OPPORTUNITY 08

Independent Ideas For Our Next President

A Legal Framework for Detaining Terrorists

Enact a Law to End the Clash over Rights

Benjamin Wittes and Mark Gitenstein

Summary

Six years after the September 11 attacks, the United States still lacks a stable, legislatively established policy for detaining suspected foreign fighters captured in the war on terrorism. American detention policy has eroded this country's international prestige and public image, embroiled its military in continuous litigation, and cast a pall of legal uncertainty and impropriety over the detention of several hundred suspected enemy fighters. (The Supreme Court will soon take up a new round of litigation over detainees and may well undermine further the detention system the current administration has put in place.)

Specific elements of a long-term detention regime that should be supported by the next President include:

- An impartial decision-maker in charge of making status determinations
- Basic procedural protections for detainees, including the assistance of counsel, the ability to see and challenge a reasonable summary of the government's evidence, and the ability to call witnesses
- A written, public opinion explaining the basis for each status determination, and review of such determinations by federal civilian courts
- For those deemed properly subject to detention, some form of regularized ongoing judicial review to ensure that continued detention is necessary and appropriate.

A variety of possible structures could accommodate these elements. What is essential is that this system be crafted in statutory law, thereby reflecting the considered judgment of the Congress of the United States—not merely the unilateral will of the executive branch or the judiciary's response to executive policy. As the Supreme Court has pointed out on several occasions, government decisions are most credible when all three branches agree.

Developing rules for detaining suspected enemies engaged in unconventional warfare against the United States and its interests represents the core challenge facing American legal policy in the war on terrorism today. The next President should work with Congress to assure that those rules conform to constitutional principles and fundamental American values, are as widely accepted as possible both domestically and abroad, and buttress rather than undermine the global campaign against terrorism and extremism.

Context

The Debate over Detentions

Debate among presidential candidates, opinion leaders, foreign policy experts, and judicial commentators over the treatment of Al Qa'eda and Taliban fighters—so called "unlawful enemy combatants"—has been extensive and spirited, but unfortunately it has avoided the core of the problem: *what U.S. policy toward detaining foreign combatants* ***should*** *be.*

For several years, the detention debate has been playing out in the federal court system and in Congress, and, more recently, in the 2008 presidential campaign. The origin of the debate was a series of executive actions by the Bush Administration to create special detention procedures and facilities, including a detention center at Guantanamo Bay Naval Base in Cuba. These actions prompted rebukes by the Supreme Court, which, in turn, have led so far to two rounds of legislation: the Detainee Treatment Act of 2005 ("DTA," *P.L. 109-148*) and the Military Commissions Act of 2006 ("MCA," *P.L. 109-366*).

The DTA followed two Supreme Court decisions handed down in June 2004: *Hamdi v. Rumsfeld*, an 8-1 decision in which the Supreme Court held that detainees who are U.S. citizens are entitled to certain procedural rights; and *Rasul v. Bush*, a 6-3 decision holding that the Guantanamo Bay facility does not lie, as the administration had contended, beyond the jurisdiction of the federal courts. In addition to addressing jurisdiction, the DTA also contained a provision sponsored by Senator John McCain (R-Ariz.), requiring that interrogations of detainees by the military at Guantanamo Bay and elsewhere conform to techniques prescribed in the Army Field Manual, thus precluding inhumane methods.

The MCA came in response to the 2006 *Hamdan v. Rumsfeld* decision, in which the Supreme Court decided 5-3 that the military commissions established by the administration violated the Uniform Code of Military Justice and the Geneva Convention on the treatment of enemy combatants. The MCA establishes procedures for using military commissions to try detainees for war crimes. Both the DTA and the MCA seek to erase the jurisdiction the Court had asserted to hear *habeas corpus* cases brought by or on behalf of detainees—a subject the Court will again take up in the current term.

The Administration's Position

The Bush Administration has correctly insisted on the authority to detain foreign fighters outside of the four corners of the American criminal justice system. The current conflict has enough in common with traditional warfare to warrant giving the executive branch a detention authority, based in part on the power to hold enemy soldiers in a conventional military conflict.

The administration has taken this analogy too far, however. The war on terrorism is not a conventional war. Too much factual uncertainty attends the status of individual detainees to permit their long-term detention based on procedures created solely by the executive branch and lacking in basic fairness to the accused, who may face a lifetime of incarceration. The proper detention regime for the war on terrorism is a

hybrid of different legal structures, drawing on elements of the laws of war and the criminal law and tailored to the unique threat posed by global catastrophic terrorism. The system should produce decisions that have credibility both with the American public, to preserve support for the broader effort to combat terrorism, and with foreign audiences, to bolster support for—rather than zealous opposition to—American anti-terrorism policy.

