or the full protections of the Geneva Conventions, let alone unfettered access to U.S. courts. Summarily granting them these privileges would cripple the integrity of the laws of war. Enemies will be less inclined to follow the rules if they suffer no consequences for breaking them. Contrary views rely on guilt-ridden, utopian thinking that says America deserves her enemies and that they will love and forswear violence against her if only she just meets some indeterminate but much higher standard of justice and fair play. When only one side plays by the rules on a battlefield, that side is likely to disproportionately suffer from illegal acts of war.

Impeding the Effectiveness of Military Operations

Soldiers have a number of equally compelling responsibilities in war: accomplishing the mission, safeguarding innocents, and protecting their fellow soldiers. These tasks are difficult enough. Soldiers should not be required to provide to unlawful combatants, in the same manner and to the same extent as would be expected of a civil court, the full array of civil protections afforded to U.S. citizens by the Constitution and created by judges since the 1960s. For example, it is highly unrealistic to expect soldiers during active operations to collect evidence and insure the integrity of the chain of custody for that evidence. American soldiers would effectively face a Hobson's choice: on

one hand, win the war, bring fellow soldiers home, and safeguard innocents; or, on the other hand, meet novel legal standards that might result in prematurely releasing war criminals who will go back to the battlefield.

Crippling Intelligence Gathering

Gaining timely, actionable information is the most powerful weapon in uncovering and thwarting terrorist plots. Requiring the armed forces to place detainees under a civilian legal process will severely restrict their access to detainees and, in turn, cripple their capacity to obtain intelligence through legitimate, lawful interrogation.

Military authorities are giving Gitmo detainees treatment that is as good as or better than that typically afforded to U.S.-held POWs. The only real difference is that Gitmo detainees may be interrogated for more than name, rank, and serial number.

Unnecessary Burdens

Changing the legal framework governing unlawful combatants is simply unnecessary. The military is already meeting its obligations to deal justly with individuals in its custody.

Since the inception of the Geneva Conventions, no country has ever given automatic habeas corpus rights to POWs. Furthermore, such action is not required by the U.S. Constitution. The Supreme Court ruled in 2004 that, at most, some detainees were covered by a statutory privilege to habeas corpus. The Court concluded, in other words, that Congress had implicitly conferred habeas corpus rights to certain individuals. However, the Military Commissions Act of 2006 repealed that privilege and, so far, Congress has not acted to restore it.

The Department of Defense already operates two tribunals that safeguard the legal rights of detainees. The Combatant Status Review Tribunal (CSRT) uses a formal process to determine whether detainees meet the criteria to be designated as enemy combatants. Tribunals known as Administrative Review Boards (ARB) ensure that enemy combatants are not held any longer than necessary. Both processes operate within the confines of traditional law-of-war tribunals and are also subject to the appeals process and judicial review. In addition, Congress has established a process under the Military Commissions Act to allow the military to try any non-U.S. detainees for war crimes they are alleged to have committed.

Conclusion

Imposing U.S. civil procedures over the conduct of armed conflict will damage national security and make combat more dangerous for soldiers and civilians alike. The drive to do so is based on erroneous views about the Constitution, the United States' image abroad, and the realities of war.

U.S. military legal processes are on par with or exceed the best legal practices in the world. While meeting the needs of national security, the system respects individuals' rights and offers unlawful enemy combatants a fundamentally fair process that is based on that afforded to America's own military men and women. Having proven itself in past conflicts, the current legal framework can continue to do so in a prolonged war against terrorism.

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1. In his recent commentary in *The Observer*, Hassan Butt, a self-confessed former member of "what is probably best termed the British Jihadi Network," dismantles the myth that Islamic terrorists are motivated to engage in acts of terror primarily by U.S. foreign policy failures or by any (real or supposed) American failures to provide Western-style due process. Hassan Butt, "My Plea to Fellow Muslims: You Must Renounce Your Terror," *The Observer*, July, 1, 2007, at *observer.guardian.co.uk/comment/story/0,,2115832,00.html*. He writes: "[W]hat drove me and many of my peers to plot acts of extreme terror within Britain, our own homeland, and abroad was a sense that we were fighting for the creation of a revolutionary state that would eventually bring Islamic justice to the world." *Id.*

Chapter 3

Gitmo Debate Misses the Point

James Jay Carafano, Ph.D.

Recent press reports detail an internal Bush Administration debate over whether to close the military detention facilities at Guantanamo Bay in Cuba. Whether to close the facility is not at the heart of the issue of how the U.S. treats detainees and prosecutes the war on terrorism. Regardless of where alien combatants are held, the U.S. government has a dual responsibility to uphold the rule of law and to protect the nation. Currently, the detention facilities at Guantanamo Bay are fully meeting those responsibilities. Any plan to move detainees would have to be justified on the basis that it would be more efficient and effective than the current system.

Doing the Right Thing

Wherever the U.S. military holds combatants, it must meet certain obligations:

- Detainees must be held in a safe, humane, and secure manner;
- Detainees must have their combatant status determined in a time and manner that are reasonable and appropriate,[1] and their detention should be reviewed periodically to ascertain whether detention is still warranted;
- If detainees are suspected to have committed war crimes egregious enough to merit punishment, they should be put on trial at an appropriate time—which historically has been deemed to be only after hostilities have ceased—under a legal system that provides fundamental procedural protections;
- Safety and security should be guaranteed for the guards, support personnel, and legal staffs representing the government and the detainees, as well as the detainees themselves; and
- The government must be able to efficiently and effectively collect intelligence and protect national security.

These basic obligations are the same no matter where aliens who are unlawful combatants are held, and they are all being met at the military detention facilities in Guantanamo Bay, Cuba, in accordance with U.S. law. A legitimate tribunal process determines whether detainees are a threat to the United States. Annually, the tribunal reassesses whether detention should be continued. These reviews have led to the release of a number of detainees. Some have been returned to their home countries or given asylum in other countries, and others are awaiting release while the United States ensures that the countries receiving them will treat them in a humane manner. Still others will be tried as war criminals under a military commission process established and authorized by law. The operations at Guantanamo Bay meet the letter of the law and are performed by the U.S. military in an exemplary manner.

Changing Course. Any proposal to move detention operations must articulate how these detention operations can be performed more efficiently and effectively than they are now. Arguing that the U.S. should close the facilities merely to placate criticisms of its detention policies is insufficient. By and large, the criticisms are patently false and

1. According to new (and novel) Supreme Court law-making, detainees have the right to a meaningful hearing by a neutral decisionmaker if the legitimacy of their detention is in question.

unjustified. In any case, because the government's responsibilities will not change, it is unlikely that detention operations will be conducted in a significantly different manner in a different location. Merely closing the facilities at Guantanamo Bay is not likely to placate any of America's critics.

The best policy is to continue to do the right thing: protect American citizens, respect the rule of law, and combat transnational terrorism. Moving the jails will not change anything.

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Chapter 4

U.N. Rapporteur Scheinin Issues Wrong Opinion on U.S. War on Terrorism

Steven Groves

Last month, the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism visited the United States for the stated purpose of reviewing its counterterrorism practices for compliance with its treaty obligations, such as those in the International Covenant on Civil and Political Rights and the Convention Against Torture. On the final day of his visit, the Rapporteur, Finnish academic Martin Scheinin, issued a lengthy press release setting forth his "preliminary findings" regarding the U.S. human rights record.[1] Scheinin's findings sharply criticized several aspects of U.S. counterterrorism policy and practices. Among Scheinin's "findings" are that the United States is *not* engaged in a war on terrorism, that the detention facility at Guantanamo Bay should be closed, and that the members of al-Qaeda and the Taliban detained there should be set free. If these findings—really just statements of opinion—are any indication of the contents of Scheinin's final report to the U.N. Human Rights Council, then it will be clear that Scheinin placed the agenda of the "international human rights community" over the right of the United States to defend itself against international terrorism.

A War by Any Other Name…

During his 10-day visit, Scheinin met with officials from the U.S. Departments of State, Defense, Justice, and Homeland Security, with Members of Congress, and with non-governmental organizations. He met with Heritage Foundation experts to discuss U.S. laws relating to the ongoing war on terrorism, including the Military Commissions Act, the Patriot Act, the REAL ID program, and other U.S. policies and practices. Little that he heard seems to have sunk in.

Among the many erroneous "findings" of Rapporteur Scheinin's preliminary report is his statement that the United States is not currently engaged in a war against terrorism. Scheinin's report reflects his belief that America is not at war: "The Special Rapporteur does not consider the international fight against terrorism as a 'war', at least not in other than rhetorical terms."[2] Scheinin's opinion that the United States is not at war seems to be nothing more than a reflection of the views of some within the international human rights community. And to be sure, there is some debate on this topic, chiefly among human rights "experts," particularly in Europe.

The reality is, however, that the United States is engaged in a global armed conflict with terrorist networks such as al-Qaeda and its affiliates. This is not merely a rhetorical war. Osama bin Laden and al-Qaeda have launched attacks against American targets for the past 15 years. Al-Qaeda operatives attacked the World Trade Center in 1993, U.S. embassies in Kenya and Tanzania in 1998, the destroyer USS *Cole* in 2000, and the World Trade Center and the

1. Office of the United Nations High Commissioner for Human Rights, "Preliminary Findings on Visit to United States by Special Rapporteur on Promotion and Protection of Human Rights While Countering Terrorism," Press Release, May 29, 2007, at *www.unhchr.ch/huricane/huricane.nsf/view01/338107B9FD5A33CDC12572EA005286F8?opendocument* (hereafter "Preliminary Findings").
2. Preliminary Findings.

Pentagon in 2001. Further, al-Qaeda certainly has no reservations about its status vis-à-vis the United States: Osama bin Laden issued a "fatwa" declaring war upon the United States in August 1996 entitled "Declaration of War against the Americans Occupying the Land of the Two Holy Places."[3] It is not clear what course of events must transpire before Rapporteur Scheinin deigns to recognize this war.

Rapporteur Scheinin disagrees that the United States is engaged in armed conflict in Afghanistan. While he concedes that the United States *was* engaged in an armed conflict at the commencement of Operation Enduring Freedom, when U.S. forces entered Afghanistan, Scheinin posits that the war ended upon "the fall of the Taliban regime as the de facto government of Afghanistan."[4] It is not, however, the place of a U.N. human rights official to make such a determination. Only the duly elected representatives of the U.S. government—not any other nation, the United Nations, or any human rights expert—may decide when the United States is at war and when it is not.

The Constitution assigns both the executive branch (the President) and the legislative branch (Congress) independent yet complementary powers to make, prosecute, and terminate war. As commander in chief, the President is authorized to engage the military forces authorized and funded by Congress to defend America from its enemies.[5] When the President engages those forces to make and prosecute war, the nation is, in a very real sense, "at war," regardless of the opinion of any group of academics or theoreticians.

On September 18, 2001, Congress authorized 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 harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[6] The President thus acted with Congress's authorization when he engaged U.S. forces in Afghanistan. Congress has not withdrawn, amended, or otherwise limited its authorization. As such, the United States remains "at war" with any organization or person involved in the September 11 attacks, such as the forces U.S. troops now combat in Afghanistan.

