

Detention Policy

One of the flashpoints of controversy and debate over U.S. conduct since 9/11 is military detention policy. Under the international law of armed conflict, or law of war, the United States has the authority to detain enemies who have engaged in combatant actions, including acts of belligerence, until the end of hostilities. A nation may detain captured enemy fighters, not as punishment, but to keep them from returning to the battlefield. Furthermore, on September 18, 2001, the United States Congress passed a Joint Resolution, later signed into law as Public Law 107-40, the Authorization for Use of Military Force (often called by its acronym AUMF), which includes the authority to detain the enemy without charge.

In the past, combatants were typically associated with countries that had organized militaries or militias that carried arms openly, wore uniforms, and complied with the laws of war. But wars we are currently engaged in are different. Those behind the September 11 attacks and other terrorist attacks on Americans—a group of non-state actors operating under the umbrella authority of al-Qaeda—do not act at the behest of any state. The law of war applied to stateless pirates in the 18th and 19th centuries. There are some novelties, as applied to our new enemy, but its principles still apply. We do not have to try terrorist or military detainees, or set them free. We may legally detain these unprivileged belligerents, at Guantanamo Bay and elsewhere, for the duration of hostilities.

The answer, far beyond closing the detention facility at Guantanamo, is to solve the broader challenge of holding accountable and incapacitating terrorists in a detention framework that is lawful, durable, and internationally acceptable. As we capture future high-value terrorists outside of Afghanistan and conclude that some may not be prosecuted in our domestic courts, we will need a sustainable legal framework and procedures to detain them. Military detention, authorized by Congress and properly calibrated to protect our national security, will enhance our nation's ability to prosecute this war. Furthermore, if done properly, it may discourage the courts, especially the Supreme Court, from meddling into issues of national security policy, which is best left to the political branches.

Notes

RECOMMENDATIONS

1. The United States is at war. Since we are at war, we must view the conflict, and craft policies, through the lens of the law of armed conflict, not criminal law.
2. Create a lawful, durable detention framework authorized by Congress and signed by the President. Certain terrorists can be detained (after a fair determination they are terrorists), without charge, pursuant to the Geneva Conventions, for the duration of hostilities.
3. Treating all captured enemy combatants as mere criminal defendants who must be tried under the laws governing domestic crimes or set free is dangerous and weakens the country and our defenses. The battlefield is not a CSI lab and it shouldn't be treated as such.
4. The government must retain the ability to protect certain sensitive information related to means and methods of intelligence collection from being divulged in public, including in court proceedings. The durable framework for detention must reflect this imperative.
5. Guantanamo Bay must not be closed unless and until a viable alternative exists, supported by a detailed policy and express congressional legislation, signed by the President, that does at least the following:
 - Expressly authorizes continued detention of detainees who cannot be safely prosecuted in a military commission or federal court, and who cannot in good conscious be set free;
 - Expressly prohibits any judge from ordering the release of any combatant into the United States, even if the judge, through the habeas process, orders the detainee released from U.S. custody;
 - Re-affirms the continued viability of military commissions, both in theatre of operations and in the United States, during wartime
6. U.S. policymakers should resist the application or reach of habeas corpus for any combatant held outside of Guantanamo Bay, Cuba.

FACTS AND FIGURES

- The U.S. has held approximately 100,000 detainees since 9/11, in Iraq, Afghanistan, and Guantanamo Bay.
- The vast majority of detainees were captured in Iraq: well over 75,000.
- The U.S. started capturing detainees in Afghanistan in October 2001.

- At its peak, there were approximately 10,000 detainees in Afghanistan.
- The International Committee of the Red Cross (ICRC), has had access to almost every single Department of Defense detainee since the war began in 2001 in Afghanistan.

Guantanamo Bay

- U.S. Naval Station Guantanamo Bay (GTMO) has existed since 1903, and has been continuously occupied by the U.S. Navy since that time.
- President Bill Clinton used GTMO as an indefinite detention facility in the mid-1990s for approximately 75,000 refugees from all around the Caribbean. The Clinton Department of Justice argued that they were not citizens, did not have legal standing to sue in U.S. federal courts, and that Guantanamo Bay, Cuba, was not in the United States and therefore detainees did not enjoy the constitutional right of habeas corpus.
- The Camp X-Ray was constructed during President Bill Clinton's term to house criminal migrants.
- The battlefield general in Afghanistan requested that high-value detainees be removed from Afghanistan for strategic interrogations. Of the 10,000 detainees in Afghanistan in the fall of 2001, approximately 778 were selected to be transferred to Guantanamo Bay.
- The first detainees arrived from Afghanistan in January 2002.
- As of August 2009, there are only 225 detainees at GTMO.
- Several dozen GTMO detainees who have been released from the island have committed further combatant acts of terrorism. The recidivism rate is over 10 percent.
- The last major influx of detainees to GTMO was in the fall of 2006, when President Bush ordered 14 high-value detainees from the CIA's interrogation and detention program to be relocated from secret facilities.
- There have been three military commission cases tried to completion since 2001. Each was held at GTMO.

