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Posted: September 18, 2010 01:40 PM

My Debate with Marc Thiessen

Earlier this week, I debated General Michael Hayden (USAF, retired), former director of both the CIA and NSA, and Marc Thiessen, former Bush speechwriter and current columnist for the Washington Post, as part of the "Intelligence Squared" Debate series from New York. I was joined by Stephen Jones, an accomplished attorney best known for defending Timothy McVeigh, the Oklahoma City Bomber. The specific proposition debated was whether terrorists (or more accurately suspected terrorists) should be treated as enemy combatants, as opposed to handling within the traditional criminal justice system, but the debate covered a wide range of issues in the conduct of the war on terrorism. According to the audience, Stephen and I won the debate handily. For those interested in seeing or hearing the debate, it will be televised on the Bloomberg News Channel starting Monday, and it will also be available soon as a podcast from NPR, or you can watch the unedited version of the debate [here](#).

For the most part, Thiessen and Hayden voiced the usual Bush Administration talking points. Thiessen is the author of the bestselling book "Courting Disaster: How the C.I.A. Kept America Safe and How Barack Obama Is Inviting the Next Attack" which Jane Mayer of the New Yorker described as the "unofficial Bible of torture apologists." Thiessen's basic argument was that the detention and interrogation practices of the prior administration were effective, as proven by the fact that there have been no successful terrorist attacks domestically since 9/11. Thiessen failed to note the multiple successful terrorist attacks on our allies, such as the London and Madrid bombings, and the constant assaults on our troops in Afghanistan and Iraq, where 5700 Americans have been killed and 39000 injured. He also continues to assert that the U.S. didn't torture anybody, that all the interrogation methods we used were legal, and that life for detainees at Guantanamo is a picnic:

What do you think these detainees in Guantanamo do all day? They're not busting rocks. They're not making license plates. They sleep. They read the Koran. They play foosball. They play soccer. They eat whenever they want, sleep whenever they want.

General Hayden, for his part, kept repeating that the law of armed conflict allows enemy combatants to be removed from the battlefield and detained for the duration of the conflict, a point that was not disputed. Thiessen and Hayden didn't score many points, but they did make one point that I wished that I had more time to respond to, and that relates to the right of habeas corpus. In the summer of 2008, in *Boumediene v. Bush*, the Supreme Court ruled that, despite Congress' and the Administrations' efforts to deny it, Guantanamo detainees did have the right to petition for a writ of habeas corpus. Thiessen and Hayden still just don't understand why we should be giving "terrorists" the right to challenge the basis for their detention in federal court. In his words "Since the Revolutionary War, the United States has held over 5 million enemy combatants. Until the war on terror, not one of them was given habeas corpus rights to petition their detention." Hayden made a similar comment, lamenting that we "give them rights that 6 million other prisoners of war we've held as a nation have not had."

According to Thiessen, "terrorists" "violate all of the rules of war" by targeting civilians and by failing to wear uniforms or distinctive insignia. The way Thiessen sees it, by failing to comply with the law of war these "terrorists" get an advantage, getting extra legal rights that regular POWs don't get, which he sees as

fundamentally unfair and deeply offensive. Since there is a sort of superficial appeal to this argument, I decided to respond to it in greater depth than the format of the debate allowed me to do.

First, it must be emphasized that detainees are not POWs, or at least the U.S. has not afforded them that status, nor have they been treated in accordance with the Geneva Prisoner of War Convention. So, in considering the claim that Guantanamo detainees are getting extra unprecedented rights, we should keep in mind that POWs would receive an extensive array of rights under the Geneva Conventions which the detainees at Guantanamo don't. Indeed, the original position of the Bush Administration, announced by President Bush in February 2002, was that even Geneva Convention Common Article 3, which sets a minimum baseline of humane treatment for all persons detained in armed conflict, did not apply to those persons detained at Guantanamo. It was only after the Supreme Court ruled in *Hamdan v. Rumsfeld* in June 2006 that Common Article 3 did apply, that the Bush Administration was forced to accept that humane treatment was legally required. So, even accepting that Guantanamo detainees are getting one right not previously afforded to traditional prisoners of war, on balance, it is far better to be a POW than a detainee.

But the right to habeas corpus, to judicial review of the basis for detention, is a significant one. Is it fair that detainees are getting even this one extra right, or is it an affront to both American history and the laws of war, as Thiessen and Hayden believe? In my view, the nature of this particular conflict makes judicial oversight of the detention process an absolute necessity.

All of our major armed conflicts in the past have been against sovereign states, or at least against regular armies, and were confined to specific geographic areas. It was clear who the enemy was because of the uniform they wore, their nationality and language, and because of where they were found. There was little likelihood of error.

But the "Global War on Terror" is quite different. Our enemies are non-state actors who wear no uniforms and blend in with the civilian population; don't carry ID cards indicating membership in al Qaeda. Unlike in other conflicts, many Guantanamo detainees were not captured on the battlefield during active combat situations. Rather, most were turned in for bounty by locals of unknown reliability, captured at the border trying to leave Afghanistan, or arrested in law enforcement style raids based on intelligence tips.

