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Dispelling Misconceptions: Guantanamo Bay Detainee Procedures Exceed the Requirements of the U.S. Constitution, U.S. Law, and Customary International Law

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Human rights activists, liberal media outlets, and Bush Administration critics have derisively characterized the U.S. military detention facility at Guantanamo Bay, Cuba, as the “gulag of our times,”¹ a “legal black hole,”² and a “stain on our nation’s character.”³ One need not dig too deeply into the facts, however, to discover that the detainees held at Guantanamo receive the most systematic and extensive procedural protections afforded to foreign enemy combatants in the history of armed conflict, including unprecedented access to legal representation and U.S. courts. In order to unearth the reality from the layers of hyperbole, half-truths, and outright lies that have been heaped upon Guantanamo Bay, this paper corrects a few of the more persistent misconceptions relating to the situation.

Misconception #1: The U.S. must either put Guantanamo Bay detainees on trial or release them.

Certain Members of Congress and parts of the self-described “international legal and human rights community”⁴ labor to spread the mistaken notion that the United States has only two viable and legitimate options for dealing with the detainees held at Guantanamo Bay: (1) charge the detainees with crimes and then try them or (2) simply release them from U.S. custody.⁵ There is, however, at least one other option, which just happens to have the most venerable pedigree in U.S. history, that the Guan-

tanamo critics ignore: hold the detainees until the end of active hostilities.

As of May, approximately 380 detainees were being held at Guantanamo Bay.⁶ Only about 60 to 80 of them are expected to stand trial before military commissions for their individual criminal acts.⁷ This list includes Khalid Sheikh Mohammed, the confessed mastermind of the September 11 attacks, and Ramzi Bin al-Shib, the so-called 20th hijacker. The remaining detainees are being held not because of any alleged criminal conduct but because (1) they fought against U.S. and Coalition forces in Afghanistan and (2) U.S. special military tribunals have determined that they are too dangerous to be released back into the world and would likely rejoin the fighting against U.S. and Coalition forces.⁸

The United States is engaged in an ongoing armed conflict in Afghanistan and therefore has no obligation—legal, moral, or otherwise—to release captured enemy soldiers so that they may return to the battlefield. Indeed, the Geneva Conventions require that combatants be released from custody

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only “after the cessation of active hostilities.”⁹ The U.S. Supreme Court recently affirmed the principle that the detention of enemy combatants is a “fundamental and accepted... incident of war” and concluded that the President is therefore authorized to hold detainees for the duration of the conflict in Afghanistan.¹⁰

The obvious rationale for the detention of enemy combatants is to prevent captured belligerents from returning to the battlefield to take up arms again against Americans and American allies. The premature release of enemy combatants from Guantanamo Bay would likely prove deadly to U.S. forces still fighting in Afghanistan: At least 30 of the approxi-

mately 395 detainees who have been released from Guantanamo Bay returned to Afghanistan to engage in further hostilities against Coalition forces.¹¹

Other than calling for the immediate release of all detainees and closing Guantanamo, critics provide no solution for how to prevent these former belligerents from returning to the battlefield and killing U.S. and Coalition soldiers. The only sensible solution is the one that the United States and other nations have long employed: hold detainees until the cessation of conflict.

Misconception #2: The Guantanamo Bay detainees received inadequate due process when they were designated enemy combatants.