Moreover, the United Nations Security Council recognizes that the military conflict in Afghanistan did not suddenly end when the Taliban regime was deposed in December 2001. In a September 2006 resolution extending the authorization for the international armed forces mission in Afghanistan through September 2007, the Security Council stated that "the situation in Afghanistan still constitutes a threat to international peace and security."[7] It is likewise unlikely that members of the 36,000-strong international security force (including 15,000 U.S. troops) in Afghanistan would agree that the war there ended in 2001, even as fighting has continued.

The situation on the ground in Afghanistan belies Scheinin's opinion. Wars do not necessarily end when an invading force topples the enemy regime. Combat operations continue today in southern Afghanistan and along the Pakistan border by U.S. and NATO forces.[8] Top Taliban military commander Mullah Dadullah, known as the "butcher of Kandahar," was killed only a few weeks ago in one such operation in the southern province of Helmand.[9] The U.N. Security Council recognizes the violent reality of the situation on the ground in Afghanistan. In September 2006, it stated its concern regarding "the security situation in Afghanistan, in particular the increased violent and terrorist activity by the Taliban, Al-Qaida, illegally armed groups and those involved in the narcotics trade…."[10] The

3. Osama bin Laden, "Declaration of War against the Americans Occupying the Land of the Two Holy Places," *Al Quds Al Arabi*, August 1996.
4. Preliminary Findings.
5. In only five of the more than one hundred instances of armed conflict in which the United States has engaged during its history has Congress exercised its authority under Article I of the Constitution "to declare" war, a legal act with numerous legal and practical implications for U.S. relations with enemies and the nations and individuals who support them. U.S. CONST., Art. I, Section 8.
6. Authorization for Use of Military Force, P.L. 107-40, 50 U.S.C. §1541, 2 (a).
7. U.N. Security Council Resolution 1707 (Sept. 12, 2006).
8. See, e.g., "Afghans Say U.S. Bombing Killed 42 Civilians," *The New York Times*, May 2, 2007, at *www.nytimes.com/2007/05/03/world/asia/03afghan.html*.
9. "Top Taliban commander killed in Afghanistan," *The Daily Telegraph*, May 14, 2007, at *www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/05/13/wafgh113.xml*.

fact that the Taliban and al-Qaeda stopped fighting Coalition forces in the open and chose instead to mount an insurgency does not mean that the state of armed conflict ceased.

Yet Rapporteur Scheinin maintains that the war in Afghanistan has ended and, so, argues that the soldiers and agents of the Taliban and al-Qaeda held in the Guantanamo Bay detention facility must be released and the facility should, in turn, be closed.[11] This actually does not accord with U.S. treaty obligations. The Geneva Conventions require that combatants be released from custody only "after the cessation of active hostilities."[12] The logic behind that requirement is that parties engaged in warfare have no obligation to release enemy combatants who are likely to return to the battlefield to fight again. Such logic does not appear to persuade Scheinin, who apparently overlooked the fact that the return of formerly detained combatants to Afghanistan is a proven threat. As many as 30 former Guantanamo Bay detainees are confirmed to have returned to Afghanistan and engaged in further hostilities against Coalition forces.[13] (These combatants presumably would disagree that the war is over.) The United States would recklessly endanger its soldiers, its citizens, and the rest of the free world if it were to release the remaining 380 detainees held at Guantanamo Bay.

Conclusion

Later this year, Rapporteur Scheinin will issue his final report detailing his findings relating to the U.S. human rights record. Scheinin should ensure that his final report takes into consideration the constitutional structure and legal traditions of the United States and reflects the challenges faced by the U.S. government and armed forces in prosecuting the war on terrorism.[14] If Scheinin's preliminary findings are any indication of what will be in his final report, then the U.N. Human Rights Council and the international human rights community will be no closer to understanding—let alone reconciling—its disputes with the United States over the global war on terrorism.

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10. U.N. Security Council Resolution 1707 (Sept. 12, 2006).
11. Preliminary Findings. ("In the case of those who have been captured during armed hostilities…such individuals should be released, or tried by civilian courts for their suspected war crimes.")
12. Geneva Convention Relative to the Treatment of Prisoners of War, Article 118, August 12, 1949.
13. "U.S. divulges new details on released Gitmo inmates," CNN.com, May 15, 2007, at *www.cnn.com/2007/US/05/14/gitmo.inmates.reut/index.html*.
14. Steven Groves, "The U.S. Deserves a Fair Report from the U.N. Human Rights Envoy," Heritage Foundation *WebMemo* No. 1470, May 24, 2007, at *www.heritage.org/Research/InternationalOrganizations/wm1470.cfm*. Reprinted below.

Chapter 5

The U.S. Deserves a Fair Report from the U.N. Human Rights Envoy

Steven Groves

From time to time, the United Nations deploys human rights experts—called "special rapporteurs"—to the United States and elsewhere to report on alleged human rights abuses. Over the years, the United States has tolerated the presence of these special envoys to investigate human rights practices regarding various issues, such as the death penalty, freedom of religion, violence against women, and the right to education.[1] In 2005, the now-defunct U.N. Commission on Human Rights created a new special rapporteur position based on the theory that counterterrorism operations were resulting in grave violations of human rights.[2] Finnish academic Martin Scheinin was appointed to the position, and he will be visiting the United States from May 16 to 25, 2007, to conduct research for a report to the new U.N. Human Rights Council. In crafting his report, Special Rapporteur Scheinin should take care to keep in mind U.S. sovereignty, the American constitutional system, and that system's basis in the consent of the governed and not forsake these principles for ill-defined international norms to which the U.S. has never acceded.

A Report on Rights

During his visit, Special Rapporteur Scheinin will meet with U.S. officials from the Departments of State, Defense, Justice, and Homeland Security, as well as other government officials and non-governmental organizations.[3] He has indicated that he intends to explore a wide range of issues, including the Military Commissions Act, the Patriot Act, "extraordinary" rendition, "secret" CIA prisons, and immigration policy. Scheinin has said he will review U.S. counterterrorism practices for compliance with U.S. human rights treaty obligations, such as those enshrined in the International Covenant on Civil and Political Rights and the Convention Against Torture.

Scheinin plans to issue a report to the new U.N. Human Rights Council in Geneva detailing his findings on the U.S. human rights record. If it is to be credible, this report must reflect a deep understanding of U.S. international treaty obligations and the international legal framework of the war on terrorism. More importantly, Scheinin's report will be credible and worthy of consideration only if it reflects a fundamental appreciation of and respect for American sovereignty and the nation's heritage and tradition of protecting individual rights and freedoms even while conducting armed conflicts and fighting terrorism. Despite what the European Union and many internationalists seek to persuade the American public and the rest of the world to believe, no nation has a longer and more distinguished history of protecting the rights that human rights advocates now consider essential than does the United States.

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1. See Office of the United Nations High Commissioner for Human Rights, "Country visits by Special Procedures Mandate Holders since 1998," at *www.ohchr.org/english/bodies/chr/special/countryvisitsn-z.htm*.
2. United Nations Office of the High Commissioner for Human Rights, Commission on Human Rights Resolution 2005/80, "Protection of human rights and fundamental freedoms while countering terrorism," April 21, 2005.
3. Rapporteur Scheinin met with a delegation from The Heritage Foundation on May 21. The discussion covered a wide range of issues relating to the U.S. legal system, the MCA, the Patriot Act, the REAL ID program, and other policies and practices relating to the war on terrorism.

Scheinin's Criticism of the Military Commissions Act

In *Hamdan v. Rumsfeld,* the U.S. Supreme Court, through the application of convoluted logic and precedent, held that Common Article 3 of the Geneva Conventions applies to the detention of unlawful enemy combatants. The Court interpreted existing statutes to require that any military commission used to try enemy combatants conform (with the exception of certain practical deviations) to the procedures of the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.[4] Congress responded to *Hamdan* with the Military Commissions Act of 2006 (MCA), which modeled the military commission process on the UCMJ.[5] The MCA provides crucial guarantees for fair trials, including the presumption of innocence, the right to be informed of charges, the assistance of counsel, the right to be present at trial, and the privilege against self-incrimination.[6] Rapporteur Scheinin nevertheless lambasted the MCA in a sharply worded press release issued shortly after its passage.[7] Scheinin's criticisms ignore the plain language of the MCA and do not accurately reflect the treaty obligations of the United States.

For example, Scheinin's press release claimed that "a number of provisions of the MCA appear to contradict the universal and fundamental principles of fair trial standards and due process enshrined in Common Article 3 of the Geneva Conventions." As an example, it stated that, under the MCA, unlawful enemy combatants do not have "the right to see exculpatory evidence if it is deemed classified information…." The MCA, however, ensures detainees the right to review exculpatory evidence—even if it is classified—by providing them with a summary of the classified information or a statement of the facts that the classified information would establish.[8]

The use of such substitutions or summaries of raw, classified information is fair and reasonable, and it is consistent with U.S. domestic law governing the use of classified information in U.S. courts.[9] Additionally, defense counsel for detainees being tried by military commission may review and use classified materials in preparing the detainee's defense and at trial, a fact that is absent from Scheinin's press release.[10] Contrary to Scheinin's implied premise, unrestricted access to classified information for terrorist suspects is not a "universal and fundamental principle" of a fair trial. To maintain otherwise misinterprets Common Article 3, which only requires that trials be conducted while "affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[11] To the extent that there exists an acknowledged set of indispensable judicial guarantees, unfettered access to classified information is not among them.

Scheinin also stated that the U.S. violated its treaty obligations under the International Covenant on Civil and Political Rights (ICCPR) by enacting the MCA: "Further, in manifest contradiction with article 9, paragraph 4 of the International Covenant on Civil and Political Rights the [MCA] denies non US citizens…in US custody the right to challenge the legality of their detention by filing a writ of habeas corpus…."[12] This statement assumes that the ICCPR applies to the detainees held at Guantanamo, which it does not. The ICCPR states that each party to the treaty "undertakes to ensure to all individuals *within its territory* and subject to its jurisdiction the rights recognized in the

4. Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006).
5. Military Commissions Act, P.L. 109-366, 120 Stat. 2615.
6. Military Commissions Act, P.L. 109-366, 120 Stat. 2615, 10 U.S.C. §§ 949l, 948q, 948s, 948k, 949c(b)(3), 949d, 949a(b)(1)(B), and 948r.
7. Office of the United Nations High Commissioner for Human Rights, "UN Expert on Human Rights and Counter Terrorism Concerned That Military Commissions Act is Now Law in United States," press release, October 27, 2006, at *www.unhchr.ch/huricane/huricane.nsf/view01/13A2242628618D12C12572140030A8D9?opendocument*.
8. Military Commissions Act, P.L. 109-366, 120 Stat. 2615, 10 U.S.C. § 949j(c), (d). During the meeting with Rapporteur Scheinin, the Heritage delegation inquired whether there were any misstatements in the October 2006 press release. Rapporteur Scheinin replied only that the statement regarding the use of classified, exculpatory information may require further elaboration.
9. See Classified Information Procedures Act, P.L. 96-456.
10. Military Commissions Act, P.L. 109-366, 120 Stat. 2615, 10 U.S.C. § 949c(b)(4).
11. Geneva Convention Relative to the Treatment of Prisoners of War, Article 3, August 12, 1949.
12. Office of the United Nations High Commissioner for Human Rights, "UN Expert on Human Rights and Counter Terrorism Concerned That Military Commissions Act is Now Law in United States."

present Covenant…."[13] The naval base at Guantanamo Bay, Cuba, is on land that is leased from Cuba by the United States and is, therefore, not "within" U.S. territory.

