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Habeas Corpus Must Not be Sacrificed in War on Terror

by Jared Goldstein

Mohammed Daihani is a Kuwaiti accountant imprisoned by the United States at Guantanamo Bay for almost four years. I was one of the lawyers who brought a suit for habeas corpus on Mr. Daihani's behalf, asking for an explanation of why the government was imprisoning him.

After the court ordered the government to explain its reasons for holding Mr. Daihani, the government released documents showing that military officials had concluded that Mr. Daihani had never taken part in any terrorist activities against the United States, and that he was not a member of al-Qaida, the Taliban, or any other anti-American group. Rather, Mr. Daihani was accused of having given a few hundred dollars to what he believed was a legitimate charity, which had given money to another organization, which, in turn, was alleged to be associated with al-Qaida.

After years of interrogations at Guantanamo, the military interrogators had come to realize that Mr. Daihani had not meant to give money to support terrorism, having had no inkling that his donation could have supported any terrorist groups.

Yet to the U.S. military it did not matter whether Mr. Daihani had intended to support terrorism or even known that he might have supported terrorism. Even if his support for terrorism was entirely

accidental, the military designated Mr. Daihani an "enemy combatant," and, on that basis, kept him locked up 24 hours a day for four years, in solitary confinement in a 9- by 6-foot cell, forbidding him to speak to his family or even to read a newspaper.

The absence of any evidence that Mr. Daihani had ever done anything to support terrorism came to light only because the right to seek habeas corpus was available. After the Supreme Court held, in 2004, that Mr. Daihani and the other detainees could seek habeas corpus, Mr. Daihani was allowed to meet with his lawyers, who worked for several years to win his freedom. More than a year after it became public that no evidence supported Mr. Daihani's imprisonment, the government released him to Kuwait, his home country.

Congress is now poised to do something it has never done before: Take away the right of prisoners to seek habeas corpus. Since long before the United States became a nation, the right to seek habeas corpus has guaranteed that anyone imprisoned by the government may ask a judge to determine whether he or she is properly imprisoned. The right to seek habeas corpus has applied to prisoners regardless of whether they are citizens or foreigners, and no matter how dangerous they are accused of being, or how horrible their alleged crimes.

The right to habeas corpus has been a basic part of English common law, and, later, American law, since the adoption of the Magna Carta, in 1215, which established that no one could be imprisoned on the mere say-so of the king.

The founders of the United States considered habeas corpus to be such a fundamental protection against tyranny that they enshrined it in the Constitution. Congress has expanded the right to seek habeas corpus several times, and it has never tried to take the right away. To do so now would turn our backs on our fundamental principles of justice.

The Bush administration has proposed revoking this fundamental right for the 450 or so foreigners held at Guantanamo. If Congress goes along, no limits will remain on the government's power to imprison people without evidence and without trial. Doubtlessly, the United States can and should lock up terrorists posing a threat to the nation -- but it must do so within the bounds of law.

Our strength as a nation is demonstrated when we treat even our worst enemies within the rule of law.

The courts must be available -- as they have been for centuries -- to make sure that the people we imprison really are our enemies. If Congress takes away the right of Guantanamo detainees to go to court, the government will be able to



wrongly hold people forever. There will be nothing anyone can do about it.

If Congress eliminates habeas corpus for the Guantanamo detainees has had a trial in which a judge looked at the evidence alleged to justify their imprisonment. If Congress takes away the right to seek habeas corpus, no one will ever know how many more prisoners are completely innocent.

The damage that unlawful imprisonment inflicts on people like Mr. Daihani is immeasurable. What can be known is the damage that eliminating habeas corpus would do to the United States: The United States would no longer be a nation under law but, rather, a nation without law.

The War on Terrorism: Habeas Corpus On and Off the Battlefield

James Jay Carafano, Ph.D.

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Congress is considering legislation to extend habeas corpus rights (i.e., the ability to challenge the legality of detention in a civil court) to unlawful enemy combatants. Granting terrorists rights to which they are not entitled will not make the world a safer place and will not win over America's enemies and critics. Worst of all, it will make armed conflicts more dangerous for soldiers and civilians.

The current legal framework allows U.S. armed forces to do their job without adversely affecting military effectiveness or going against standards of international law. Congress should not undermine the United States' ability to detain unlawful combatants and, if appropriate, try them for war crimes.