Arguments Raised About Guantanamo and Habeas Corpus

As this controversy continues, presidential candidates have focused on two questions: whether to shut down the Guantanamo Bay facility, and whether to restore *habeas corpus* for detainees held there. All of the Democratic candidates for president would close the facility, and all of those who have spoken to the issue would restore *habeas corpus* jurisdiction as well. On the Republican side, all but two of the candidates (McCain and Representative Ron Paul of Texas) would keep the facility open, and none has argued for restoration of *habeas* rights to detainees.

The Guantanamo issue turns largely on the public diplomacy impact of the facility, and of alleged abuses there. Illustrating the Democratic viewpoint, Senate Foreign Relations Chair Joseph Biden (D-Del.) has said Guantanamo ". . . has become the greatest propaganda tool that exists for recruiting terrorists around the world." Former Arkansas Governor Mike Huckabee has summed up the prevailing Republican view by observing that, "[i]f we're going to make a mistake right now, let's make it on the side of protecting the American people."

Many proponents of closing the facility would transfer the detainees to high-security facilities within the United States, such as the military detention facility at Fort Leavenworth, Kansas. An amendment to the 2008 Defense Authorization Act proposed by Senators Dianne Feinstein (D-Calif.) and Tom Harkin (D-Iowa) would require the Administration to do just that.

Advocates for restoring *habeas* rights for detainees argue that *habeas corpus* is central to American law and life. Senator Chris Dodd (D-Conn.) has asserted, "To deny this

right not only undermines the rule of law, but damages the very fabric of America. It is not who we are, and it is not who we aspire to be." By contrast, Representative Duncan Hunter (R-Calif.) has argued that restoring *habeas* jurisdiction "will create an avalanche of litigation that will bring our detainee policy to a grinding halt."

Distractions from the Real Issue

The arguments over both Guantanamo and *habeas corpus* skirt the real issue. Granted, whether to accord *habeas* rights to detainees nabbed and held abroad, and where to hold such people under military control, are important questions. But, they are not the central question at hand; indeed, they are distractions from the central question. Their prominence in the campaign is a matter of a tail—or pair of tails—wagging the dog. The dog is the detention policy itself.

The role of *habeas* review of detentions is significant, after all, only in the absence of a more cohesive mechanism for evaluating the legality of the detentions. (*Habeas corpus* is the ancient writ by which a court can review the lawfulness of an incarceration and free a prisoner whose imprisonment cannot be justified.) In the criminal justice system, *habeas* review is only a stopgap against injustice. It is not a front-line defense. An inmate brings a *habeas* case in our country only after trial, conviction, and the exhaustion of all appeals. And, only after state-level *habeas* review fails to provide relief may an inmate take up the matter in federal court. What's more, because the criminal justice system is so fully developed that our political system highly regards its integrity, courts conducting *habeas* review treat its results with great deference—disturbing them only when substantial constitutional error plagues the outcome, and sometimes not even then.

In the context of war on terrorism detentions, however, *habeas* has perversely become the principal avenue of judicial review. This has happened, not because *habeas* lawsuits are the most sensible initial check on administrative detention decisions, but rather because a viable front-end mechanism does not exist. The administration initially declined to develop a front-end mechanism at all, and, in response to adverse court rulings, developed only a cursory one, which courts understandably distrust.

Specifically, detainees now have their status reviewed by a Combatant Status Review Tribunal (CSRT), which decides whether they have been properly determined to be unlawful enemy combatants. CSRTs' judgments are made with the detainee permitted to contest only the sparest summary of the evidence against him and without the aid of a lawyer, although decisions may be appealed to a federal appeals court.

Habeas review of detentions has been an attempt on the part of the courts to fill the void, but, ironically, has filled it with a system of judicial review far more disruptive than one the administration could obtain legislatively. Because the law is still very much in flux, courts do not know what law to apply, the jurisdiction of the courts themselves is hotly contested, and *habeas* lawyers are busily attacking CSRT procedures before appeals have been exhausted. The administration, meanwhile, has tenaciously sought to eliminate *habeas* review of Guantanamo detentions, but has not created a system in which the public, the international community, and the courts have confidence. The result is that commentators and candidates are spending a lot of time debating the role of *habeas corpus* within the detention system without discussing the makeup of the system itself.

