

A Response to Senators Graham and McCain on Gitmo Detainees
By: Michael Navarre

Senators John McCain and Lindsey Graham wrote an Op-Ed published in the May 6, 2009 Wall Street Journal titled, “How to Handle the Guantanamo Detainees.” While I fully realize that Senators Graham and McCain may never read a response from a young, former Navy judge advocate who writes part-time for a military justice blog, I pen this response because of my utmost respect for Senator McCain and his views on the prisoner of war debate.

As an initial matter, I would say that I agree with the Senators’ desire to “move on” from the now decried opinions of various administration lawyers. Those legal opinions should not now become the focus of prosecutions, they should become a part of history.

Once we move on, there still remain issues in the debate started by President Obama’s announcement to close the detention facility at Guantanamo Bay, and I want to make three points in response to the Senators. First, the Senators create a straw man of “preventive detention” that ignores a core issue in the law of war—detention of enemy combatants is only for the duration of the conflict. Second, any war crimes tribunal must be used to punish exactly that, only war crimes. Unfortunately, that is not how they are currently being used. Finally, we must be careful to continue to distinguish between those detainees held at places like Bagram after seizure on the battlefield in Afghanistan and those taken to Bagram from non-battlefields, such as Iraq.

The discussion of “preventive detention” in the article fails to emphasize two important points, in my opinion, regarding the continued detention of enemy prisoners of war from Afghanistan—(1) once the war ends we must release all POWs unless they are to be tried for war crimes and (2) the distinction between Al Qaeda and Taliban detainees.

It seems to me that a fundamental precept of the law of war is that when “the war” ends each side must release all the combatants held to the other side. In this “war” that fundamental precept raises many questions, which are essential to determining whether continued detention will be appropriate. Most notably when will this “war” end? And, who are lawful combatants that should be released?

The right answer to the first question cannot be, “never.” The McCain/Graham article seems to assume that such a situation is possible in constructing a free-standing national security court to review the “preventive detention” of the most dangerous prisoners. When the current surge in Afghanistan ends, the Obama Administration must seriously consider whether the war is over and determine what our obligations are under the international law. Just because the current conflict calls for difficult choices, doesn’t change that we are a nation that abides by the rule of law, because it is, as Senator McCain has said in other contexts, “our greatest strength: that we are different and better than our enemies.” That principle must be at the forefront of the debate and “preventive detention” should not trump that fundamental rule. There is no easy answer for what to do when the war ends, thus that debate should begin now and not be put off while we form a national security court to secure America.

A Response to Senators Graham and McCain on Gitmo Detainees
By: Michael Navarre

As for the second question, while there has been little discussion of the difference between Al Qaeda and Taliban fighters, or more correctly former-Afghanistan Army fighters, the question is important. The first category, Taliban, are likely considered POWs under international law and should be released at the end of the conflict. Al Qaeda, on the other hand, are not traditional fighters and can be handled differently than POWs, including trial by legal and just military commissions. While this distinction seems trivial, such distinctions are important to showing that we are a nation that abides by the rule of law and are better than our enemies.

Second, I agree that the actual trials by military commissions have worked relatively well compared to what detractors said when the commissions were being formed, primarily due to the incredible service of military judge advocates participating in the system as judges, prosecutors, and defense counsel, among other roles. However, the McCain/Graham article fails to note at least one important problem with the military commission trials currently underway—even in the trials of Al Qaeda, the commissions are trying criminals and enemy combatants.

The 9/11 conspirators currently being prosecuted by the commissions are being prosecuted for crimes of terrorism, not actions on a battlefield. If the 9/11 terrorists are “enemy combatants” that can be tried for war crimes, then any act of international terrorism becomes an act of war that invokes a nation’s war powers. Again, that cannot be the case. Is there a difference between Timothy McVeigh’s crimes and the 9/11 terrorists’ crimes or should we treat them the same? I think the answer is closer to treating them the same than invoking the war powers to try the 9/11 terrorists at military commissions. While I am sure this point will be heatedly debated because of the international character of the crimes, I think it is America’s duty to take the high road to be different and better than our enemies by adhering to the spirit of the law of war and treating these individuals for what they are, criminals. Doing such will make America stronger, not weaker.

Finally, we must be sure to distinguish between the detainees held at Guantanamo or Bagram that were taken from the battlefield in Afghanistan and those taken from other places. While Afghanistan is still arguably an active theater of war, some of the detainees at Bagram were not taken from that battlefield. Detainees taken to Bagram from other parts of the world, including Iraq, fall into categories such as criminals. We cannot allow generalizations to trump that clear distinction under international law.

I want to be sure to say that I applaud Senators McCain and Graham—though some might say that applause from a relatively unknown military justice blogger is like one hand clapping—for engaging in this debate; such discourse is what America was built upon. In my humble opinion, however, Senators McCain and Graham too quickly pass over important points that require attention under the rule of law. Furthermore, I truly believe that adhering to these distinctions and addressing them in this discourse will ensure America’s security, not harm it, by showing our commitment to be better than our enemies and demonstrating America’s commitment to the rule of law.

This article is written purely in my personal capacity. The views expressed herein should not be attributed to any of my employers, clients, or fellow bloggers.