

Enemy Combatants: National Security vs. Due Process

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Enemy Combatants:
National Security vs. Due Process

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to

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During the course of the Global War on Terrorism (GWOT), several hundred foreign nationals suspected of terrorism or supporting terrorism have been captured by United States (U.S) forces and their allies. Many of them are being held at the U.S. Naval Base in Guantanamo Bay, Cuba. U.S. Government officials designated these individuals as “enemy combatants” or “unlawful combatants,” who are not entitled to the same protections as a prisoner of war under the 1949 Geneva Conventions.¹ The procedures used to determine that these individuals were enemy combatants were subject to numerous legal challenges and subsequently modified by the Bush Administration. However, questions remain as to its constitutionality. Nevertheless, the current modified process already preserves the balance between due process rights and national security interests, and must be protected against future challenges.

The Modified Enemy Combatant Process

One week after the terrorist attacks, the U.S. Congress passed the *Authorization for Use of Military Force* (AUMF), giving the President George W. Bush authorization “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism

against the United States by such nations, organizations, or persons.”² Citing the AUMF, the Constitution, and the laws of the U.S., President Bush issued the Military Order of 13 November 2001, the basis for detaining enemy combatants³.

The order established the policy that foreign nationals suspected to be members of al Qaeda or other terrorist organizations seeking to do harm to the U.S. or anyone who supports such organizations would be detained and *may* be tried by military commission. The individuals were not entitled to be tried by a military commission. Furthermore, the enemy combatants had no guarantee of timely due process. The detainees were prohibited from seeking relief outside the jurisdiction of a military commission.⁴ The result was that foreign-national detainees could be held indefinitely without recourse to protest their innocence.

The Supreme Court recently ruled that the initial process did not satisfy the due process requirements of the Constitution or U.S. Law.⁵ In the case of *Rasul v. Bush* the Court ruled that foreign nationals who wish to dispute the legality of their designation as enemy combatants can do so by filing a *habeas corpus* petition in the U.S. court system. The Court did not address the issue of what other proceedings might be necessary to satisfy due process requirements.⁶ In a related case, *Hamdi v. Rumsfeld*, the Supreme Court held the President could hold

U.S. citizens as enemy combatants, but U.S. citizens were entitled to notification as to the basis for their designation as an enemy combatant and the opportunity to challenge this basis before an impartial fact finder. However, the Court also said that "an appropriately authorized and properly constituted military tribunal" could serve as a sufficient venue for such challenges. The Court specifically referred to the procedures contained in U.S. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees*, as an acceptable alternative.⁷

The Bush Administration and the U.S. military refined the process in response to the Court's rulings by adding two different levels of review for enemy combatants who are not designated to be tried by military commission. Less than one week prior to the Supreme Court's rulings, the Department of Defense announced the establishment of the Administrative Review Board (ARB). The ARB is an annual review to determine if an enemy combatant remains a threat or a source of intelligence. The enemy combatant is given sufficient advance notice to prepare with the assistance of a military officer and translator for the ARB, where he presents his case for release. The detainee's home state and relatives are invited to submit information on his behalf. The ARB makes a recommendation to a

civilian official, who decides to release, transfer, or continue the detention.⁸

Additionally, in direct response to the Supreme Court's rulings, the Deputy Secretary of Defense, Paul Wolfowitz, issued the order creating the Combatant Status Review Tribunal (CSRT). The CSRT provides foreign national detainees with notice of the basis for their classification as enemy combatants and gives them the opportunity to challenge the classification. The detainees are notified of their right to a personal representative and a translator to assist them with the process, as well as their right to a *habeas corpus* review in a federal district court to challenge the CSRT's decision. The detainee is present, except during deliberations and when classified material is involved. The detainee can present evidence and call witnesses. The detainee may testify, orally or in writing, but cannot be forced to do so. The CSRT makes its determination based on the facts presented with a rebuttable presumption in favor of the government.⁹

Why the Process is Balanced

As noted above, the Supreme Court's ruling in *Rasul* gave foreign national enemy combatants the right to challenge their designation by seeking a writ of *habeas corpus* in federal district court pursuant to 28 USC § 2241, the federal *habeas corpus* statute. However, the Court did not address the issue of

what other proceedings would be necessary to resolve a detainee's claim of innocence.¹⁰ The Court in *Hamdi* did suggest that a military tribunal created under the guidelines of U.S. Army Regulation 190-8 could be used as an appropriate forum for detainees to challenge their designation as enemy combatants.¹¹ The creation of the CSRTs and ARBs meets the requirements of due process expressed by the Supreme Court.

