

CHAPTER 9

The Supreme Court Guantanamo Ruling: How the Administration Should Respond

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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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