

Guantánamo Bay: A Reflection On The Legal Status And Rights Of 'Unlawful Enemy Combatants'

Dr. Terry D. Gill, Associate Professor of Public International Law at Utrecht University and Professor of Military Law at the University of Amsterdam, Achter Sint Pieter 200, 3512 HT Utrecht, Netherlands, t.gill@law.uu.nl

Dr. Elies van Sliedregt, Associate Professor of Criminal Law at Leiden University, Steenschuur 25, 2311 ES Leiden, Netherlands, e.vansliedregt@law.leidenuniv.nl

Abstract

The United States administration's policy of detaining 'unlawful enemy combatants' at the United States military base in Guantánamo Bay falls short of international and domestic law standards. The problem in the authors' view is not that the United States has decided to designate those captured on the battlefield in Afghanistan as 'unlawful combatants' who (allegedly) fall outside the scope of international humanitarian law. International humanitarian law has long recognized the existence of such a category. The problem is rather that international humanitarian law has been sporadically and selectively applied and in many respects has been ignored or violated with respect to the detainees held in Guantánamo and elsewhere within the context of the 'war on terror'. In its recent judgements in *Hamdi v. Rumsfeld*, *Rumsfeld v. Bush* and *Rasul v. Bush* the United States Supreme Court has not passed an unambiguous and clear judgement on the United States policy towards unlawful enemy combatants. The Court may have rejected the executive's claim that it has the authority to incarcerate people suspected of terrorist connections without any judicial review, the three decisions have not imposed on the executive a clear framework governing the detention of alleged terrorists. The Court has upheld the government's power to hold 'enemy combatants' according to standards that fall short of the requirements of the Geneva Conventions. Moreover, the due process protection granted to those challenging their status as 'enemy combatant' is so deferential to the executive that it could render review virtually insignificant.

Keywords

Guantanamo Bay, unlawful combatant status, due process, enemy combatant, Supreme Court, *Hamdi*, *Padilla*, *Rasul*, status determination procedures, habeas corpus.

[full text](#) [back](#)

ISSN 1871-515X