WebMemo
Published by The Heritage Foundation
No. 1216
September 18, 2006

Congress Should Compromise on Military Commissions

James Jay Carafano, Ph.D.

The United States has in its custody enemy combatants accused of serious war crimes. They should be brought to trial quickly under processes that both respect the rule of law and protect U.S. national security. For this to happen, Congress must sanction the trial procedure that the Administration will employ, but the Administration and the Senate Armed Services Committee differ significantly in their approaches. If the interpretation of Geneva Article 3, a contentious issue that is mostly irrelevant to trying the combatants, is left out of its legislation, then Congress will be in a good position to compromise with the Administration and authorize a trial procedure that will protect national security, ensure due process, and stand up to Supreme Court review.

Appropriate Protections

The Department of Defense 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. Usually, the only individuals to be tried, during or after hostilities, are combatants accused of war crimes. Such unlawful combatants have chosen to violate the rules of war as defined in the Geneva Conventions and so should not be accorded the full procedural protections that honorable, law-abiding soldiers receive. In their treatment, national security interests should predominate. All that unlawful combatants are due is humane treatment.

The Bush Administration was right to argue against using the Uniform Code of Military Justice (UCMJ) as a basis for authorizing military commissions. The UCMJ is a traditional legal system that puts the protection of individual rights first, ahead of accommodations for national security and military necessity. This system is not appropriate for trying the terrorists and unlawful combatants in the Defense Department's custody. Accordingly, the Administration designed a legitimate judicial process that foremost protects national security interests, while also including procedural protections to ensure due process.

The Supreme Court ruled in Hamdan v. Rumsfeld that Congress must explicitly authorize the commissions used to try alleged war criminals, and so the Administration presented its proposal to Congress. It differs in two critical respects from the Senate Armed Services Committee (SASC) bill: the application of Common Article 3 of the Geneva Conventions and defendants' access to classified evidence. These differences should be resolved quickly.

This paper, in its entirety, can be found at:
www.heritage.org/research/homelanddefense/wm1216.cfm

Produced by the Douglas and Sarah Allison Center for Foreign Policy Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

Common Article 3

A major sticking point between the Senate and the Administration is the interpretation of part of the Geneva Conventions. Common Article 3, which is "common" to the four Geneva Conventions signed in 1949, defines standards for humane treatment. Its framers intended the article's wording to be vague, recognizing that states should have wide latitude to adapt enforcement to their unique cultural, political, and strategic circumstances so that they can protect their peoples and individual human rights. The Administration seeks to nail down the interpretation of Article 3 to ensure that the methods it uses to interrogate suspected terrorists remain legitimate. Some would have the Senate legislation framed in a manner that would prohibit the president from authorizing any aggressive interrogation techniques. Neither of these approaches is appropriate. Each seeks to limit the power of future presidents to define how these standards should be interpreted in wartime.

In addition, resolving this issue is not essential to try the terrorists now in U.S. custody. The only germane issue is the interpretation of Common Article 3's requirement of "judicial guarantees which are recognized as indispensable by civilized peoples." This requires some due process, such as that which status review boards and military commissions provide. If Congress explicitly ratifies the Administration's proposed military commissions, then a majority of the Supreme Court would uphold them as consistent with the Geneva Conventions. This satisfies U.S. obligations under the Conventions.

Rules of Evidence

The Administration and SASC also differ with respect to the rules of evidence, compulsory self-incrimination, and handling classified information. The appropriate compromise is to defer to the Administration as it seeks to adopt these procedures to ensure that U.S. national security is not compromised in the course of the trials. Notably, the Administration approach includes robust appellate procedures that would allow defendants to appeal through a Court of Military Commission Review to the D.C. Circuit Court and, by certiorari, to the Supreme Court. This appeal process is an adequate guarantee that procedures used to withhold classified information from defendants are not abused.

The Way Forward

Establishing military commissions to try terrorists should not be a battleground for debating the limits of the president's power in interpreting Common Article 3. In addition, Congress should give deference to the Administration in prescribing rules of evidence to protect national security if this is combined with a legitimate and robust appellate process to protect human rights. Congress should resolve these issues and move quickly to complete legislation so that the unlawful combatants in U.S. custody can be tried and their statuses finally resolved.

For background on this topic, see James Jay Carafano, Ph.D., "The Detention and Trial of Unlawful Combatants," Heritage Foundation *Lecture* No. 954, July 21, 2006.

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