The debate over Guantanamo likewise skirts the core of the problem. Admittedly, the public diplomacy problem is real. Rightly or wrongly, Guantanamo has become a symbol around the world of injustice and excess in America's response to terrorism. But, closing Guantanamo will not fix this problem. Many of the detainees cannot simply be released or charged, as many critics have contended they should be. Some are sworn enemies of the United States committed to fighting it militarily, although they have committed no crime. Others may have committed crimes, but the crime cannot be proved in a traditional courtroom, either because the evidence is too thin or because it was obtained by unsavory means. These people may be too dangerous to release, and the laws of war do permit long-term detention of military enemies.

Address the Core Questions

One way or another, the United States is going to be holding some number of Al Qa'eda and Taliban fighters outside the criminal justice system for some time to come.

So, if the military closes the detention operation at Guantanamo, it will simply have to recreate it somewhere else. As long as there is no accepted procedure for making detention decisions, the public diplomacy problem that plagues the base will continue to plague any future detention site—which will become, in the public mind, Guantanamo by another name. Debating Guantanamo in the absence of a larger debate about detention policy is really an exercise in debating the setting for a policy in lieu of debating the policy itself.

Simply put, if America puts the underlying system right, the problems of *habeas corpus* and Guantanamo will take care of themselves. *Habeas* will, one way or another, prove a non-problem—either because it will not be necessary at all or because it will not be intrusive. Guantanamo will either grow less controversial as detention policy improves or it can be closed and a new facility opened without the taint of its history. By contrast, if America fails to get the system right, neither restoring *habeas* rights nor closing Guantanamo will compensate for the failure. One step will merely inject judges into the confusion; the other will require the costly construction of a new facility and movement of detainees. *The right approach is to create the appropriate system first and then figure out what role* habeas corpus *and Guantanamo should play within it.*

Developing rules for detaining suspected enemies engaged in unconventional warfare against the United States represents the fundamental challenge facing American legal policy in the war on terrorism today. While problems such as interrogation techniques, the treatment of detainees, the CIA's program of secret prisons, and extraordinary rendition are vital to address as well, they are ancillary issues, which policy-makers cannot resolve without first taking on the core questions: who can be detained, for how long, under what rules, what are the detainee's rights under these rules, and what role should the courts play in overseeing detentions?

An Administrative Detention Law Is Necessary

Balancing Civil Liberties and Wartime Needs

The detention of Taliban and Al Qa'eda fighters presents difficult questions to a democracy that values civil liberties and the rule of law yet wishes to prevail in a long-term conflict with irregular forces of extreme violence. Indefinite detention, even of non-citizens, runs counter to foundational notions of what this country stands for. The conflict between basic American values and indefinite detention energizes, as it should, the controversy over *habeas corpus* rights of detainees at Guantanamo.

But, the issue is complicated. Our legal system tolerates indefinite detention for a number of purposes, including protecting the U.S. population from aliens the government does not wish to admit but who cannot be returned home, preventing the dangerously mentally ill or sexually deviant from injuring people in the community, and isolating individuals with potentially fatal communicable diseases. Further, the concept that foreign fighters can be held indefinitely during times of war is incontrovertibly established in international and constitutional law. The Third Geneva Convention specifically authorizes and regulates the detention of uniformed military captives, who can lawfully be kept off the field of battle for the duration of hostilities.

Terrorists Are a Unique Case

The problem is that the Guantanamo detainees, whom the Administration terms "unlawful enemy combatants," do not fall within the Geneva Convention definition of "prisoners of war." They are not members of a uniformed army with a clear hierarchy of command. Rather, like saboteurs, they infiltrate the civilian community and engage in violence against non-combatants—activity that often meets the definition of "war crimes." Such forces, under the laws of war, are also subject to detention for the duration of the hostilities, assuming they can be identified; but they forfeit the generous protections afforded to POWs.

The administration argues that the Geneva protections should not extend to fighters who have no intention of reciprocating. Taliban and Al Qa'eda, after all, do not apply

those rights to their detainees, whom they have been known to behead. In almost every way, rather, they flout the rules of warfare—at great peril to civilians.

The United States' refusal to give such people the protections due to prisoners of war is not new. Although President Carter submitted to the Senate a protocol to the Third Geneva Convention that would have treated many members of terrorist groups as prisoners of war, the Reagan Administration withdrew the protocol, arguing that this erosion of the line between honorable soldiers and terrorists "would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves." The New York *Times* and Washington *Post*, among others, sided with the Reagan Administration.[1]

The paradox is that, precisely because terrorists flout the rules of warfare and make themselves harder to distinguish from civilians when captured, they necessitate a level of due process that conventional forces, which make no secret of their status as belligerents, do not require. The question is what sort of process might identify these unlawful combatants accurately and with public credibility. The Geneva Conventions require only that, in cases of doubt, all individuals receive review by a "competent tribunal"— historically, cursory field panels that provide few procedural protections. But such panels are a bad fit with the war on terrorism. In many of these cases, the factual issues are too complicated, the lines between civilian and combatant too hazy, the duration of the conflict too uncertain, and the consequences to the liberty of individuals too vast.