The territorial limitation clause in the ICCPR is no accident. No less a figure than Eleanor Roosevelt insisted that the phrase "within its territory" be added to the draft text of the ICCPR to limit its territorial scope. She stated:

> The purpose of the proposed ["within its territory"] addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although *outside its territory were technically within its jurisdiction for certain purposes*. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying states in certain respects, but were outside the scope of legislation of those states.[14]

Scheinin's press statement thereby disregards the plain language and history of the ICCPR. Scheinin either does not understand those concepts or has decided that the ICCPR somehow applies to the detainees at Guantanamo in spite of the facts and the law. If the latter, Scheinin would be effectively foisting a treaty obligation upon the United States that it has not consented to, namely the extraterritorial application of the ICCPR to persons outside of U.S. territory.

Scheinin's error is not original. A 2006 report on the status of detainees held at Guantanamo written by a team of U.N. special rapporteurs similarly ignored the law as well as the actual treaty obligations of the United States.[15] As set forth in the official U.S. reply to that report, the rapporteurs sought to spin treaty obligations out of thin air and then contend that the United States was in violation of those very same obligations.[16]

Recommendations to Rapporteur Scheinin

Several statements in Scheinin's October 2006 press release regarding the MCA require revision, and in his final report, he has the opportunity to set the record straight. To the extent that his final report addresses Guantanamo Bay, it should make clear that international humanitarian law (the law of armed conflict), and not international human rights law, applies to the detainees held there. If Scheinin's report repeats the mistaken conclusions of the earlier U.N. special rapporteurs' report on Guantanamo, its credibility, as well as Scheinin's, will be thrown into question.

Despite his press release regarding the MCA, Scheinin should be given the benefit of the doubt. It is unlikely that he has yet gained the necessary expertise in the American constitutional system and familiarity with the details of complex legislation such as the MCA and the Patriot Act. After he has had the opportunity to meet with U.S. officials and thoroughly review U.S. legislation and constitutional law, however, Scheinin must ensure that his report reflects a deep and thorough understanding of U.S. treaty obligations within the context of the ongoing war on terrorism. A final report that disregards the letter of the law or the plain language of treaties would smack of willful blindness or, worse, the existence of a biased agenda.

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13. International Covenant on Civil and Political Rights, Art. 2(1).
14. U.N. ESCOR Hum. Rts. Comm., "Summary Record of the Hundred and Thirty-Eighth Meeting," 6th Sess., 138th mtg at 10, U.N. Doc. E/CN.4/SR.138 (1950) (emphasis added). As a specific example of what would *not* be included within the ICCPR's jurisdiction, Mrs. Roosevelt cited territories that one nation had leased from another. Such is the case here where the United States leases the territory encompassing Guantanamo Bay from Cuba.
15. U.N. Economic and Social Council, "Situation of detainees at Guantanamo Bay," U.N. Doc. E/CN.4/2006/120, February 27, 2006, at *http://daccessdds.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement*.
16. "Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba, March 10, 2006," at *www.asil.org/pdfs/ilib0603212.pdf*.

Conclusion

Claims that the United States has violated its international treaty obligations merely because Congress or the President has not implemented a treaty in the same manner as the European Union are elitist and demonstrate a fundamental disrespect for U.S. sovereignty and the American system of constitutional government. According to the principles of this nation's founding, the people themselves are sovereign and the government derives its powers from their consent. Thus the American constitutional system was crafted, adopted, and ratified by the founders of this nation and the people of the United States. Most international laws and purported international norms were not. Even international treaties that the United States has ratified, such as the Geneva Conventions and the ICCPR, are subject to interpretation and implementation by U.S. elected representatives.

Ignoring these principles, many in the international human rights establishment refuse to credit U.S. protections of individual rights unless they conform to their conceptions of international legal norms. But Special Rapporteur Scheinin should not succumb to this fallacious notion. He should issue a report that respects the legal history and traditions of the United States and reflects the challenges faced by the U.S. government and armed forces in prosecuting the war on terrorism.

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Chapter 6

A Tour of Guantanamo Prison Shows America at Its Best

Edwin J. Feulner, Ph.D.

GUANTANAMO BAY—At least two detainees at the holding facility here skipped lunch today because they're on a hunger strike. Which is a pity for them—the food was delicious. By contrast, the steady stream of news about "Gitmo" tends to leave one with a bad taste.

On the day I toured the facility, lawyers for 100 detainees were in court insisting their clients have a right to be heard in American civilian courts. And a recent McClatchy newspaper story claimed that "reports of mistreatment and torture have dogged the facility since it opened," and added, "critics . . . have described an island gulag of desolation and despair."

What's missing from the criticism is any sense of perspective. For one thing, the most outspoken critics of American policy haven't bothered to visit Guantanamo. If they did, they'd see that the U.S. military is using the facility to hold roughly 400 enemy combatants. And despite all the criticism, Gitmo's the most transparent facility ever used to house prisoners of war.

Most of the detainees have lawyers. That must be a first in the history of warfare. No government is required under the laws of war to charge enemy combatants with any crime; anyone picked up on a battlefield may be held until hostilities end.

Furthermore, the Geneva Convention does not require that detainees be allowed to speak to lawyers and does not give them the right to challenge their detention in civilian courts. By any measure, the U.S. government has extended our deadly enemies unprecedented legal rights.

In return, we're collecting valuable intelligence. Many detainees are still giving us useful information about the location of al-Qaida training facilities and the terrorist organization's chain of command.

As far as alleged torture goes, consider the hunger strikers mentioned above. To keep them alive, the military has been tube-feeding them the same way a hospital feeds an incapacitated patient. "Medical associations have called it unethical," Reuters news agency reports. Would letting the detainees die be more ethical? Doctors at Gitmo even adjusted the detainees' feeding schedule so that, during Ramadan, they wouldn't be getting any sustenance during daylight hours. We're not only protecting the lives of detainees, we're respecting their religious traditions as well.

In fact, if there's any abuse going on, it might be that the detainees are eating too much. They get 4,000 calories a day—hardly a starvation diet. Guards say one has gained 150 pounds.

Some Americans seem to have forgotten there's a war going on. Not these detainees: They regularly threaten their guards and vow to have their friends kill the guards' families back home. Our service members take these threats seriously—many remove their nametags before they'll walk past a cell block. One officer's tag identified him as Col. "I don't know."

At least 10 former Gitmo detainees, once released, returned to the battlefield against coalition forces only to be killed or captured again. One even managed to assassinate an Afghan judge. So it makes sense that our military hold on to dangerous people until we can be certain they're no longer a threat.

Incidentally, more than a quarter of all current Gitmo detainees are eligible to leave, but they've got no place to go. No country is willing to accept them, so they remain here. One reason we can't simply deport them is that the U.S. military will not, as a matter of policy, send a detainee to a country where he is likely to be tortured. Remember that the next time you're told the United States condones torture.

I've never been prouder of our men and women (many of the guards at Gitmo are women) in uniform than when I saw how professionally they handled themselves and our enemies. Our facility at Guantanamo Bay should be in the news every day—as an example of what we're doing right: Winning the war on terror, while still treating our enemies humanely.

First appeared in the Chicago Sun-Times*, November 9, 2006.*

Chapter 7

Myths of Guantanamo

James Jay Carafano, Ph.D.

Guantanamo Bay isn't run by the CIA, the FBI, or private contractors. It is run by men and women in the armed services. They are the guards, the administrators, the doctors, the engineers, the lawyers, and the chaplains. They're the ones in charge. And their work is hardly hidden: The Pentagon has invited a steady stream of reporters, politicians, human-rights groups, and the representatives of other governments to visit the detention facilities—and judge what is being done there for themselves.

Unlike others who have taken the Pentagon up on its offer, I have to admit that when I went recently, I didn't go as an unprejudiced judge. I know these people. They are the kinds of people I worked with during my 25 years of military service. In fact, some of the folks working at Guantanamo I have served with before. I feel like I have spent enough time around soldiers to know when I'm being told the truth, and I have spent enough time around the Pentagon to know not to believe everything I'm told.

I'm also a military historian, and I know sometimes even good armies do bad things. There are, in fact, more than a few examples in America's military past. I have little tolerance for these travesties. Nothing angers me more than dishonorable service in the name of an honorable cause.

We were shown all the facilities, how the prisoners were being treated, and permitted to talk freely to any soldier we came across. I chatted with reservists who had been there a few months and quizzed professional interrogators who had spent their whole careers talking to bad people.

I found nothing at Guantanamo to be ashamed of. The most common criticisms, from what I saw, have little basis in fact.

Myth #1: Detainees are abused and tortured.

According to the officers I talked to, high-value detainees were interviewed, on average, about once a week for two to four hours. They are handcuffed to the floor, and the interrogators talk to them. That's about it. There is no torture or inhuman punishment. There are no solitary confinement facilities at Guantanamo. The detainees have more access and better access to health care than the soldiers and the dependents on the island. The new detention facilities built at the camp are exactly like the most modern federal prison facilities in the United States.

Myth #2: Detainees are forgotten and abandoned.

There are, on average, two lawyers and three reporters for every detainee in Guantanamo. The International Committee of the Red Cross has a presence there, on average, about one out of every three days. And committee representatives have unaccompanied access to the detainees whenever they want it. International organizations, including the Organization for Security and Cooperation in Europe and the European Parliament, have inspected the facilities as well.

Myth #3: Detainees have no rights.

Every detainee at Guantanamo has had his detention status reviewed by a formal board. Of the 400 or so detainees still there, about 120 have been determined to eligible to be released to their home country or other country.

They are being sent home as soon as countries agree to accept them and not torture them. Three hundred and fifteen have already been released from Guantanamo, including five in the month I visited. The others are given an annual review board to determine if detention is still warranted. In addition, the detainees have the right to challenge their detention in U.S. federal civilian courts.

Myth #4: Detainees are not dangerous.

Some of the evidence against the vast majority of Guantanamo's remaining detainees is classified, but some of it is not, including some 100,000 documents, articles and equipment in the detainees' personal affects. Included in this cache is a fax addressed to one detainee who claimed he was a cook. The fax addressed him as the head of Taliban intelligence operations. There is enough evidence to try at least three dozen of them with major war crimes (once Congress approves the military commissions to try them).

Even inside the razor wire at Guantanamo, the detainees are dangerous. There are, on average, 10 incidents a day at Guantanamo, ranging from verbally threatening U.S. soldiers to attacking them with homemade weapons. Even the doctors have to wear body armor when they attend to their patients.

Myth #5: Detainees have no intelligence value.

Even though they have been off the battlefield for some time, the integrators told us that almost every week they learn something important that helps fight the war on terror. Recently, through interrogations, the intelligence team at Guantanamo assembled a composite sketch that's being used to track down a Taliban warlord in Afghanistan.

From what I saw at Guantanamo what our soldiers are doing is humane and just. Instead of criticism, the United States and the military should be honored for investing the resources and resolve to do the job right.