Soldiers and the Laws of War

Separate laws regarding the conduct of war were established for a reason: The environment of armed conflict differs significantly from everyday civil society. Soldiers must be able to accomplish the mission and obey rules of conduct while under stressful, chaotic, and dangerous conditions. The laws of war also give soldiers the legal means to deal with enemy soldiers, civilians, and unlawful combatants who intentionally ignore the rules.

Encouraging Lawlessness in Armed Conflict

Granting unwarranted legal rights puts soldiers and civilians at risk by rewarding treachery with privilege. Unlawful enemy combatants--

individuals who do not adhere to the traditional laws or customs of war--are not entitled to Prisoner of War (POW) status or the full protections of the Geneva Conventions, let alone unfettered access to U.S. courts. Summarily granting them these privileges would cripple the integrity of the laws of war. Enemies will be less inclined to follow the rules if they suffer no consequences for breaking them. Contrary views rely on guilt-ridden, utopian thinking that says America deserves her enemies and that they will love and forswear violence against her if only she just meets some indeterminate but much higher standard of justice and fair play. When only one side plays by the rules on a battlefield, that side is likely to disproportionately suffer from illegal acts of war.

Impeding the Effectiveness of Military Operations

Soldiers have a number of equally compelling responsibilities in war: accomplishing the mission, safeguarding innocents, and protecting their fellow soldiers. These tasks are difficult enough. Soldiers should not be required to provide to unlawful combatants, in the same manner and to the same extent as would be expected of a civil court, the full array of civil protections afforded to U.S. citizens by the Constitution and created by judges since the 1960s. For example, it is highly unrealistic to expect soldiers during active operations to collect evidence and insure the integrity of the chain of custody for that evidence. American soldiers would effectively face a Hobson's choice: on one hand, win the war, bring fellow soldiers home, and safeguard innocents; or, on the other hand, meet novel legal standards that might result in prematurely releasing war

criminals who will go back to the battlefield.

Crippling Intelligence Gathering

Gaining timely, actionable information is the most powerful weapon in uncovering and thwarting terrorist plots. Requiring the armed forces to place detainees under a civilian legal process will severely restrict their access to detainees and, in turn, cripple their capacity to obtain intelligence through legitimate, lawful interrogation.

Military authorities are giving Gitmo detainees treatment that is as good as or better than that typically afforded to U.S.-held POWs. The only real difference is that Gitmo detainees may be interrogated for more than name, rank, and serial number.

Unnecessary Burdens

Changing the legal framework governing unlawful combatants is simply unnecessary. The military is already meeting its obligations to deal justly with individuals in its custody.

Since the inception of the Geneva Conventions, no country has ever given automatic habeas corpus rights to POWs. Furthermore, such action is not required by the U.S. Constitution. The Supreme Court ruled in 2004 that, at most, some detainees were covered by a statutory privilege to habeas corpus. The Court concluded, in other words, that Congress had implicitly conferred habeas corpus rights to certain individuals. However, the Military Commissions Act of 2006 repealed that privilege and, so far, Congress has not acted to restore it.

The Department of Defense already operates two tribunals that safeguard the legal rights of detainees. The Combatant Status Review Tribunal (CSRT) uses a formal process to determine whether detainees meet the criteria to be designated as enemy combatants. Tribunals known as Administrative Review Boards (ARB) ensure that enemy combatants are not held any longer than necessary. Both processes operate



within the confines of traditional law-of-war tribunals and are also subject to the appeals process and judicial review. In addition, Congress has established a process under the Military Commissions Act to allow the military to try any non-U.S. detainees for war crimes they are alleged to have committed.

Conclusion

Imposing U.S. civil procedures over the conduct of armed conflict will damage national security and make combat more dangerous for soldiers and civilians alike. The drive to do so is based on erroneous views about the Constitution, the United States' image abroad, and the realities of war.

U.S. military legal processes are on par with or exceed the best legal practices in the world. While meeting the needs of national security, the system respects individuals' rights and offers unlawful enemy combatants a fundamentally fair process that is based on that afforded to America's own military men and women. Having proven itself in past conflicts, the current legal framework can continue to do so in a prolonged war against terrorism.

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