

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

Treatment of Detainees and Unlawful Combatants: Selected Writings on Guantanamo Bay

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.

First published as Heritage Foundation WebMemo No. 1535, July 5, 2007.

-
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.*