1. Irene Khan, Foreword to AMNESTY INTERNATIONAL REPORT 2005 (Amnesty Int'l 2005), available at <http://web.amnesty.org/report2005/message-eng>.
2. *Gitmo: Still a “legal black hole,”* THE LOS ANGELES TIMES, May 1, 2007, available at <http://www.latimes.com/news/opinion/la-ed-gitmo1may01,0,7490666.story>.
3. Press Release, Senator Tom Harkin, Statement of Senator Tom Harkin (D-IA) on Supreme Court Decision to Hear Terror Detainee Case (June 29, 2007), available at <http://harkin.senate.gov/news.cfm?id=278179>.
4. The relevant community for determining what is reasonable and customary under the laws of war is the community of nations. The community of nations does not adhere to the radical, outlandish “norms” promoted by the international legal and human rights community.
5. See, e.g., Press Release, Senator Tom Harkin, Harkin Introduces Legislation to Close Guantanamo (May 23, 2007), available at <http://harkin.senate.gov/news.cfm?id=274983>; Press Release, Representative Jane Harman, It Is Time To Close The Guantanamo Bay Detention Facility (May 8, 2007), available at http://www.house.gov/list/press/ca36_harman/May_8_07.shtml; Press Release, American Civil Liberties Union, ACLU Welcomes Guantanamo Closure Bill (May 23, 2007), available at <http://www.aclu.org/natsec/gen/29864prs20070523.html>; and Press Release, Amnesty International, Abandon Military Commissions, Close Guantanamo (July 4, 2007), available at <http://web.amnesty.org/library/Index/ENGAMR511182007> (“Those currently held in Guantanamo should be released unless they are to be promptly charged and tried in accordance with international standards of fair trial.”).
6. Press Release, Office of the Assistant Secretary of Defense for Public Affairs, Detainee Transfer Announced (May 19, 2007) available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10898>.
7. Mark Mazzetti, *Pentagon Revises Its Rules on Prosecution of Terrorists*, THE NEW YORK TIMES, January 19, 2007 (citing Pentagon officials), and Military Commissions Act of 2006, Pub. L. No. 109-366, § 950v (enumerating the specific crimes that may be tried by military commissions).
8. Additionally, as of June approximately 80 current Guantanamo detainees had been determined to be eligible for transfer, subject to ongoing discussions between the United States and other nations. Press Release, Office of the Assistant Secretary of Defense for Public Affairs, Detainee Transfer Announced (June 19, 2007) available at <http://www.defenselink.mil/releases/release.aspx?releaseid=11030>.
9. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118.
10. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).
11. *U.S. divulges new details on released Gitmo inmates*, Reuters, May 14, 2007, at <http://www.alertnet.org/thenews/newsdesk/N14322791.htm>, and Press Release, Office of the Assistant Secretary of Defense for Public Affairs, Detainee Transfer Announced (May 19, 2007), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10898>. Some detainees have been released to their countries of origin after the United States received assurances that they would not be allowed to reengage in hostilities or after they convinced U.S. authorities that they no longer posed a threat. Presumably, some of the least dangerous detainees were released after first agreeing to provide valuable intelligence regarding their pre-detention activities.

In violation of the Geneva Conventions and the customary laws of war, Taliban and al-Qaeda fighters in Afghanistan wear no uniforms or insignia. Unlike the soldiers of every nation that seeks the protections of the Geneva Conventions and other laws of war, Taliban and al-Qaeda fighters refuse to carry their arms openly. Such choices drastically increase the dangers of war to the civilians among whom Taliban and al-Qaeda forces hide.

These choices also make it more difficult for U.S. military personnel to determine whether, upon a combatant's capture, the combatant is in fact a member of the enemy force. To address the problem, the U.S. military established a system to screen each detainee to determine whether he is an enemy combatant. The result is that detainees at Guantanamo Bay have received more procedural protections ensuring the fairness of their detention than any foreign enemy combatant in any armed conflict in the history of warfare.

Under the Geneva Conventions, enemy combatants who have committed a belligerent act but whose detainee status is in question are entitled to have their status determined by a "competent tribunal."¹² In accordance with that provision of the Geneva Conventions, prior to the September 11 attacks the U.S. military established Army Regulation 190-8, Section 1-6, setting forth procedures for the operation of tribunals to make such determinations—that is, whether a combatant may be held as a prisoner of war.¹³ The U.S. Supreme Court recently cited Army Regulation 190-8 as an example of a procedure which would satisfy the due process requirements for determining the status of the Guantanamo Bay detainees.¹⁴ In response, the Department of Defense established special tribunals modeled on Army Regulation 190-8—Combatant Status Review Tribunals (CSRTs)—to determine the

status of detainees at Guantanamo Bay.