First appeared on FOXNews.com, October 6, 2006.

Chapter 8

The Detention and Trial of Unlawful Combatants

James Jay Carafano, Ph.D.

Mr. Chairman and other distinguished Members of the committee, thank you for the opportunity to testify before you today on the U.S. government's proposal to try unlawful combatants by military commissions in light of the Supreme Court decision in *Hamdan v. Rumsfeld*.[1] What I would like to do in my testimony is: (1) describe how this decision fits in the context of how America ought to fight the war on terrorism; (2) make the case that Congress ought to ratify the President's discretion to use military commissions to try these types of unlawful combatants and the offenses charged, and grant the greatest discretion to this and future presidents to establish just rules for such tribunals consistent with national security; and, (3) suggest how the Bush Administration's proposal for commissions could be amended to satisfy legitimate congressional concerns.

Winning the Long War

My view of what the Congress should do is tempered by a 25-year military career as a soldier and strategist. In deciding how to move forward after *Hamdan v. Rumsfeld*, strategy matters. While Congress and the Bush Administration must a find a remedy that is consistent with the demands of the Constitution, satisfying the rule of law is not enough. The best solution is one that is consistent with how the law in free societies should be used in wartime, and an approach that supports the national strategy.

President Bush was right to argue that the concerted effort to destroy the capacity of transnational groups who seek to turn terrorism into a global corporate enterprise ought to be viewed as a long war. Identifying the war on global terrorism as a long war is important, because long wars call for a particular kind of strategy—one that pays as much attention to protecting and nurturing the power of the state for competing over the long term as it does to getting the enemy.

Long war strategies that ignore the imperative of preserving strength for the fight in a protracted conflict devolve into wars of attrition. Desperate to prevail, nations become over-centralized, authoritarian "garrison" states that lose the freedoms and flexibility that made them competitive to begin with.[2] In contrast, in prolonged conflicts such as the Cold War, in which the United States adapted a strategy that gave equal weight to preserving the nation's competitive advantages and standing fast against an enduring threat, the U.S. not only prevailed, but thrived emerging more powerful and just as free as when the stand-off with the Soviet Union began.

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1. Salim Ahmed Hamdan, an al-Qaeda suspect held at the facility for terrorist combatants at the U.S. military base in Guantanamo Bay, Cuba, challenged the government's right to try him by the military commissions established by President George W. Bush's November 13, 2001, order governing the detention, treatment, and trial of non-citizens in the war against terrorism. The Supreme Court ruled in Hamdan's favor, declaring that the commissions have to be explicitly authorized by Congress.
2. See Aaron L. Friedberg, *In the Shadow of the Garrison State* (Princeton: Princeton University Press, 2000).

The lessons of the Cold war suggest that there are four elements to a good long war strategy:[3]

1. providing security, including offensive measures to go after the enemy, as well as defensive efforts to protect the nation;
2. economic growth, which allows states to compete over the long term;
3. safeguarding civil society and preserving the liberties that sustain the will of the nation; and
4. winning the war of ideas, championing the cause of justice that, in the end, provides the basis for an enduring peace.

The greatest lesson of the Cold War is that the best long war strategy is one that performs all of these tasks equally well.

I want to highlight the elements of long war strategy, because the successful prosecution of three of them—providing security, protecting civil society, and winning the war of ideas—will depend in part on well Congress moves forward after *Hamdan v. Rumsfeld*. Congress should authorize military commissions in a manner that respects equally all three of these aspects of fighting the long war.

Satisfying National Security

There are three issues at stake in ensuring the nation has the right instruments for fighting the long war. First, military commissions must be conducted in a manner that optimizes meeting national security interests. Second, the principle of law that protects both U.S. soldiers and civilians on the battlefield must be preserved. Third, the power of the Executive Branch to adapt and innovate to meet the challenges of war should not be encumbered.

In order to optimize national security interests, I would argue against using the Uniform Code of Military Justice (UCMJ) as a basis for authorizing military commissions for trying unlawful combatants. The UCMJ is structured as a traditional legal system that puts the protection of the rights of the individual foremost, and then adds in accommodations for national security and military necessity. Such a system is not at all appropriate for the long war. For example, Article 31(b) of the UCMJ requires informing servicemen suspected of a crime of their Miranda Rights. The exercise of Miranda Rights in impractical on the battlefield. Hearsay evidence is prohibited in court martial. On the battlefield, much of the collected intelligence that the military acts on is hearsay. In fact, reliable hearsay may be the only kind of evidence that can be obtained about the specific activities of combatants. Likewise, overly lenient evidentiary rules make sense when trying a U.S. soldier for a theft committed on base, but not when someone is captured on the battlefield and is being tried for war crimes committed prior to capture, perhaps in another part of the world.

Rather than seek to amend courts-martial procedures to address security concerns, I believe it would be preferable to draft military commissions that put the interests of national security first, and then amend them to ensure that equitable elements of due process are included in the procedures.

I also believe that for the protection of both soldiers and civilians, the distinction between lawful and unlawful combatants be preserved as much as possible. If we respect the purposes of the Geneva Conventions and want to encourage rogue nations and terrorists to follow the laws of war, we must give humane treatment to unlawful combatants. However, we ought not to reward them with the exact same treatment we give our own honorable soldiers. Mimicking the UCMJ sends exactly the wrong signal.

Finally, the Executive Branch's power to wage war ought not to be unduly encumbered. If there is one truism in war, it is that conflict is unpredictable. Carl von Clausewitz, the great 19th century Prussian military theorist called it the "friction of battle." Clausewitz also said that "everything in war is simple, but in war even the simple is difficult." That is why in drafting the Constitution, the framers gave wide latitude to the Executive Branch in the con-

3. See James Jay Carafano and Paul Rosenzweig, *Winning the Long War: Lessons from the Cold War for Defeating Terrorism and Preserving Freedom* (Washington, D.C.: The Heritage Foundation, 2005).

duct of war. They recognized that the president needed maximum flexibility in adapting the instruments of power to the demands of war. In bounding the president's traditional war powers, Congress should take a minimalist approach.

Respecting the Rule of Law

After September 11, the Bush Administration's critics framed a false debate that indicated that citizens had a choice between being safe and being free, arguing that virtually every exercise of executive power is an infringement on liberties and human rights. The issue of the treatment of detainees at Guantanamo Bay has been framed in this manner. It is a false debate. Government has a dual responsibility to protect the individual and to protect the nation. The equitable exercise of both is guaranteed when the government exercises power in accordance with the rule of law.

In the case of the military tribunals, the Supreme Court has outlined a rather narrow agenda for Congress to ensure that the rule of law is preserved. As legal scholars David Rivkin and Lee Casey rightly pointed out in a June 30, 2006, *Wall Street Journal* editorial: "All eight of the justices participating in this case agreed that military commissions are a legitimate part of the American legal tradition that can, in appropriate circumstances, be used to try and punish individuals captured in the war on terror[ism]. Moreover, nothing in the decision suggests that the detention facility at Guantanamo Bay must, or should, be closed."[4] No detainee was ordered to be released. Nor was their designated status as unlawful combatants (who are not entitled to the same privileges as legitimate prisoners of war who abide by the Geneva Conventions) called into question. The Supreme Court did not so much as suggest that the non-citizen combatants held at Guantanamo must be tried as civilians in American civilian courts. Nor did it require that detainees be tried by courts martial constituted under the UCMJ.

In addition, while the Court held that the basic standards contained in Common Article 3 of the Geneva Conventions[5] apply, it should be pointed out that the Geneva Conventions have been honored, except—according to the Supreme Court—in the way the military commissions were established. Common Article 3 requires a floor of humane treatment for all detainees. Granted, some of the language in Common Article 3 is vague and subject to varying interpretations. For the purposes of this discussion the most relevant issue is the interpretation of the phrase that treatment should include "judicial guarantees which are recognized as indispensable by civilized peoples." This requires some due process, such as the type of due process the status review boards and military commissions provide. If Congress explicitly ratifies the military commissions, then a majority of the Court would uphold them as consistent with the Geneva Conventions. This should satisfy U.S. obligations under the treaty.

Thus there is no reason for Congress to require courts-martial under the UCMJ, to draft guidelines for new commission procedures, or to partially overrule or repeal our ratification of the Geneva Conventions. Congress also appears to have approved the president's military commissions in the Detainee Treatment Act in December of 2005, although the Court has ruled this authorization is not sufficiently specific. I would suggest that nothing has changed in the past few months that should alter the sense of Congress.

It should also be understood that military commissions are intended for limited use. We should not try most detainees. We should simply detain most of them until hostilities are concluded or they are no longer a threat. A separate administrative review process is used to determine whether further detention is warranted, or for example, whether the detainee is an innocent non-combatant.[6] The Court never said detention was improper. We should only

4. David B. Rivkin, Jr. and Lee A. Casey, "Hamdan: What the Ruling Says and What it Doesn't Say," *The Wall Street Journal*, July 3, 2006, at *www.opinionjournal.com/extra/?id=110008599* (July 18, 2006).
5. Common Article 3 was signed in Geneva on August 12, 1949. It applies to the treatment of persons taken in a conflict that is not of an international character. It mandates that persons who have laid down their arms and are no longer taking active part in hostilities shall be treated humanely without adverse distinction based on race, color, religion, faith, sex, birth, or wealth, or any similar criteria. It also prohibits using violence against such people, particularly murder, mutilation, cruel treatment, and torture; taking of hostages; and outrages upon personal dignity. Finally, it prohibits the passing of sentences and carrying out of executions without a judgment by a regularly constituted court that affords the judicial guarantees recognized by all civilized peoples, and mandates that the sick and wounded by cared for. See "Convention (III) Relative to the Treatment of Prisoners of War," August 12, 1949, at *www.icrc.org/ihl.nsf/0/e160550475c4b133c12563cd0051aa66?OpenDocument* (July 18, 2006).

try those who are war criminals, and we have bent over backward to give them unprecedented levels of due process—perhaps too much. It might even be best to delay their war criminal trials, as we have in many wars, until the end of hostilities. That, however, is something that traditionally has been, and should be, left to the president's discretion.

Winning the War of Ideas

By explicitly authorizing military commissions, Congress can also make a useful contribution to winning the war of ideas. The Court's decision has been portrayed across much of the world as a huge defeat for the Bush Administration and a repudiation of its decision to hold unlawful combatants. The ruling will, no doubt, be used by al-Qaeda and its affiliates as a major propaganda tool. It will also give ammunition to America's harshest critics on the international stage. In particular, the decision is likely to exacerbate tensions in the trans-Atlantic relationship. Washington has been increasingly under fire from European Union (EU) officials and legislators about Guantanamo. The EU's External Relations Commissioner, Austria's Benita Ferrero-Waldner, has called for the Guantanamo detention facility to be closed, and the European Parliament passed a resolution urging the same. The EU's condemnation of the Guantanamo facility has echoed those of the United Nations Committee Against Torture and the U.N.'s hugely discredited Commission on Human Rights, which condemned the detention facility without even inspecting it. Now, these groups are trumpeting the Supreme Court's decision.

However, these critics have largely ignored what the Court's decision actually says. The approval of the Congress and affirmation by the Court that the commissions represent the will of the American people demonstrate our resolve both to take the threat of transnational terrorism seriously and to respect the rule of law.