Precisely because the enemy was not readily identifiable by uniform, insignia, identification card, or nationality, our intelligence personnel and armed forces often, understandably, erred on the side of caution, especially when it came to foreigners found in Afghanistan, choosing to detain first and ask questions later. Although there were any number of legitimate reasons foreigners might be visiting Afghanistan, because al Qaeda was made up primarily of non-Afghans, any suspicious Muslim foreigner without an airtight explanation for his presence in the country and perfect documentation was liable to be detained.

Both Thiessen and Hayden acknowledged during the debate that the detention process was not perfect and did not require rigid proof that an individual was an enemy combatant, but rather merely a "reasonable belief."

As General Hayden stated during the debate:

If they are enemy combatants... I have the right to hold them, consistent with the laws of armed conflict because they are a danger to you. The Geneva Convention doesn't require me to prove that they're a criminal. I simply have to have a reasonable belief that they're enemy combatants.

Asked by an audience member what an acceptable error rate would be, General Hayden responded,

We do the very best we can. . . I hope the audience is not demanding 100 percent certitude and 100 percent perfection before your intelligence services or your military services can act in your defense.

Thiessen echoed Hayden in his explanation of the process of detaining enemy combatants:

You have to have a reasonable belief that these people were captured in the war and that they are members of al-Qaeda or the Taliban and were conducting operations against us. . . . Were there some people that were sent there by accident, that we made a mistake? . . . There's some mistakes made, absolutely.

Although both Thiessen and Hayden acknowledged that innocent people might have been rounded up, they also stressed that there were procedures in place, namely Combatant Status Review Tribunals (CSRTs), to review the basis for detention. According to Hayden, we "ensure through this process, due process, that the individual you have is the individual you believe them to be." Thiessen explained the CSRTs this way: "we had a process in Guantanamo that was set up to review the evidence against them and to make sure that people who. . . didn't belong there were sent back." What both debaters failed to mention was that the Bush Administration's initial position was that the detainees were not entitled to any form of review of their detention and that the CSRTs were only set up in July 2004, more than two and a half years after Guantanamo opened, in response to the Supreme Court's ruling in *Hamdi v. Rumsfeld*.

More to the point, as the Supreme Court has determined, the rules and procedures which apply in CSRTs are hopelessly inadequate for the critical function they serve. These tribunals gave a presumption of reliability to the government's evidence, admitted unlimited hearsay, and provided no meaningful opportunity for a detainee to call witnesses or introduce exculpatory evidence. Perhaps their most fatal flaw was the lack of legal representation for detainees at such hearings, which the Department of Defense curiously labeled "non-adversarial" proceedings. Thus, according to the majority opinion in *Boumediene*, "even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact."

Another difference between the current conflict and our wars of the past is that wars against sovereign nations have a definable endpoint, when one side surrenders or is defeated and a treaty or armistice is signed. The war against al Qaeda and the Taliban has already gone on for 8 years, and there is no clear end in sight. The terrorist threat certainly has not abated since 9/11, and arguably has multiplied. The jihadists see the fight as a multi-generational struggle, and there is little likelihood that Osama bin Laden, or his successor, will ever make peace with the U.S.. Thus, if detainees may be held until the end of the conflict, they could be in for a very long stay. This might be acceptable for a genuine terrorist, but for a person wrongly detained, it is wholly unacceptable. As Justice Kennedy put it, "given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore." In affirming the right of Guantanamo detainees to habeas corpus, the Court was responding to the concern that without the format of an adversarial trial with reasonable evidentiary safeguards in front of a neutral fact-finder, an innocent detainee might never leave Guantanamo.

The Court's wisdom has been borne out in the subsequent habeas litigation. In the cases to reach the merits in the federal district courts, 37 of 53 of the detainees have prevailed and been granted the writ, despite the fact that all of the detainees were at one time found by a CSRT to be enemy combatants. That is, in 70% of cases, the government has failed to meet the modest burden of proving to a federal judge by a preponderance of the evidence that the detainee meets the expansive definition of an enemy combatant. [According to General Hayden, one detainee won his petition because the only way to prove he was an enemy combatant was to reveal an intelligence source, which he declined to do; he had no explanation for the other 36.]

The fundamental difference between people like Marc Thiessen and General Hayden and "terrorist sympathizers" like myself is that they seem to feel that detaining dozens of innocent people potentially for decades is acceptable. Those wrongfully held at Guantanamo are, in essence, just another form of collateral damage, civilian casualties in a just and necessary war. What upsets Thiessen and Hayden is not that we have detained scores of innocent men for so many years, but that the detainees were ever allowed into court in the

first place. For my part, I don't see forcing the government to justify the long-term detention of an individual in a court of law as a great imposition on the most powerful nation in the history of the world. I represented a detainee at Guantanamo, Mohammed Jawad. He was detained in Afghanistan in December 2002 and transferred to Guantanamo in February 2003. Six and half long years later, a federal district judge finally ordered the U.S. government to prove that he truly was an enemy combatant. Two weeks before the trial on the merits, the Department of Justice notified the court that they no longer considered Mr. Jawad "detainable." The writ of habeas corpus was granted and Mr. Jawad was released back to Afghanistan, a free man. If Thiessen and Hayden had their way, he never would have had his day in court and would still be languishing in Guantanamo. In my opinion, that would be a travesty. If Thiessen and Hayden would like to try to convince me otherwise, I'll be happy to debate them again.