

Questions to David Rivkin from Senator Hatch

In what ways have some Supreme Court decisions undermined our national security?

From *Hamdi* to *Boumediene*, the Supreme Court's post-9/11 cases have placed tremendous burdens on the United States' ability to detain captured enemy combatants. The constitutionally-grounded habeas process mandated in *Boumediene* has proven impossible to apply in most instances. With federal district court judges applying demanding evidentiary and other requirements, the government is unable to meet its burden in many habeas cases. The battlefield is simply too dangerous an environment to allow our military to collect evidence against most captured enemy fighters sufficient to support an arrest under criminal law. Efforts to do so are likely to be detrimental to the safety of our soldiers. The prospect of aggressive discovery efforts, undertaken in the context of habeas litigation by plaintiff counsel, and directed at ferreting out sensitive national security information further complicates the situation. These problems were predicted by those of us who have long warned against extending habeas rights to enemy combatant aliens captured overseas.

The problem is not limited to detainees at Guantanamo Bay. The lower courts are now in the process of extending constitutional habeas to detainees held by U.S. forces in Afghanistan. As a result, U.S. forces have already curtailed the extent to which captured enemy combatants can be detained for protracted periods of time. This is the first war in American history where thousands of captured enemy fighters and operatives have been released while hostilities are still ongoing. This "catch and release" paradigm endangers our ultimate victory in Afghanistan. Since many released enemy combatants return to the Taliban, al Qaeda, and other terrorist formations, these litigation-driven releases needlessly jeopardize the lives of American soldiers and civilians.

Concerns that our courts may make further constitutional rights available to alien enemy combatants have led the U.S. military to start using *Miranda* warnings when capturing enemy fighters on foreign soil. The issuance of such warnings severely compromises any opportunities to interrogate these detainees, rendering moot the past several years' debate about appropriate interrogation methods. The resulting lack of actionable intelligence about the enemy complicates our ongoing military operations and is likely to increase U.S. casualties.

While undermining the military's essential ability to detain and interrogate captured enemy fighters is bad enough, trends in the Supreme Court's jurisprudence – in particular, a willingness to disregard well-settled precedent, extend the Constitution's reach to non-U.S. persons overseas and ignore fundamental constitutional limitations on the Judiciary's role in the area of national security – suggest that the Court is likely to continue to expand its writ to other military decisions. The rules of engagement, the

extent of permissible collateral damage in the context of ongoing combat operations, whether or not a given military engagement amounts to an armed conflict or not are likely to become subjects for judicial review. If this were to happen, U.S. ability to wage war successfully would be dramatically undermined, particularly if we continue to face an enemy unfettered by any normative or legal constraints on the use of force.

Does the Supreme Court's decision to get involved with some aspects of the War on Terror violate the separation of powers?

Yes. The judiciary is the branch of government that is least well-equipped to reach sound judgments about how to prosecute a war in general, what constitutes an appropriate detention regime or how to gather battlefield intelligence. The judiciary is equally poorly-equipped to gainsay judgments made in these areas by the two political branches. It has neither the institutional expertise, nor, given how the courts can only deal with specific cases and controversies, the opportunity to look at policy in a comprehensive manner. It was this relative institutional incapacity, which the Framers understood all too well, that caused them to deny Article III courts the power to engage in an open-ended scrutiny of discretionary national security-related judgments.

Indeed, as the courts' political question doctrine (that is grounded in both prudential and constitutional imperatives) has long recognized, national security judgments are delegated under Articles I and II to the political branches because there are no standards readily ascertainable by the courts that would allow the judiciary to second-guess Executive or legislative judgments about national security matters.

What problems does reliance on foreign law create for our national security?

Reliance on foreign law by Article III courts has a pernicious impact in the national security area. Many of our allies have decisively rejected much of the traditional legal architecture governing armed conflict. They have embraced instead new international and domestic legal regimes that dramatically inhibit the ability of states – although not that of non-state actors – to wage war. These regimes impose historically unprecedented restraints on the circumstances in which a state can legitimately use armed force (the parameters of permissible self-defense), equalize the rights and obligations of lawful and unlawful belligerents, in some important respects, even advantaging unlawful belligerents. They also drastically rework the definition of the extent of collateral damage permissible in the course of combat, as well as recast the fundamental relationship between the international law of war and international humanitarian law.

That our allies have gone in this direction has substantially undermined and, frequently, crippled their ability to wage war decisively and successfully. Our European allies, in

particular, are perfectly aware of the dramatic policy consequences of their doctrines, but, having abandoned most serious war-fighting capabilities, are not greatly troubled. For the U.S., which remains the primary security guarantor of the existing international system, to be bound by the same dysfunctional legal architecture would be nothing short of calamitous. To the extent that U.S. courts incorporate this dysfunctional legal architecture by reference to, or reliance upon, foreign law, they adversely impact the fighting ability of the U.S. military.

Question for the Record for David Rivkin from Senator

In your written statement you reference a situation at the Bagram A Afghanistan, where lower courts “are already beginning the process of the habeas regime to individuals captured and held by the U.S. in a global world.”

- **Can you elaborate on what specific harm may come from**

There are reports that, the decision a District Court Judge in the District of Columbia, Judge Bates, in the *Maqaleh* case, has caused the curtail operations that might result in the capture of enemy fighters near Afghan borders. Judge Bates’ ruling posits that individuals, who are held in Afghanistan, but who were originally captured outside of Afghanistan, are entitled to the same constitutionally-based habeas review as the detainees of Bay’s detainees. *Maqaleh* has potentially devastating implications for the operations of U.S. Special Forces. The net result is that, while the U.S. continues to use air assets to attack Pakistan-based al Qaeda targets, its ground force operations against such targets have been curtailed. This situation clearly benefits the enemy at a time when U.S. Special Forces are trying to turn the tide against a surge in Taliban activities in Afghanistan.