What Must Be Done

Also unchanged is the government's obligation to devise an equitable long-term solution that fairly executes justice while fully satisfying our national security interests. What is needed is a process that does not treat unlawful combatants as regular criminals or traditional prisoners of war. That would simply reward individuals for breaking the rules of the civilized world. Most Guantanamo detainees are not currently set to be tried for war crimes, and they may continue to be detained with only minor changes to the administration's status determination proceedings. For those scheduled to be tried for war crimes, the Bush Administration must follow existing courts-martial rules or seek explicit congressional approval for the planned military commissions.[7]

Congress can satisfy its legal and national security obligations explicitly by authorizing the proposed military commission process. What is critical is that the Bush Administration move forward expeditiously, demonstrating once again its unswerving commitment to fight the long war according to the rule of law.

First given as testimony before the Senate Armed Services Committee, July 19, 2006.

6. Hundreds of detainees have been released from Guantanamo for one reason or another. Not all were innocent or harmless, however. By some estimates, approximately 25 of those released have been recaptured or killed when they took up arms again.
7. This unprecedented requirement was created by the Supreme Court's decision in *Hamdan v. Rumsfeld.*

Chapter 9

The Supreme Court Guantanamo Ruling: How the Administration Should Respond

James Jay Carafano, Ph.D., Nile Gardiner, Ph.D., and Todd Gaziano

Last week, the Supreme Court issued a split decision declaring unlawful the military commissions the United States planned to use at Guantanamo Bay. Regardless of the decision's legal merits, it is not a rebuke of the Bush Administration's conduct of the battle against the threat of transnational terrorist groups. The decision will have little practical impact on fighting the long war. Nothing has changed the fact that the government must fashion a means to adjudicate the status of detainees that satisfies both the rule of law and U.S. national security interests.

What the Critics Say

Salim Ahmed Hamdan, an al-Qaeda suspect held at the facility for terrorist combatants at the U.S. military base in Guantanamo Bay, Cuba, challenged the government's right to try him by the military commissions established by the President's November 13, 2001, order governing the detention, treatment, and trial of non-citizens in the war against terrorism. The Supreme Court ruled in Hamdan's favor, declaring that the commissions have to be explicitly authorized by Congress. The Court's decision has been portrayed across much of the world as a huge defeat for the Bush Administration and a repudiation of its decision to hold unlawful combatants. The ruling will, no doubt, be used by al-Qaeda and its affiliates as a major propaganda tool. It will also give ammunition to America's harshest critics on the international stage. In particular, the decision is likely to exacerbate tensions in the transatlantic relationship. Washington has been increasingly under fire from European Union (EU) officials and legislators over Guantanamo. The EU's External Relations Commissioner, Austria's Benita Ferrero-Waldner, has called for the Guantanamo detention facility to be closed, and the European Parliament passed a resolution urging the same. The EU's condemnation of the Guantanamo facility has echoed those of the United Nations Committee Against Torture and the U.N.'s hugely discredited Commission on Human Rights, which condemned the detention facility without even inspecting it. Now, they are trumpeting the Court's decision.

Why The Critics Are Wrong

The critics have largely ignored what the Court's decision actually says. As legal scholars David Rivkin and Lee Casey rightly pointed out in a June 30, 2006, *Wall Street Journal* editorial: "All eight of the justices participating in this case agreed that military commissions are a legitimate part of the American legal tradition that can, in appropriate circumstances, be used to try and punish individuals captured in the war on terror. Moreover, nothing in the decision suggests that the detention facility at Guantanamo Bay must, or should, be closed." No detainee was ordered to be released. Nor was their designated status as unlawful combatants (who are not entitled to the same privileges as legitimate prisoners of war who honor the Geneva Conventions) called into question. The Supreme Court did not so much as suggest that the non-citizen combatants held at Guantanamo must be tried as civilians in American civilian courts. On the contrary, the justices recognized that these combatants may be tried by our existing courts-martial, another military tribunal. Nothing changes on the ground at Guantanamo.

What Must Be Done

Also unchanged is the government's obligation to devise an equitable long-term solution that fairly executes justice while fully satisfying our national security interests. What is needed is a process that does not treat unlawful combatants as regular criminals or traditional prisoners of war—that would simply reward individuals for breaking the rules of the civilized world. Most Guantanamo detainees are not currently set to be tried for war crimes, and they may continue to be detained with only minor changes to the Administration's status determination proceedings. For those scheduled to be tried for war crimes, the Administration must follow existing courts-martial rules or seek explicit congressional approval for the planned military commissions.

The Administration can satisfy its legal and national security obligations by amending the rules and procedures governing the Administration's military commissions to match more closely the Uniformed Code of Military Justice (already authorized by Congress), or Congress can explicitly authorize the proposed military commission process. What is critical is that the Administration move forward expeditiously, demonstrating once again its unswerving commitment to fight the long war according to the rule of law.

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Chapter 10

The U.N.'s Guantanamo Folly: Why the United Nations Report Is Not Credible

Nile Gardiner, Ph.D., and James Jay Carafano, Ph.D.

A new report from the U.N. Commission on Human Rights concludes by calling on the United States to close its detention facility at Guantanamo Bay "without further delay."[1] The report, issued by a body that counts Sudan, Cuba, China, and Zimbabwe as current members, alleges torture at the Guantanamo facility, and demands that "all persons found to have perpetrated, ordered, tolerated or condoned such practices, up to the highest level of military and political command," presumably including the U.S. President and the Secretary of Defense, be "brought to justice."[2] These demands, however, are groundless. None of the report's authors toured Guantanamo, despite an invitation from the Pentagon,[3] and so the report is based largely upon recycled allegations, without legal foundation, from well-coached former detainees. As the United Nations tries desperately to recover from waves of corruption scandals, it seeks to shift attention to its favorite target, Washington's prosecution of the war on terrorism. The Guantanamo report, based on little more than innuendo, unsubstantiated claims, and conjecture, is just such a ploy and deserves to be rejected out of hand.

Dealing with the Long War's Enemies

In the wake of combat operations in Afghanistan, the United States established a detention facility at the U.S. military base in Guantanamo Bay, Cuba. The primary purpose of detention during war is to prevent combatants from returning to the battlefield. The facility provides a safe and secure place to hold and interrogate dangerous combatants while operating in accordance with U.S. law and applicable treaty obligations. In addition, Combatant Status Review Tribunals were established to determine the validity and disposition of detainees' designations as enemy combatants and their continued detention, including, in some cases, long-term detention. The U.S. Supreme Court acknowledged in 2004 that such military tribunals are appropriate under American and international law.

Establishing Guantanamo was a measured and effective response to the 9/11 terrorist attacks and must be considered in the context of the greatest assault on the United States since Pearl Harbor. As British Prime Minister Tony Blair has pointed out, "It is important we never forget the context in which this happened, which is the context of the war in Afghanistan and the reason for that is the slaughter of 3,000 innocent people on September 11."[4]

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1. United Nations Commission on Human Rights, "Situation of Detainees at Guantanamo Bay," February 15, 2006, at *www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf*.
2. *Ibid.*
3. It should be noted that the U.N.'s request for full, unfettered access to Guantanamo detainees was denied by the Pentagon on the grounds of security. The U.N. Rapporteurs were offered the same degree of access as U.S. congressmen and senators, as well as the media and non-governmental organizations (NGOs).
4. "Blair Reminds Guantanamo Critics of September 11 'Slaughter,'" *The Guardian*, February 23, 2006. Blair has steadfastly refused to condemn Guantanamo or support calls for the immediate closure of the camp, describing the facility as "an anomaly" that should "end sooner rather than later."

Long-term detention of dangerous suspects requires modern facilities. There must be adequate security to ensure the safety of the U.S. soldiers guarding detainees and to safeguard prisoners. Modern medical and support facilities are required, as well as the infrastructure to support military commissions and legal counsel for the detainees. Constructing all this in the theater of active combat was not an option, as such facilities will be little more than targets for terrorists. There are at present 500 detainees at Guantanamo and a further 200 have been released or returned to their country of origin. About 25 of those freed have since taken up arms again against the United States.

Since their inception, the Guantanamo operations have faced intense international scrutiny. The International Red Cross periodically inspects the facilities and has unfettered direct access to detainees. It presents its findings directly to the U.S. government. In addition, more than 100 Members of Congress have visited the facility, and so have 170 representatives of the national and international media and many representatives of nongovernmental organizations.

The U.N. Commission on Human Rights

Within the ailing United Nations system, one would be hard-pressed to find a more dysfunctional or discredited agency than the Commission on Human Rights. For many years, it has been widely seen as the plaything of dictators, keen to steer the U.N. away from serious investigation into their affairs. About a quarter of the commission's current membership is made up of repressive regimes.[5] The Sudanese government, one of the most barbaric dictatorships of modern times, has sat on the commission for the past three years while actively coordinating a campaign of genocide by the Janjaweed militias in the Darfur region of the country, which has already left up to 300,000 dead. Another brutal dictatorship, Libya, chaired the 53-strong commission in 2003-04.

Even U.N. Secretary-General Kofi Annan, usually tolerant of dictatorial governments, acknowledges the need for a complete overhaul of the U.N.'s human rights apparatus:

> We have reached a point at which the commission's declining credibility has cast a shadow on the reputation of the United Nations system as a whole and where piecemeal reforms will not be enough. The commission's ability to perform its tasks has been overtaken by new needs and undermined by the politicization of its sessions and the selectivity of its work.[6]

That Annan endorsed the Guantanamo report so soon after acknowledging the commission's complete dysfunction and failure is a staggering act of hypocrisy.[7]

The Motives and Background of the U.N.'s Rapporteurs

This latest report is little more than a selective and politicized document from a thoroughly condemned body. The commission's claim that it was written by a team of "independent investigators" is incredible. Rather, the authors are all long-serving U.N. "Rapporteurs," part and parcel of the U.N.'s widely disparaged human rights apparatus.

The chair of the investigation, Leila Zerrougui, is president of the U.N. working group on "arbitrary detention" and previously headed the U.N. Subcommittee for the Promotion and Protection of Human Rights between 2000 and 2004. She is also a judge on the Supreme Court of Algeria, a country with a very poor human rights record[8] and has held positions in Algeria's Ministry of Justice and Presidency of the Republic.[9] It is extraordinary that an Algerian public official, whose own government stands accused of presiding over the disappearance of thousands of people

5. Joseph Loconte, "Relativism and Rights," National Review Online, February 3, 2006.
6. Secretary-General Kofi Annan, speech to the U.N. Commission on Human Rights, Geneva, April 7, 2005.
7. "UN Chief Says US Should Close Prison at Guantanamo Bay as Soon as Possible," Associated Press, February 17, 2006.
8. See U.S. Department of State, *Country Report on Human Rights Practices*, 2004, February 28, 2005, at *www.state.gov/g/drl/rls/hrrpt/2004/41718.htm*.
9. Biographical details published by the International Commission of Jurists, at *www.icj.org/article.php3?id_article=3441&id_rubrique=11&lang=en*.

in the 1990s,[10] now sits in judgment of the United States. To promote full transparency and accountability, the United Nations should release the complete details of Zerrougui's service for the Algerian regime.

