

CHAPTER 8

The Detention and Trial of Unlawful Combatants

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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 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).

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

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 is 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 Conventions⁵ 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 be 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).

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

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.

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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*.