Consistent with Army Regulation 190-8, the CSRT hearing provides each detainee with a hearing before a neutral panel composed of three commissioned military officers. The tribunals make their decisions on the detainee's status by majority vote, based on the preponderance of the evidence. The detainee has the right to attend all open portions of the CSRT proceedings, the opportunity to call witnesses on his behalf, the right to cross-examine witnesses called by the tribunal, and the right to testify on his own behalf.¹⁵ These procedures go far beyond what most nations provide and what the Geneva Conventions require.

Because unlawful enemy combatants violate the laws of war by employing deception to hide or confuse their identities and affiliations, the CSRT hearings were designed not just to meet but to exceed the due process protections provided by hearings conducted pursuant to Army Regulation 190-8. Specifically, Guantanamo Bay detainees are given the following rights as part of their CSRT hearings:

- A military officer is appointed to serve as the detainee's personal representative and explains the CSRT process to the detainee, assists in the collection of relevant information, and helps prepare for the hearing.
- In advance of the hearing, the detainee is given a summary of the evidence supporting his designation as an enemy combatant.
- A member of the tribunal is required to search government files for any evidence suggesting the detainee is not an enemy combatant.
- The decision of every CSRT hearing is automatically reviewed by a higher authority in the Department of Defense who is empowered to order further proceedings.¹⁶

12. Geneva Convention Relative to the Treatment of Prisoners of War, art. 5.

13. U.S. Dep't of Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6, October 1, 1997, available at http://www.usapa.army.mil/pdffiles/r190_8.pdf.

14. Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004).

15. Memorandum from the Deputy Secretary of Defense, to the Secretaries of the Military Departments et al., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained as U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>. Cf. U.S. Dep't of Army, Reg. 190-8, § 1-6.

There would be little or no doubt whether detainees are members of the Taliban or al-Qaeda if such forces simply followed the Geneva Conventions and wore uniforms, displayed insignias, and carried their arms openly. The resulting irony is that unlawful enemy combatants detained at Guantanamo Bay have been given heightened due process despite, and as a direct result of, their repudiation of the laws of war.

Misconception #3: The Guantanamo Bay detainees are entitled to habeas corpus relief.

The U.S. Supreme Court ruled over 50 years ago that non-citizen enemy combatants imprisoned outside of the United States during wartime do not have a right to the extraordinary writ of habeas corpus—a legal cause of action brought by a person who alleges he is unlawfully imprisoned. That case, *Johnson v. Eisentrager*, involved 21 German nationals who had been convicted of espionage by U.S. military commissions convened in China and then transferred to U.S. detention facilities in Allied-occupied Germany. Once in Germany, they petitioned a U.S. federal court to release them under a writ of habeas corpus, alleging that they had been wrongfully imprisoned. The Supreme Court ruled that the German prisoners did not have a right to be released under habeas corpus because they “at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”¹⁷

The large majority of Guantanamo Bay detainees today are in the same shoes as the German prisoners were 50 years ago. They are being held outside of the United States¹⁸ for acts committed in Afghanistan, the location of most combatants’ capture. As such, the detainees have no right to the extraordinary writ.

In 2004’s *Rasul v. Bush*, the Supreme Court chose largely to ignore its own precedent¹⁹ when it extended statutory (not constitutional) access to habeas corpus review to the detainees at Guantanamo Bay. Thereafter, Congress rightly “overruled” the Supreme Court by changing the statutory law to revoke federal court jurisdiction over habeas corpus actions filed by Guantanamo Bay detainees.²⁰ It is that legislation that Guantanamo Bay critics now seek to undo with yet another round of legislation.

