The Legal Basis for Detaining Al Qaida and Taliban Combatants

The United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. There is no question that under the law of war the United States has the authority to detain persons who have engaged in unlawful belligerence for the duration of hostilities, without charges or trial. Like all wars, we do not know when this one will end. Nevertheless, we may detain combatants until the end of the war.

Detention of enemy combatants in wartime is not an act of punishment. It is a matter of security and military necessity, and has long been recognized as legitimate under international law. The U.S. Supreme Court, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), specifically recognized the authority of the President to detain persons who fought with the Taliban and al Qaida against the United States. Detaining enemy combatants prevents them from returning to the battlefield and engaging in further armed attacks against innocent civilians and U.S. and Coalition forces. Furthermore, detention serves as a deterrent against future attacks by denying the enemy the fighters needed to conduct war. Releasing enemy combatants before the end of hostilities and allowing them to rejoin the fight could prolong the conflict and further endanger U.S. and Coalition forces and innocent civilians.

There is no requirement under the law of war that a detaining power charge enemy combatants with crimes, or give them lawyers or access to the courts in order to challenge their detention. To the extent that enemy combatants have committed offenses under the law of war, a detaining power may choose to try them. The law of war, which includes the Geneva Conventions, recognizes that military fora may be used to try persons who engage in belligerent acts in contravention of the law of war. The United States and many other nations have used military commissions throughout history; military commissions have an established and legitimate place in the law of war.

The Third Geneva Convention of 1949 accords POW status generally only to enemy forces that follow certain rules: being commanded by a person responsible for subordinates; having a fixed, distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war. The President determined that although the Geneva Convention applies to Taliban detainees, such detainees are not entitled to POW status. As explained by the White House Press Secretary on February 7, 2002: "Under Article 4 of the Geneva Convention, . . . Taliban detainees are not entitled to POW status . . . . The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war." Regarding al Qaeda, the statement continues: "Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty." [1]

Even if detainees were entitled to POW status, they would not have the right to lawyers, access to the courts to challenge their detention, or the opportunity to be released prior to the end of hostilities. Nothing in the Third Geneva Convention provides POWs such rights, and POWs in past wars have generally not been given these rights.

For more information on the legal framework for the Global War on Terror and DoD Detention policy, see http://armed-services.senate.gov/e_witnesslist.cfm?id=1559.

[1] Statement by the White House Press Secretary, in Washington, D.C. (at http://www.state.gov/s/l/38727.htm).