Further, a survey of the backgrounds of Zerrougui's colleagues on the U.N.'s Guantanamo investigation reveals in some instances extreme and highly biased views regarding the U.S.-led war on terrorism, as well as a trigger-happy willingness to make unsubstantiated allegations against the United States and key allies.

The U.N.'s Guantanamo Team

- **Leila Zerrougui**, Chairman Rapporteur of the Working Group on Arbitrary Detention (Algeria)
- **Leandro Despouy**, Special Rapporteur on the Independence of Judges and Lawyers (Argentina)
- **Manfred Nowak**, Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Austria)
- **Asma Jahangir**, Special Rapporteur on Freedom of Religion or Belief (Pakistan)
- **Paul Hunt**, Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (New Zealand)

While serving as the U.N.'s Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions, Asma Jahangir defended 18 Pakistani nationals deported by the United States in the aftermath of the 9/11 attacks at a forum given by the American Civil Liberties Union (ACLU), declaring that "they do not have the resources to defend themselves against the tyrannical behavior of a superpower."[11] Jahangir, former chair of Pakistan's Human Rights Commission, strongly opposed U.S. military action against the Taliban regime in Afghanistan by demonstrating on the streets of Lahore[12] and subsequently undertook a 10-day investigative mission to Afghanistan to probe alleged "massacres" of captured Taliban and al-Qaeda fighters by the U.S.-backed Northern Alliance.[13] Early in 2002, Jahangir had called for an urgent investigation into reports, quickly discredited, of "summary executions" of Palestinians by Israeli troops at the Jenin refugee camp.[14] The U.N.'s own inquiry into Jenin subsequently concluded that there had been no massacre by the Israeli Defense Force.[15]

Paul Hunt, a fellow rapporteur on the U.N.'s Guantanamo commission, has been particularly exercised by U.S. military operations in Iraq. In his unique role as "Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health," Hunt demanded an "independent inquiry" into the American offensive against al-Qaeda-backed insurgents in the Iraqi city of Fallujah in May 2004 to investigate "credible allegations that the Coalition Forces have been guilty of serious breaches of international humanitarian and human rights law."[16]

Like Hunt, Manfred Nowak, the U.N.'s "Special Rapporteur on Torture" appears just as concerned with the conduct of the U.S.-led war on terrorism as he is with the terrorist threat that America and its allies are confronting. In a recent newspaper interview, Nowak equated the actions of terrorists with the anti-terror tactics of the United States. Nowak observed that "the world is more dangerous: on the one hand due to terrorists, and on the other due to actions taken in the fight against terrorism, which are violating international rights law."[17] Nowak, a law professor who has worked with the United Nations for over 10 years, has also accused the United States of holding terrorist suspects in secret facilities on U.S. ships in international waters and has launched his own inquiry into that allegation.[18]

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10. See "Algeria: 10 Years of State of Emergency, 10 Years of Grave Human Rights Abuses," Amnesty International USA, at *www.amnestyusa.org/countries/algeria/document.do?id=6464EC953D18525580256B5A0056096F.*
11. "Rights Activist Jahangir Takes Up Cause of 18 Deported Pakistanis," Ethnic News Watch, *News India*, November 15, 2002.
12. "Give Peace a Chance, Say Asian Activists," Inter-Press Service, October 16, 2001.
13. "UN Investigator To Probe Alleged Killings of Taliban Fighters by Northern Alliance," Associated Press, October 18, 2002.
14. "UN Official Demands Probe of Israeli Killings of Palestinians," PanAfrican News Agency, April 15, 2002.
15. United Nations General Assembly Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/10, July 30, 2002, at *www.un.org/peace/jenin*. See also "UN Report: No Massacre in Jenin," USA Today/Associated Press, August 1, 2002, at *www.usatoday.com/news/world/2002-08-01-unreport-jenin_x.htm.*
16. "UN Rights Expert Calls for Inquiry Into US-led Assault on Fallujah," Agence France-Presse, May 3, 2004.
17. "Torture by UK and US 'Biggest Human Rights Threat Since Nazis,'" *The Sunday Herald*, November 20, 2005.

In addition to his personal crusade to expose abuses by the United States, Nowak has also targeted the British government's new anti-terror legislation, threatening to report Britain to the U.N. General Assembly for human rights violations.[19] Nowak criticized a UK proposal to deport Islamic extremists and has called on Britain to reverse its plan to draw up "memorandums of understanding" with Middle Eastern and African countries to whom Britain would send terror suspects.

U.S. Policy Must Be Dictated by the National Interest

The U.N.'.s Guantanamo report is a highly charged political polemic that lacks credibility and should have no bearing on U.S. detention policies. Rather, the long-term future of the Guantanamo facility must be decided by the overriding national security criteria. The U.S. military should do what is best to secure the nation and its allies against the threat of transnational terrorism while continuing to respect its obligations to follow U.S. law, including applicable international treaties. So far, Guantanamo has succeeded as an effective tool in the war on terrorism, and the absence of any terrorist attacks on U.S. soil since 2001 is a testament to that.

U.S. anti-terror policy cannot be dictated by supranational institutions such as the United Nations. U.S. policy on Guantanamo Bay can only be set by the President and the United States Congress, in consultation with America's allies and treaty partners—not by bureaucrats in Turtle Bay or Geneva. A U.S. decision to give in and close the Guantanamo facility would not only undermine America's security but also be a major propaganda victory for al-Qaeda and its affiliates, who would portray it as the humbling of a superpower.

The United Nations should focus on combating real human rights abuses in countries such as Syria, Iran, Burma, and North Korea, as well as members of its own human rights commission, including Sudan and Zimbabwe. Further, the U.N. must finally put an end to abuses in its peacekeeping operations, where acts of great cruelty toward defenseless refugees have irreparably tarnished the world body's reputation.[20] U.N. officials and peacekeepers must be brought to justice for the rape and abuse of the people they are supposed to be protecting.

The U.N., which has struggled for decades to even agree on a definition of terrorism, once again demonstrates a clear lack of moral clarity in its release of the commission's Guantanamo report. The United States, as well as key allies such as Great Britain, should reject the hectoring of unelected U.N. officials and call upon the world body to take a more positive role in combating international terrorism. The U.N. must be reminded that appeasement of violent extremists is always doomed to failure.

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18. "Expert Says UN Looking For Secret US Detention Facilities as Part of Probe," Associated Press, June 29, 2005.
19. See "Expulsions Illegal, UN Tells Clarke," *The Guardian*, August 25, 2005, at *http://politics.guardian.co.uk/terrorism/story/0,15935,1555931,00.html*; and "Row Over New Rules for Deporting Hate Preachers," The Times Online, August 24, 2005.
20. See Nile Gardiner, Ph.D., "The U.N. Peacekeeping Scandal in the Congo: How the U.S. Should Respond," Heritage Foundation *Lecture* No. 868, March 22, 2005, at *www.heritage.org/Research/InternationalOrganizations/hl868.cfm.*

Chapter 11

Congress Protects Rights, Preserves National Security

James Jay Carafano, Ph.D.

When Congress passed the law that will govern how terrorist suspects can be tried in military tribunals, it acted just like the Founding Fathers would have wished. It stuck fast to principles, the bedrock of values and beliefs that this nation stands for—and it compromised on particulars.

The Defense Department holds about 350 detainees at Guantanamo Bay who are considered enemy combatants and whom the military believes would fight America and its allies if released. Like all captured enemies, these detainees should be held for the duration of hostilities or until the military is satisfied that they pose no further threat.

This is how enemies captured in wartime have traditionally been handled. Military leaders believe, however, that some of these detainees have committed serious war crimes. They wanted, and rightly so, to bring them to justice. That's where Congress comes in.

This summer, the Supreme Court ruled that Congress must explicitly authorize the commissions used to try alleged war criminals. The administration was right to argue against using the Uniform Code of Military Justice or the regular civilian court system as a basis for these trials.

Both are traditional legal systems that put the protection of individual rights first, ahead of accommodations for national security and military necessity. This system is not appropriate for trying terrorists in the Pentagon's custody while the war is still going on.

Instead, the Bush administration proposed a judicial process that foremost protects national security interests while also including appropriate procedural protections.

Meanwhile, the Senate Armed Services Committee authored a competing version of legislation for the "military commissions" that would try the alleged war criminals at Guantanamo. Intense negotiations between the House, Senate and White House produced a compromise that Congress passed last week.

Three principles were at stake in the debate—ones that should be used to grade the compromise. Any suitable legislation would have to 1) respect the rule of law, 2) guarantee the basic human rights to the defendants and 3) respect the legitimate national security interests of the United States. By any fair measure of the legislation, Congress did all three.

In stipulating the procedures that will be used to interrogate defendants, Congress fulfilled the Supreme Court's mandate of specifically authorizing the rules for trials. Congress also has the authority to grant alien unlawful combatants statutory due process rights to which they are not otherwise entitled. Congress granted many such statutory rights, including the right to counsel.

Congress also stipulated that these procedures complied with Common Article 3 of the Geneva Conventions. This measure was designed to reassure the rest of the world that the United States takes seriously its responsibility to respect the basic human rights of all persons, on and off the battlefield.

Finally, Congress ensured that adequate measures were taken to protect legitimate secrets and the "sources and methods" used to obtain them. Some complain that other war crimes trials, such as the Nazi Nuremberg trials and the prosecutions of Bosnian war criminals at the Hague, did not allow for "secret" evidence.

But there is a significant difference. Those trials didn't take place during a war when enemies on the battlefield might use the information to their advantage. Under the congressional rules for military commissions, defendants will still be able to know about and challenge evidence—they just won't be able to give away America's secrets.

This is a rare example of democracy at its best.

First appeared in the Atlanta Journal Constitution *October 4, 2006.*

Chapter 12

Excerpted from

International Law and the Nation-State at the U.N.: A Guide for U.S. Policymakers

Lee A. Casey and David B. Rivkin, Jr.

The War on Terrorism

At this time, the most confrontational international law differences between the United States and Europe involve the war on terrorism. By and large, Europe (at least the states of the EU) does not accept that there is a legally cognizable, ongoing armed conflict between the United States and al-Qaeda and its allies. The vast bulk of European opinion, both official and unofficial, views al-Qaeda as a law enforcement issue and (*sub silencio*) the American reaction to the September 11, 2001, attacks to have been disproportionate. As a result, many of the measures taken by the United States since September 11 are considered illegitimate, if not outright illegal, by much of Europe.

Guantanamo Bay. This is especially true of the U.S. detention facilities at Guantanamo Bay, Cuba, which have become a symbol in Europe for alleged U.S. overreaching. These facilities were established to detain the most dangerous individuals captured by U.S. and allied forces in Afghanistan. The United States has classified these prisoners as "unlawful" or "unprivileged" enemy combatants who are not entitled to the rights and privileges of prisoners of war under the Geneva Conventions but who may be held without criminal trial until hostilities are concluded. This classification has a long history in the laws and customs of war (describing individuals who fail to meet certain basic requirements, including a proper command structure, wearing uniforms, bearing arms openly, and eschewing direct attacks on civilians) and is fully recognized by the United States Supreme Court.[1] Nothing in the Court's 2006 *Hamdan v. Rumsfeld* decision, which invalidated the rules established for military commission trials, changed this.