Congress therefore needs to create new statutory procedures for handling "unlawful enemy combatants" of the Guantanamo type. The procedures must not be subject to the whim of the executive. Instead, they should be blessed by all three branches of government, reflecting the unified will of the American political system. These processes need not include all the protections of a criminal trial. But, they need to be

[1] *See* "Denied: A Shield for Terrorists," New York *Times*, February 18, 1987, at A22; "Hijacking the Geneva Conventions," Washington *Post*, Feb.18, 1987.

considerably more robust than the process applied to prisoners in a conventional military conflict or the process applied to detainees today at Guantanamo.

The Detention Law Should Specify Safeguards

Defining Combatants

The threshold question for Congress is how to define the universe of people subject to detention. At a minimum, this group includes overseas fighters who are not members of any uniformed military but have engaged in hostilities against the United States or its allies. It also should include individuals who have purposefully planned, or knowingly and materially supported, those hostilities.

It is important to exclude individuals taken into custody within the United States or in Iraq or any other theater of war where the United States applies the Geneva Conventions to detentions, either by law or policy. The new process should be limited to the types of individuals currently in custody at Guantanamo—that is, long-term detainees held as part of the global conflict with Al Qa'eda and its affiliates.

Assuring Due Process Protections

This detention system will not have all the attributes of the criminal justice system, but it must have some, and it must create an adversarial process whereby detainees have a meaningful opportunity to dispute and contest the evidence against them. Key elements should include the following new features:

- ***Impartial finder of fact.*** The presiding officer should be a judicial officer, either a military or civilian judge. (Currently, CSRT panels consist of three military officers, none necessarily trained in law and all part of the normal chain of command.)
- ***Right to Counsel.*** The detainee should be represented by competent military counsel. (Under current rules, detainees may be assisted by a "personal representative"—a non-legal military officer who has no obligation to keep

conversations with the detainee confidential and who is not charged to represent the detainee's legal interests rigorously.)

- ***Access to Evidence.*** Counsel for the detainee should be able to see the evidence against his or her client, including classified information and all exculpatory materials. And, the detainee personally should be given a summary of the prosecution's evidence, specific enough to allow a fair opportunity to respond to it.
- ***Full and Fair Hearing.*** The detainee should be able to present evidence, obtain witnesses, compel testimony, cross-examine government witnesses, and respond to the government's evidence admitted against him. (The CSRTs have never permitted a detainee to hear testimony by a government witness, have denied all detainee requests to question witnesses not held at Guantanamo, and have denied detainees requested access to unclassified evidence 40 percent of the time. Only 10 percent of detainees have presented any evidence at all to their CSRT. The government itself has never produced a witness during the unclassified portion of a CSRT. In most cases, rather, it has relied solely on classified evidence. What's more, it has adopted a definition of classified information so broad as to include the interrogation of the detainee himself—meaning that detainees in CSRTs do not have access to their own interrogations.[2])
- ***Exclusion of Illegally Obtained Evidence.*** The law should bar the tribunals from considering statements obtained by torture or conduct just short of it. (Although current interrogation rules at Guantanamo do not permit coercion, some detainees are being held based on statements previously elicited under coercion, including statements obtained in a CIA detention program in which coercive interrogation was a central objective.)
- ***Findings of Fact and Conclusions of Law.*** The process should result in a reasoned, written document that explains the detention judgment and is subject to review by the civilian courts of the United States.

[2] *See* Mark Denbeaux, *et al.*, *No Hearing Hearings: An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantanamo*. Seton Hall University School of Law, Nov. 17, 2006. Available at: http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

- ***Periodic Review.*** Some form of ongoing status review must ensure both that the continued detention of each enemy combatant is necessary and that the conditions of confinement are humane and lawful. Review decisions should be subject to appeal, but judicial review should be deferential. Detainees should have help in the process from their lawyers. And, the review process ought to be codified in law.[3] (Currently, detainees can obtain annual review by Administrative Review Boards to determine if they remain too dangerous to either release or transfer to their home governments. In two years of this process, review boards have so far recommended 14 releases and 174 transfers.)
- **Habeas Corpus.** *Habeas* review should indeed be preserved for detainees. It should, however, be applied as it is in criminal cases today—only after the process is complete and with considerable deference to the judgments that precede it.