In announcing the creation of the CSRT, the Department of Defense specifically cited the rulings of the Supreme Court and stated that "[t]he procedures for the Review Tribunals are intended to reflect the guidance the Supreme Court provided in its decisions"¹² The CSRT, like the tribunal in the Army regulation, is composed of three officers with a judge advocate acting as the recorder. It provides the detainee with notice why he is being detained, gives the detainee an opportunity to challenge the basis for his detention, and the record of the CSRT is subject to review by the convening authority's staff judge advocate. One significant difference is that the tribunal under Army regulations does not provide the detainee with representation. Another difference is that the CSRT order allows the detainee to challenge the determination in federal district court.¹³ Based on these factors, the CSRT's procedures satisfy the due process requirements established by the Supreme Court in *Hamdi*.

However, the government added another opportunity for the detainee to be heard by creating the ARB. ARB procedures ensure that the due process rights of foreign national enemy combatants are protected. The ARB is a guaranteed annual review provided to detainees previously determined to be enemy combatants. This goes beyond what the Supreme Court held to be necessary in its rulings.

Critics of these procedures claim that the use of military tribunals will not provide a fair trial because the tribunal members are military personnel. Critics believe that the trials of enemy combatants should be conducted in the civilian federal court system.¹⁴ The Supreme Court stated in *Hamdi* the use of military tribunals to hear challenges by enemy combatants to be an appropriate venue.¹⁵ The CSRT procedures are based on the Army Regulation 190-8 and constitute an appropriate venue.

Even though the order establishing the CSRT provides a rebuttable presumption in favor of the government, the Supreme Court held in *Hamdi* that such a presumption was valid, so long as the enemy combatant could refute the evidence to ensure the detainee was not held erroneously. The Court also stated that "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the

Government in such a proceeding.”¹⁶ Thus, the fact that the Federal Rules of Evidence are not applicable to the CSRT does not make it an invalid venue. These allowances are part of the balancing act needed to protect national security in a time of war. Therefore, the argument that these proceedings can only take place in the civilian federal court system carries very little weight and is inconsistent with the Supreme Court’s intent.

Another issue critics have with the enemy combatant procedures at Guantanamo Bay is the indefinite length of detention.¹⁷ The Supreme Court addressed this issue in *Hamdi*. The Court found that so long as U.S. forces remain engaged with terrorist forces in Afghanistan, enemy combatants captured there could be detained pursuant to the AUMF. The Court cited both U.S. law and international law to support its position. As the Court explained, “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”¹⁸

The President’s ability to detain enemy combatants who pose a threat to national security or who have the ability to provided assistance to the military in the war on terrorism is a necessary part of balancing individual due process rights with

national security interests. On the whole, the procedures implemented follow the Supreme Court rulings and balance due process requirements with national security interests. Steps must be taken to protect the process from future legal challenges.

Protecting the Process

The Supreme Court's rulings highlighted two issues that could impact enemy combatant procedures and require immediate action. First, the AUMF was not a formal declaration of war, bringing into question the President's authority to detain terrorists as enemy combatants and use military tribunals. Second, the Court's opinions indicated that if U.S. forces withdraw from Afghanistan, then enemy combatants captured there must be released.¹⁹ It is likely that a terrorist released at the end of hostilities will pose a serious threat to resume terrorist activities. The GWOT is not a conventional war between nation states where repatriated enemy prisoners return to their everyday lives. Terrorists like al Qaeda are motivated by an ideology of hatred not patriotism. This hatred will continue after military actions in Afghanistan have concluded.²⁰

Two steps need to be taken to prevent judicial interference in the GWOT based on these issues. First, Congress must enact legislation explicitly authorizing the detention of enemy combatants. Congress should also establish procedures for enemy

combatants to challenge their designation by adopting the procedures currently used. Appeals should be made through the Court of Appeals for the Armed Forces, a court of civilians who are experienced in military matters.