Finally, to assert that the Guantanamo detainees deserve habeas hearings is to assert that the CSRT hearings that have been provided to each and every detainee have been fundamentally inadequate.²¹ They have not. The CSRT hearings exceed the requirements for determination of combatant status under the Geneva Conventions and U.S. military regulations.

Recommendations for Congress. Congress should not interfere with the U.S. military’s policy of detaining alien enemy combatants at Guantanamo Bay for the duration of the war on terrorism. These detainees should not be released until the cessation of hostilities in Afghanistan and elsewhere or until

16. Memorandum from the Deputy Secretary of Defense, to the Secretaries of the Military Departments et al., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained as U.S. Naval Base Guantanamo Bay, Cuba.

17. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

18. In his solo opinion concurring in the judgment in *Rasul v. Bush*, Justice Kennedy asserts that Guantanamo Bay “is in every practical respect a United States territory.” 542 U.S. 466, 487 (2004) (Kennedy, J., concurring). However, in addition to this assertion’s being unpersuasive in light of the fact that the lease between Cuba and the United States for Guantanamo Bay expressly states that the base remains under Cuba’s “ultimate sovereignty,” Kennedy did not provide the deciding vote in the 6-3 decision and the assertion has no force of law.

19. See, e.g., *id.* at 493–94 (Scalia, J., dissenting) (examining the convoluted logic the majority used to reach a holding otherwise foreclosed by the Court’s on-point precedent in *Eisentrager*).

20. Detainee Treatment Act of 2005, P.L. 109-148, and Military Commissions Act of 2006, P.L. 109-366.

21. Moreover, this assertion necessarily implies that each of the hundreds of thousands of prisoners of war held by the United States in World Wars I and II—as well as the Civil War, the Korean Conflict, and every other war in which the United States has ever engaged—were denied a fundamental right to which they were entitled. No POW in any of those wars was granted anything approaching the systematic and extensive process that has been afforded to the non-citizen, unlawful enemy combatants held in Guantanamo Bay.

such time that the detainees are no longer a threat to U.S. and Coalition forces. Calls by Members of Congress and the “international legal and human rights community” to release the approximately 380 detainees remaining in Guantanamo are reckless in the extreme and not supported by the U.S. Constitution, U.S. laws, the Geneva Conventions, or customary international law.

Congress should decline to take the extraordinary step of providing the writ of habeas corpus to the unlawful enemy combatants held at Guantanamo Bay, none of whom are U.S. citizens or legal residents. Even if granting non-citizens who are unlawful enemy combatants the right to habeas corpus were the right decision for this war—and it decidedly is not—it would set a dangerous precedent for America’s ability to fight future wars, including conventional wars in which enemy combatants are affiliated with nation-states. In any future conflict, the international community, including the United Nations, would surely demand that prisoners of war held by U.S. forces have access to U.S. courts to try their claims that they are being held unjustly. Further, granting the writ of habeas corpus to non-citizens who are

unlawful enemy combatants is almost certain to embolden liberal and progressive jurists to “discover” new constitutional rights for U.S. enemies to access U.S. courts to try their claims. Finally, extending habeas corpus to Guantanamo Bay will impede the effectiveness of military operations and place an unnecessary burden on U.S. military forces in the field.²²

Conclusion. While U.S. troops are deployed in the field in Afghanistan and Iraq, Congress should focus its efforts on strengthening their ability to succeed. Congress should not hamper our troops’ efforts with shortsighted legislation extending unprecedented rights to foreign terrorists and other enemy combatants. Rewarding or releasing captured Taliban and al-Qaeda fighters is not any way for legislators on the home front to support U.S. troops fighting abroad.

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22. James Jay Carafano, Ph.D., *The War on Terrorism: Habeas Corpus On and Off the Battlefield*, Heritage Foundation WEBMEMO No. 1535, July 5, 2007, available at <http://www.heritage.org/Research/LegalIssues/wm1535.cfm>.