

Combatant Status Review Tribunals

In response to last week's decisions by the Supreme Court, the Deputy Secretary of Defense today issued an order creating procedures for a Combatant Status Review Tribunal to provide detainees at Guantanamo Bay Naval Base with notice of the basis for their detention and review of their detention as enemy combatants. Each of these individuals has been determined to be an enemy combatant through multiple levels of review by the Department of Defense. The procedures for the Review Tribunal are intended to reflect the guidance the Supreme Court provided in its decisions last week.

The Supreme Court's Decisions

- The Supreme Court held that the federal courts have jurisdiction to hear challenges to the legality of the detention of enemy combatants held at Guantanamo Bay. In a separate decision – involving an American citizen held in the United States – the Court also held that due process would be satisfied by notice and an opportunity to be heard, and indicated that such process could properly be provided in the context of a hearing before a tribunal of military officers.
- The Court specifically cited certain existing military regulations, Army Regulation 190-8, which it suggested might be sufficient to meet the standards it articulated. The tribunals established under those regulations are relatively informal and occur without counsel or a personal representative. The process is a streamlined process designed to allow for expeditious determinations; in citing it, the Court recognized the military's need for flexibility and indicated that the process might provide all that was needed even for a citizen. Even in a traditional conflict, such a hearing is not provided to everyone who is detained, but only in cases of doubt as to the basis for detention.

The Process – The order issued today creates tribunals very much like those cited favorably by the Court to meet the unique circumstances of the Guantanamo detainees, and will provide an expeditious opportunity for non-citizen detainees to receive notice and an opportunity to be heard. It will not preclude them from seeking additional review in federal court.

- *Notice.* By July 17, each detainee will be notified of the review of his detention as an enemy combatant, of the opportunity to consult with a personal representative, and of the right to seek review in U.S. courts.
- *Personal Representative.* Each detainee will be assigned a military officer as a personal representative to assist in connection with the Tribunal process. This person is not a lawyer but provides assistance to the detainee that is not normally offered in the process cited favorably by the Supreme Court or required by the Geneva Conventions.
- *Tribunals.* Detainees will be afforded an opportunity to appear before and present evidence to a Tribunal composed of three neutral commissioned military officers, none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee.

- *Hearings.*
 - The detainee will be allowed to attend all proceedings of the Tribunal except for those involving deliberation and voting or which would compromise national security if held in the presence of the detainee.
 - The detainee will be provided with an interpreter and his personal representative will be available to assist at the hearing.
 - The detainee will be allowed to present evidence, to call witnesses if reasonably available, and to question witnesses called by the Tribunal.
 - The detainee will have the right to testify or otherwise address the Tribunal in oral or written form, but may not be compelled to testify.
- *Decision.* The Tribunal will decide whether a preponderance of evidence supports the detention of the individual as an enemy combatant, and there will be a rebuttable presumption in favor of the Government's evidence.
- *Non-Enemy Combatant Determination.* If the Tribunal determines that the detainee should no longer be classified as an enemy combatant, the Secretary of Defense will advise the Secretary of State, who will coordinate the transfer of the detainee for release to the detainee's country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.