Second, coordinate with the new government in Afghanistan to return enemy combatants to Afghanistan as soon as it is practical. Before this happens, the government of Afghanistan must be capable of taking custody of the enemy combatants. This issue must be addressed before the judiciary steps in and enemy combatants are released and resume terrorist activities. The language of the Supreme Court's rulings indicates that it is merely a matter of time before the U.S. Government will have to address this issue. It is in the interests of national security to be proactive and develop a plan for the long term handling of enemy combatants.

These steps would allow the Bush Administration and the military to conduct the GWOT without judicial interference, while at the same time protecting the due process rights of foreign national enemy combatants. This allows the U.S. to maintain the moral high ground. Maintaining the moral high ground is important not because of international opinion, but because it is the right thing to do. Setting aside the principles on which this country was founded to fight terrorism is giving into the terrorists.

Conclusion

The original procedures for reviewing a foreign national's designation as an enemy combatant were in violation of due process as defined by the Supreme Court. The current process is constitutional because it incorporates the procedures recommended by the Court and an additional level of review. It achieves the requisite balance between an individual's right to due process and national security interests. To prevent future judicial interference and maintain the balance, the government must codify the process and it must prepare for the long term treatment of enemy combatants. Without this balance, U.S. credibility will suffer, making it more difficult to fight the war on terrorism. The U.S. must hold true to the ideals on which it was founded. Otherwise, the terrorists will win.

Notes

¹ U.S. Department of Defense, "Guantanamo Detainee Process" Fact Sheet, Aug 2004, <<http://www.defenselink.mil/news/Aug2004/d20040818GTMOdetProc.doc>> (22 December 2004) (Defining an enemy combatant "as an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."); Michael C. Dorf, "What is an 'Unlawful Combatant,' And Why It Matters: The Status of Detained Al Qaeda And Taliban Fighters," Jan. 23, 2002, <<http://www.writ.findlaw.com/dorf/20020123.html>> (22 December 2004).

² Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224.

³ Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

⁴ *Id.* at 57,835-57,836.

⁵ See *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

⁶ *Rasul*, 124 S. Ct. at 2698-99.

⁷ *Hamdi*, 124 S. Ct. at 2639-41, 2648-52.

⁸ Designated Civilian Official Department of Defense, memorandum for distribution, subject: "Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba," 14 September 2004; U.S. Department of Defense, "Navy Secretary to Oversee Enemy Combatant Admin Review," 23 June 2004, <<http://www.defenselink.mil/releases/2004/nr20040623-0932.html>> (22 December 2004).

⁹ Deputy Secretary of Defense, memorandum for the Secretary of the Navy, subject: "Order Establishing Combatant Status Review Tribunal," 7 July 2004. Cited hereafter as Deputy Secretary of Defense, "Order." Secretary of the Navy, memorandum for distribution, subject: "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo By Naval Base, Cuba," 29 July 2004. Cited hereafter as Secretary of the Navy, "Implementation." U.S. Department of Defense, "Combatant Status Review Tribunals" Fact Sheet, July 2004, <<http://www.defenselink.mil/news/Jul2004/d20040707fact-sheet.pdf>> (22 December 2004). Cited hereafter as DoD, CSRT Fact Sheet, July 2004.

¹⁰ See note 6.

¹¹ See note 7.

¹² DoD, CSRT Fact Sheet, July 2004.

¹³ U.S. Army, Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Washington, D.C.: Department of the Army, 1 October 1997), § 1-6; Deputy Secretary of Defense, "Order;" Secretary of the Navy, "Implementation."

¹⁴ "Update: Detainee rights," *Issues and Controversies*, Facts.com (30 Jul 04).

¹⁵ See note 7.

¹⁶ *Hamdi*, 124 S. Ct. at 2649; Deputy Secretary of Defense, "Order."

¹⁷ "Update: Detainee rights," (30 Jul 04).

¹⁸ *Hamdi*, 124 S. Ct. at 2639-42.

¹⁹ See *Rasul* and *Hamdi*.

²⁰ Dorf, "What is an 'Unlawful Combatant,'" <<http://www.writ.findlaw.com/dorf/20020123.html>> (22 December 2004).

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