

Brigadier General (Ret.) Tom Hemingway: Closing Guantanamo Bay

National Strategy Forum Event Summary

By Eric S. Morse

Brigadier General (Brig Gen) Tom Hemingway addressed the National Strategy Forum at the Union League Club of Chicago on February 17, 2010. Brig Gen Hemingway is a retired Air Force judge advocate who was appointed Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He also served as an associate professor of law at the U.S. Air Force Academy, and a senior judge on the Air Force Court of Court of Criminal Appeals.

September 11, 2001, was a major surprise for the legal community. What was once a clearly defined field with well-understood rules and regulations quickly became muddied with the infusion of dangerous non-state actors into the system.

In the aftermath of the start to the global war on terror (GWOT), Brig Gen Tom Hemingway suggests that there were several political failures that harmed the judicial system's approach to dealing with non-state actors in the GWOT. These include:

- The failure of the administration to authorize Article 5 Tribunals (from the Geneva Convention) during battlefield conditions to determine the status of a detainee.
- The failure of the presidential administrations (Bush II and Obama) to conduct successful public diplomacy campaigns to convey to the public the legal, political, and national security reasons for conducting military commissions and building the Guantanamo Bay facility.
- The failure to construct a 21st century judicial system that could clearly process and try suspected terrorist individuals captured on the battlefield.

Under current law, trying a suspected terrorist is very complicated. A detainee deemed to have committed an act of terrorism is considered both a criminal and a terrorist. At the heart of the issue is whether they should be tried in federal district court in a criminal trial or be tried before a military commission (not a court martial proceeding). Either format has its pros and cons, but amongst many national security specialists, it is thought that military commissions would be the most appropriate format.

Brig Gen Hemingway also believes that military commissions are better at processing Guantanamo detainees because: military commissions maintain the legal standards equivalent to, or better than, existing international tribunals; and there is already a state of the art courtroom at Guantanamo that is well-equipped to handle secret information and to provide sufficient security. He reiterated that the legal standards of military commissions are equally as rigorous, if not more so, as criminal courts. It would be difficult, but not impossible, to try a terrorist in a federal district court. However, a secure courtroom would need to be constructed at a high cost and the courthouse area security would be very expensive.

Two sides exist in the deliberation over Guantanamo Bay. On the one hand, there is the assertion that detainees have become radicalized while in prison, making it more likely that they will turn to violent extremism upon release. For example, evidence exists that a number of the Yemeni detainees who were released have (re)turned to terrorist activities. In addition, Guantanamo Bay has allegedly been used as a recruitment tool for extremist groups in the Middle East. Brig Gen Hemingway said that he has found no empirical evidence to support that allegation. Another allegation is that Guantanamo Bay has practiced torture to extract relevant information. Brig Gen Hemingway believes that this concern has been overblown, noting that neither he, nor any government lawyer he has worked with on these cases, would consider admitting evidence derived from torture into either a criminal trial or military commission.

The moral justice argument, on the other hand, believes that it is unethical to detain an individual if they are innocent of a crime. However, Brig Gen Hemingway was careful to note that, although a detainee may be deemed eligible for release, this does not mean the detainee was improperly held as an "unprivileged belligerent" in the first place. As in many conflicts, suspects are initially held to keep them off the battlefield. Herein lies the delicate policymaking balance. How far should the government go to provide justice while also ensuring U.S. national security? Is it better to risk detaining an individual who will not be accused of a war crime, or to be certain that U.S. national security remains intact?

Apart from the legal complexities, Guantanamo Bay conditions are often fallaciously described as horrible and in-humane. On the contrary, Brig Gen Hemingway noted that the facilities at Guantanamo Bay offer significant improvements over both American and European prison facilities. Increased care is taken to provide excellent Islamic-oriented treatment, including 6,000-calorie Halal meals per/day, interruption of prison activities to allow for prayer five times a day, the provision of a Qur'an in every cell, and the transmittance of prisoner mail.

The Obama administration has stated its intent to close Guantanamo Bay. Before that can happen, at least two carefully considered steps must occur. Not only must the Obama administration secure a suitable replacement facility, which currently is unavailable either in the U.S. or Europe, but also determine whether to use a criminal or military tribunal system to try the detainees.

Brig Gen Hemingway's extensive experience with Guantanamo Bay issues has lead him to conclude that there is no reason to close a well-equipped and well-run facility. He said that there is nothing wrong with Guantanamo Bay and military commissions that transparency and public education cannot cure.