Weighing Two Judicial Models

Two broad models are worth considering to create such a system. First, a *National Security Court* would be a specialized federal court responsible for making detention judgments under the new law.[4] Such a court would be staffed by federal judges, making the judiciary the first-line decision-maker in these cases. Like the special court that authorizes surveillance in national security cases, it would have the advantage of maximizing the legitimacy of detention decisions, as federal court judgments enjoy unique credibility, domestically and abroad.

A specialized court approach would put detentions in the hands of judges with all the prestige of the federal court system, yet with particular expertise in applying rules that protect classified information and national security concerns. The disadvantage of this model is that it would profoundly change the existing system, disrupting current

[3] We do not attempt to discuss here the specific substantive standard that should be applied for purposes of determining whether individual detainees pose a sufficient ongoing threat to national security to justify continued detention. Nor do we discuss what enhanced procedures ought to apply to military commissions when detainees are tried for alleged crimes.

[4] The idea of a national security court has been advanced by a politically diverse array of legal scholars, including Harvard law professor Jack Goldsmith, Georgetown law professor Neal Katyal, and former terrorism prosecutor Andrew McCarthy.

operations and requiring civilian judges to make military decisions, rather than merely review them.

The other alternative, *bolstered CSRTs*, is reflected in legislation proposed by Senate Armed Services Committee Chair Carl Levin (D-Mich.).[5] This approach would beef up the procedural rights a detainee would receive from the CSRTs, making the existing military panels more court-like but leaving the first-line judgments in the hands of the military justice system. The role of the federal courts would be to review these judgments in much the same way these courts routinely review actions by administrative agencies.

This model would harmonize more readily with current practices, as it builds on a system that already exists, under which CSRT judgments may be appealed to the U.S. Court of Appeals for the District of Columbia Circuit. It also would preserve the executive's authority over military matters. The major disadvantage of this model is that, by keeping judges at a distance, it might garner less public and international legitimacy than would a national security court. Its similarity to a discredited prior policy also might carry the taint of executive detention with a judicial rubber stamp.

Making the Legislative Decision

Deciding between these two models is less important, ultimately, than the substance of the rules within the chosen model. The national security court approach has worked effectively in the surveillance arena for 30 years and could be tailored to the detention arena. The military justice system, which provides first-rate tribunals for criminal trials of American service personnel every day, surely could be adapted to the detention regime as well.

[5] *See* Section 1023 of the National Defense Authorization Act for Fiscal Year 2008 (S. 1547).

Either approach would work, if the process is adversarial, fair, enshrined in statute to reflect the judgment of the American political system, and recorded in each case in a complete, written, publicly accessible opinion explaining the basis of the detention decision. With these attributes, either model would dramatically improve America's legal and public diplomacy standing yet still permit the lengthy detentions of terrorists.

There is little doubt that the Supreme Court would uphold such a detention regime. In *Hamdi*, a majority of justices considered even the detention of an American citizen to be clearly within the purview of the president's war powers. "We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they are captured, is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use," wrote Justice Sandra Day O'Connor for a court plurality. O'Connor's opinion faults the military for not giving the detainee an adequate way to determine his legal status. But, the process she labels adequate is far less generous procedurally than the approach sketched here.

With the recommended system in place, there will be no reason for the current administration, or its successor, to fear *habeas* review. Such review will merely constitute a duplicative check, which may create a considerable amount of litigation but should operate with maximum deference to the decisions of the tribunals making detention judgments. It will serve merely as a last line of defense against egregious system failure, and not—as it is now—a first-line challenge to unstable and shifting rules in the face of weak factual records and an uncertain combination of international and domestic law.

Concluding Observations

As a practical matter, the United States has no alternative to some form of administrative detention. Numerous detainees now at Guantanamo—and those likely to be captured in future—cannot realistically be put on trial, either because they have not committed crimes or because the main body of evidence is, for one reason or another, inadmissible. These people, however, may be too dangerous to set free. Across a number of areas of law—mental illness, warfare, immigration—the courts have approved carefully crafted schemes that permit non-criminal detentions in order to protect the public. The war on terrorism requires its own scheme, tailored to its particularities.

The Bush Administration's insistence on deriving this scheme purely from the laws of war, without involving the other branches of government, has resulted in a confused, widely criticized, poorly justified, and sometimes unfair system for which Congress has so far needed to take no responsibility. It is long past time for Congress to take ownership of this problem and to create the rules—rules that both authorize detentions and put limits on them—that will govern Guantanamo or whatever facility replaces it. Candidates for President should advocate this reasoned middle way.

About the Author and the Project

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