Most European states, however, have signed and ratified Protocol I Additional, an addendum to the 1949 Geneva Conventions. This treaty was particularly promoted by the International Committee of the Red Cross, and its provisions attempt to regularize the status of unlawful combatants, especially the guerrilla and irregular fighters who comprised so many of the "national liberation movements" in the post–World War II period. It was, in fact, for this very reason that the United States rejected Protocol I. It is not a party to that instrument and is not bound by Protocol I's requirements—except to the extent that they represent binding customary norms.

Opponents of American policy in the war on terrorism commonly claim that, in fact, Protocol I does constitute a binding statement of customary law and argue incorrectly that the United States has recognized as much. To support this point, proponents of this claim generally cite the 1987 remarks of Michael Matheson, then serving as Deputy Legal Adviser, Department of State. A careful examination of Mr. Matheson's remarks, however, reveals that he did not suggest that Protocol I constituted a restatement of customary international law, but merely that a number of its provisions might have that status.[2] In this connection, he noted that, because of the difficulty in determining which rules enjoy sufficient "acceptance and observation" to be considered customary norms, "we have not

1. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942).

attempted to reach an agreement on which rules are presently customary law, but instead have focused on which principles are in our common interests and therefore should be observed and in due course recognized as customary law." This is, of course, a critical distinction between principles and rules in assessing what are the actual legal obligations of the United States. The U.S. has not accepted either that the category of "unlawful enemy combatant" has been abolished or that such individuals must be treated as Geneva POWs or civilian criminal defendants.

The Use of Stressful Interrogation Methods. The EU governments, along with a large portion of European public opinion, reject the use of stressful interrogation methods by the United States, claiming that these "amount to torture." Whether stressful interrogation methods are appropriate as a means of obtaining intelligence from captured enemy combatants is a complex question of morality and expedience. As a legal matter, however, stressful interrogation methods are not inherently torture. In the relevant treaties (and U.S. federal statutes), torture is narrowly defined to encompass only the infliction of severe pain and suffering. Thus, the stress methods, such as isolation, sleep interruption, and standing, authorized by the United States for use on captured al-Qaeda and Taliban members are not "torture" *unless taken to a degree extreme enough to constitute severe pain and suffering*. Significantly, the European Court of Human Rights itself reached this conclusion in *Ireland v. United Kingdom* (1978), a decision construing very similar standards under EU human rights conventions.[3]

In fact, *Ireland v. United Kingdom* involved Britain's use of five stressful interrogation techniques—hooding, wall standing, subjection to noise, sleep deprivation, and reduced diet—in tandem against Irish Republican Army (IRA) members. The court ruled that these methods, even when used together, did not amount to torture. It did conclude, however, that when used together, these methods constituted cruel and inhuman treatment. This decision is, of course, not binding on the United States, but it does suggest that European claims that the United States has engaged in torture are ill-founded and that the U.S. could meet international standards simply by ensuring that the stressful interrogation methods employed at Guantanamo and elsewhere are not utilized together as done by Britain against the IRA. In any case, generic claims that "coercive" interrogation methods inherently amount to torture and that they are banned by international law are incorrect.

Other Controversial Policies. There are, of course, a number of other American policies in the war on terrorism that have been criticized or openly denounced in Europe. These include the claimed existence of "secret" U.S. detention facilities in Central and/or Eastern European countries, as well as the practice of "rendition"—transferring captured terrorists to other (usually their home) countries. There have obviously been abuses committed by Americans during the war on terrorism—although the U.S. record in this regard compares very favorably with previous conflicts and, especially, with that of other countries. In defending the American legal position, however, the first question must always be: Is the United States actually subject to the norm it has allegedly violated? The second question is whether the U.S. interpretation of applicable norms is simply different from the prevailing view in Europe and/or elsewhere. The United States is an independent sovereign with the right and obligation to interpret international law for itself. It does not have to accept the views of any other state or group of states, save in those circumstances where it has consented to do so. That is the essence of sovereignty.

Universal Jurisdiction. One means of avoiding that sovereignty, of course, would be to punish individual American officials in the courts of other states (which may take a different view of the applicable legal norms and their meaning) on a theory of "universal jurisdiction." As a principle of judicial authority, universal jurisdiction has a long history. Before the 20th century, however, it was limited to offenses committed by non-state actors beyond the territorial limits of any state. Thus, all states were said to have the "universal" right to prescribe acts of piracy on the high seas, including the trans-oceanic slave trade. Even in this area, however, the right to prescribe did not automatically translate into the right to try and punish without some additional jurisdictional basis.[4]

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2. See Remarks of Michael J. Matheson: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 *Am. U. J. Int'l* 419, 421–424 (1987).

3. *Republic of Ireland v. the United Kingdom*, Series A, No. 25 (Judgment of Jan. 18, 1978).

4. For a more detailed discussion of this point and related authorities, see Lee A. Casey and David B. Rivkin, Jr., "The Dangerous Myth of Universal Jurisdiction," in Robert H. Bork (ed.) *"A Country I Do Not Recognize" The Legal Assault on American Values* 135, 138–42 (Hoover 2005).

Since the end of World War II, however, claims have been made for a universal jurisdiction over offenses such as war crimes, crimes against humanity, genocide, and crimes against peace. These claims have been based largely on the Nuremberg trials. In fact, the International Military Tribunal never claimed to act pursuant to "universal" jurisdiction or even under international law or on behalf of the international community. Its authority was founded on the right of the victorious Allies to legislate for a conquered Germany. Nevertheless, increasingly extravagant claims have been made for universal jurisdiction, and in the 1990s, some European states actually enacted laws purporting to vest their courts with the power to try and punish universal jurisdiction offenses. The most notable was Belgium. The Belgian universal jurisdiction law was used to initiate proceedings against various Western leaders, including Israel's Ariel Sharon and U.S. Secretary of State Colin Powell, Vice President Richard Cheney, and General Tommy Franks. Belgium repealed the law after the United States made plain that NATO Headquarters could not remain in a country (in Brussels) where U.S. officials might face such judicial harassment.

In fact, there is little state practice, involving both a right to prescribe and punish "international" offenses, supporting universal jurisdiction. There are very few instances in which a country has attempted to punish an individual, let alone a state official, for offenses that did not take place on its own territory or against its own citizens. Moreover, and more to the point, there are even fewer examples—if any at all—in which a state whose citizen or official has been targeted for such a prosecution accepted the assertion of this judicial power based on a belief that it was legally required to do so because of some "universal" right to try and punish certain crimes. In short, universal jurisdiction is a theory of international law that has very little basis in reality.

Excerpted from Heritage Foundation Backgrounder *No. 1961, August 18, 2006.*

Chapter 13

Embrace the Need for Decisive Leadership

John Yoo

Critics of the war on terrorism and the war in Iraq charge that President Bush has infringed on the Constitution. They say it's up to Congress to approve the course of the Iraq War, the interrogation policies at the Guantanamo Bay base and the wiretap surveillance by the National Security Agency.

Yet this view misreads the Constitution's allocation of war-making powers between the executive and legislative branches. As commander in chief and chief executive, the president has broad constitutional authority—indeed, a duty to protect the nation from foreign attack. He requires no approval to take the nation to war if it's attacked.

The framers of the Constitution designed the presidency to wield power quickly and decisively. As they understood it, Congress could counter presidential decisions in foreign affairs through its powers over funding or domestic legislation.

A state of war doesn't mean that checks and balances don't exist, only that Congress usually allows the president to act alone because it agrees with executive policy or lacks the political will to use its own constitutional powers.

Much of the confusion concerns the provision in Article I, Section 8 of the Constitution, which says that Congress alone has the power to declare war. In fact, a comprehensive reading of the text and structure of the Constitution demonstrates that it doesn't mandate a specific process for waging war.

James Madison insisted on the phrase "declare war" versus "make war" because he wanted presidents to have the flexibility to repel sudden attacks. In fact, the Constitution distinguishes between "declaring war," "engaging in war" (Article I, Section 10, Clause 3) and "levying war" (Article III, Section 3, Clause 1).

In short, to declare war isn't the same as to start fighting a war. Congress has declared war just five times in its history. And only one of them, the War of 1812, constituted an affirmative declaration of war. The other four—the Mexican-American War, the Spanish-American War, World War I and World War II—merely declared the prior existence of a state of war.

Earlier in American history, a declaration of war had the practical effect of getting Congress on board to fund the building of an army to prosecute the war. Today, we have a large fighting force at the ready, and the main effect of declaring war would be to alter legal relationships between subjects of warring nations and to trigger certain rights, privileges and protections under the laws of war.

Declarations provide the legal grounds for war and the opportunity for enemy nations to make amends and, thereby, avoid the scourge of war.

The power to declare war is not a check on executive power to engage in hostilities. It's designed to address these legal issues and others in times of conflict.

It serves notice to the enemy's allies that they could be viewed as co-belligerents and that their shipping is subject to capture. It means our citizens could be prosecuted for dealing with the enemy, that internment or expulsion of enemy aliens is possible and that diplomatic relations have been cut off.

Once we're at war, the Constitution leaves the means of how the war is prosecuted almost entirely in the president's hands. Still, this power isn't absolute, and Congress retains a critical check on it—the power to defund initiatives with which it doesn't agree.

As for the question of the NSA's wiretapping program, Richard Posner, a federal judge, says that, of course, a president's inherent wartime authority as commander in chief encompasses using a range of intelligence-gathering techniques.

In an era of terrorism, rogue nations and weapons of mass destruction, it's imperative to get correct answers to questions concerning foreign-policy authority.

But we should look skeptically at claims that radical changes in the way we make or declare war would solve our problems—even those stemming from poor judgment, unforeseen circumstances and bad luck.

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Chapter 14

The Great EU Inquisition: Europe's Response to the U.S. Rendition Policy

Nile Gardiner, Ph.D., and James Jay Carafano, Ph.D.

"We do not have a war against terror."[1] This extraordinary statement by a senior European Union (EU) official reflects the divide between Washington and Europe's leading political institutions over the fight against al-Qaeda. Despite three major terrorist attacks on European soil in the past three years (in London, Madrid, and Istanbul), many top European officials still do not grasp the magnitude of the terrorist threat. Instead, they are engaged in a campaign of pandering and grandstanding to delegitimize U.S. counter-terrorism efforts, especially the policy of rendition.

The Council of Europe,[2] which oversees the European Court of Human Rights, has already released a flimsy report on rendition, and the European Parliament has launched its own investigation. These supranational institutions' anti-American animus reinforces the need for the U.S. to oppose "ever-closer union" in Europe. While U.S.–EU relations have been damaged by the rendition controversy, Washington should continue to work closely with the governments of individual European states and must maintain the successful policy of rendition, a vital weapon in the defense of the West. Officials from the United States and European nation-states should unite in castigating the EU-Council of Europe witch-hunt, which is widening the transatlantic divide.

Europe's Political Show Trial

The leaders of al-Qaeda and the many other Islamic terrorist organizations that operate across the globe will no doubt warmly welcome the latest attempts by European officials to rein in the U.S.-led war on terrorism.