Iraq

- Since the war began in Iraq in 2003, there have been approximately 75,000 "security internees" in Iraq.
- Since Iraq signed the Geneva Conventions, the Geneva Conventions applied in full force to the conflict, including to captured enemy fighters, called "security internees" under the U.N. resolution authorizing the conflict.
- Security internees could be detained without criminal charge. Their cases were subjected to periodic administrative review.

- Some security internees in Iraq were captured several times and released several times.
- The U.N. Security Council resolution authorizing U.S. and coalition forces to detain suspected terrorists expired last year. Since that time, U.S. forces must comply with Iraqi domestic criminal law to detain a suspected terrorist in Iraq, including getting an arrest warrant from an Iraqi judge in some circumstances.
- As of August 2009, there are approximately 10,000 persons detained in U.S.-managed detention facilities in Iraq. Those numbers are expected to dwindle to approximately 2,500 within the year.
- There are between 250 and 750 high-value al-Qaeda detainees currently being detained in Iraq at U.S. detention facilities. If released, they pose a serious risk to U.S. and Iraqi civilians and forces.
- Persons detained in Iraq now are either tried in an Iraqi criminal court or set free.
- Security internees in Iraq did not have access to U.S. courts, nor did any court find that they enjoyed the right of habeas corpus in the United States

Afghanistan

- At its peak, the United States held approximately 10,000 detainees in Afghanistan in U.S.-run detention facilities.
- As of August 2009, there are approximately 1,000 detainees in U.S.-run detention facilities. That number is likely to rise as combat activity increases in the country.
- Most Guantanamo Bay detainees came from the detainee population in Afghanistan.
- The main detention facility in Afghanistan is at the Bagram Air Base.
- Detainees in Afghanistan have been attempting to gain access to U.S. courts to challenge their detention. To date, they have been mostly unsuccessful, except for three detainees who were granted the right to challenge their detention in federal court. Judge Bates of the District Court in Washington, D.C., found that three detainees, captured outside of Afghanistan, but brought to Afghanistan for detention, should have the right to challenge their detention. The Bush and Obama Administrations have both disagreed with that decision, and have appealed the ruling.

ADDITIONAL RESOURCES

The Heritage Foundation's Detention of the Enemy During Wartime Web Page

<http://www.heritage.org/research/nationalsecurity/enemydetention>

Includes:

- Legal Basis of U.S. Detention Policies, at <http://www.heritage.org/research/nationalsecurity/enemydetention/DetentionPolicy.cfm>
- Military Commissions and Due Process, at <http://www.heritage.org/research/nationalsecurity/enemydetention/MilitaryCommissions.cfm>
- Glowing Opinions of European Leaders Who Have Visited Guantanamo, at <http://www.heritage.org/research/nationalsecurity/enemydetention/ViewsonGuantanamo.cfm>
- The National and International Legal Response to 9/11, at <http://www.heritage.org/research/nationalsecurity/enemydetention/ResponseTo9-11.cfm>
- Armed Conflict and the Geneva Conventions, at <http://www.heritage.org/research/nationalsecurity/enemydetention/ArmedConflict.cfm>

Charles D. Stimson, "Gitmo Inmates' Constitutional 'Rights,'" Heritage Foundation Commentary, at <http://www.heritage.org/Press/Commentary/ed061308a.cfm>

Charles D. Stimson, "Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War," Heritage Foundation *Legal Memorandum* No. 35, January 23, 2009, at <http://www.heritage.org/Research/NationalSecurity/lm35.cfm>

David Rivkin, Lee Casey, and Charles Stimson, "Common Article 3 of the Geneva Conventions and U.S. Detainee Policy," Heritage Foundation *WebMemo* No. 2303, February 19, 2009, at <http://www.heritage.org/Research/LegalIssues/wm2303.cfm>

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