The European Parliament in Strasbourg has launched a 46-member inquiry into "the alleged illegal transfer of detainees and the suspected existence of secret CIA detention facilities in the European Union and in candidate countries," with members haggling for "much-coveted seats" on the investigative committee.[3] Baroness Sarah Ludford, vice chairman of the committee and patron of the "Guantanamo Human Rights Commission,"[4] has pledged to leave "no stone unturned" in "upholding the core values of human rights which lie at the heart of the union" and has urged senior U.S. officials to face hearings in Europe.[5] In a major affront to U.S. sovereignty and a demonstration of breathtaking arrogance, Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld have been called upon to testify before the committee.

There is little doubt that the inquiry will feed upon widespread anti-American sentiment in the European Parliament and will be used to batter U.S. counter-terrorism strategy. As one British Conservative Member of the European Parliament put it, the inquiry will likely serve as "a platform for anti-U.S. bile."[6]

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1. Quoted in *The Financial Times*, December 14, 2005. The official is not named in the article.
2. The 46-nation Council is a separate from the European Union but works closely with the European Commission.
3. "MEPs Scramble for Seats on CIA Prison Committee," *European Report*, January 18, 2006.
4. See *www.guantanamohrc.org*. Ludford is a long-standing critic of the Iraq War and U.S. policy in the war on terrorism.
5. "MEPs Aspire to Cheney and Rumsfeld Hearings in CIA Probe," EUObserver.com, January 27, 2006.
6. Roger Helmer, British Member of the European Parliament for the East Midlands, quoted in the *Press Association*, January 26, 2006.

The U.S.-EU spat was sparked by an article in *The Washington Post* which alleged that the Central Intelligence Agency (CIA) ran a covert prison, or "black site," for senior al-Qaeda suspects at a Soviet-era compound in Eastern Europe as part of a "hidden global internment network."[7] The *Post* article also charged that scores of detainees had been "delivered to intelligence services in Egypt, Jordan, Morocco, Afghanistan and other countries, [in] a process sometimes known as 'rendition.'" The U.S.-based Human Rights Watch later claimed that the CIA was operating secret detention facilities in Poland and Romania.[8]

These reports prompted moral indignation and mass hysteria among the political elites of Brussels and Strasbourg and led to sensational accusations that the United States tortured terror suspects while holding them in "gulags," with the connivance of Eastern European governments. Some alleged that the U.S. flew terror suspects to countries in North Africa and the Middle East for the specific purpose of torture.

This controversy led to an undignified political power play by federal European politicians who seek to dictate the security policy of European nation-states. With echoes of French President Jacques Chirac's infamous threat to aspiring EU members in Eastern Europe who had supported the United States over the war with Iraq,[9] the European Union's Justice Minister Franco Frattini warned of "serious consequences, including the suspension of voting rights in the council," for any EU member-state found to have hosted secret CIA facilities.[10]

In addition, the United Nations, with its hugely discredited human rights apparatus in tow, could not resist the opportunity to take a swipe at the United States. Louise Arbour, the U.N.'s High Commissioner for Human Rights, launched a fierce attack on America's "so-called war on terrorism," condemning U.S. interrogation techniques and the rendition of terrorist suspects.[11] While millions languish under the boot of brutal dictatorships from Rangoon to Pyongyang to Tehran, the U.N.'s chief concern on its "Human Rights Day" last December was U.S. tactics in the battle against the most barbaric terrorist movement in modern history.

The Council of Europe Report

The European Parliament's investigation follows a major inquiry by the Council of Europe, which published its initial findings in late January. In presenting his report, Dick Marty, the Council's Rapporteur, condemned the "gangster-style methods" of the Bush Administration, stating that "individuals have been abducted, deprived of their liberty and all rights, and transported to different destinations in Europe, to be handed over to countries in which they have suffered degrading treatment and torture."[12]

On closer examination however, Marty's case is paper-thin and lacks any concrete evidence. If this case were presented in a court of law, it would be dismissed out of hand. In the words of Denis MacShane, the UK's former Minister for Europe, the report has "more holes than a Swiss cheese."[13]

Marty's report contains no primary source documentation and relies entirely upon media accounts. It is filled with conjecture, innuendo, and a barely disguised sneering contempt for the U.S. approach to the war on terrorism. For example, Marty concludes that "the current U.S. Administration seems to start from the principle that the principles of the rule of law and human rights are incompatible with efficient action against terrorism," a clear misrepresentation of the U.S. position.[14]

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7. Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *The Washington Post*, November 2, 2005.
8. "Evidence CIA Has Secret Jails in Europe," *Financial Times*, November 3, 2005.
9. Chirac attacked the "infantile" and "dangerous" behavior of Poland, Hungary, and the Czech Republic, which joined Britain, Spain, Italy, Denmark, and Portugal in supporting the United States in the Iraq war. Chirac complained that they were "not well brought up" and had "missed a good opportunity to keep quiet. When you are in the family, after all, you have more rights than when you are asking to join and knocking at the door." See "Threat of War: Furious Chirac Hits Out at 'Infantile' Easterners," *The Guardian*, February 18, 2003.
10. "EU Threat to Countries With Secret CIA Prisons," *The Guardian*, November 29, 2005.
11. "UN Official Faults US Detentions," *The Washington Post*, December 8, 2005. Arbour's less-than-subtle critique of U.S. policy followed an attack in August on British anti-terror plans by the U.N.'s Special Rapporteur on Torture, Manfred Nowak, who threatened to report the UK to the U.N. General Assembly for human rights violations. See "Expulsions Illegal, UN Tells Clarke," *The Guardian*, August 25, 2005.
12. "Report on CIA Says 'Gangster' Methods Used," *Financial Times*, January 25, 2006.
13. "'Gangster' US Accused Over Torture," *The Daily Telegraph*, January 25, 2006.

Significantly, the Council of Europe's report admits, "At this stage of the investigations, there is no formal, irrefutable evidence of the existence of secret CIA detention centers in Romania, Poland or any other country."[15] It cites the findings of an investigation appointed by the Romanian Parliament and conducted by OADO, a human rights NGO, that "do not seem to provide any evidence of such centers."[16] Nevertheless, the report freely cites rumors and circumstantial and highly ambiguous facts as justification for condemning U.S. efforts to protect itself and its allies against terrorist attacks.

U.S. Rendition Policy

The U.S. practice of rendition dates back to the mid-1990s and was established by the Clinton Administration to target al-Qaeda cells operating across the world. Rendition involves the capture of terrorist suspects, who are brought to the United States to face trial or are transferred to the governments of their home countries for further questioning.

The policy has three main goals:

- Keep terror suspects off the streets,
- Bring to justice those wanted for terrorist offenses, and
- Gather valuable intelligence information about possible future terror attacks.

The CIA and FBI put rendition to good use in June 1997 in the capture in Pakistan of Mir Aimal Kasi, who was brought back to America to face trial for the 1993 murder of two CIA employees in Virginia. According to then-CIA Director George Tenet, more than two-dozen terrorists, half of them al-Qaeda suspects, were brought to justice by rendition between July 1998 and February 2000.[17] A number of European governments also employ rendition. France, for example, captured Carlos the Jackal in Sudan in 1994 and brought him to France to face trial; this operation was deemed lawful by the European Court of Human Rights. After 9/11, the United States greatly expanded its use of rendition. Between 100 and 150 major terrorist suspects have been apprehended under the policy since 9/11.[18]

The U.S. rendition policy is not intended to facilitate the torture of detained suspects. Torture is against U.S. law, and government policy requires that American officials must obtain assurances from countries where detainees might be transferred that no methods contrary to international and U.S. law will be employed.

That these programs are secret does not imply that they are illegal or conducted without the cooperation of the sovereign nations through which detained individuals may transit or in which they may be temporarily detained. Secrecy protects the personnel who transport these potentially dangerous prisoners. It also prevents terrorists from gaining any operational advantage by knowing who has been recently detained.

Finally, there is no credible evidence that renditions have been used in conjunction with "secret prisons" in Eastern Europe. There is no clear operational need for such prisons. The United States openly maintains a long-term detention facility at Guantanamo Bay that is run in accordance with U.S. law and abides by relevant international treaties.

Significantly, British Prime Minister Tony Blair has strongly supported U.S. statements that the policy of rendition has not been used to facilitate the torture of terror suspects in other countries and has firmly rejected calls for a British parliamentary inquiry. In a response to the House of Commons, Blair stated:

> Let me draw a very clear distinction indeed between the idea of suspects being taken from one country to another and any sense whatever that ourselves, the United States or anyone condones

14. Council of Europe Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions in Council of Europe Member States," p. 12, January 22, 2006, at *http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf*.
15. "Alleged Secret Detentions in Council of Europe Member States," p. 15.
16. "Alleged Secret Detentions in Council of Europe Member States," p. 6.
17. For background on the history of rendition by the United States, see "A Brief History of Renditions," The Associated Press, December 27, 2005.
18. Figures cited by The Associated Press, December 27, 2005.

> the use of torture. Torture cannot be justified in any set of circumstances at all. The practice of rendition as described by Secretary of State Condoleezza Rice has been American policy for many years. We have not had such a situation here, but that has been American policy for many, many years. However, it must be applied in accordance with international conventions, and I accept entirely Secretary of State Rice's assurance that it has been.[19]

The Centralization of Power in Europe

The rendition controversy has seriously damaged the United States' working relationship with the EU in the war on terrorism. However, it should not weaken the ability of the United States to cooperate effectively with individual European nation-states, which have strongly supported U.S. efforts in the war on terrorism. Nor should it discourage the United States from continuing to use rendition, which has proved a very effective mechanism.

A key lesson that the United States should take away from the rendition debate is that the increasing political centralization of Europe poses a fundamental threat to U.S. interests. Washington must support a Europe of nation-states and stop paying lip-service to the Franco-German dream of ever-closer integration.[20] The United States works most effectively when it cooperates directly with national governments in Europe, employing a "coalition of the willing" strategy. Europe is not and never has been a united political entity, and U.S. policy must support national sovereignty in Europe. Washington's political capital in Europe must be spent not in Brussels or Strasbourg, but in the national capitals, where America's strongest allies are to be found.

Remain Firm on Rendition

Rendition has proved a highly effective tool in the war against terrorism and has pulled hundreds of extremely dangerous terror suspects off the streets. In all probability, many lives, both American and European, have been saved by this practice. The West is engaged in an epic war against Islamic extremists who will give no quarter, whether in London, Brussels, New York, or Baghdad. The policy of rendition is a response to this reality.

European Union officials and Members of the European Parliament should stop using the war on terrorism as an elaborate public relations exercise and cease wielding it as a stick with which to beat U.S. foreign policy.

The United States must continue to pursue aggressively those who threaten the security of the free world and should continue to work closely with individual European governments in the fight against al-Qaeda and other Islamic terrorist groups. Most importantly, the U.S. must resist the temptation to blunt its most effective weapons in the face of criticism from the EU, the U.N., and other supranational institutions.

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19. Tony Blair, "Prime Minister's Questions," December 7, 2005, quoted in BBC News Online, January 19, 2006, at *http://news.bbc.co.uk/2/hi/uk_news/politics/4627360.stm.*
20. For background, see Nile Gardiner, Ph.D., and John Hulsman, Ph.D., "The United States Should Not Back the European Constitution," Heritage Foundation *WebMemo* No. 668, February 16, 2005, at *www.heritage.org/Research/Europe/wm668.cfm.*

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