



## Don't forget we're at war

By Richard Samp

Those who have challenged the legality of the administration's policy of indefinitely detaining enemy combatants in our war against al-Qaeda have begun to face up to a harsh reality: The courts have by and large upheld the policy. They have rejected efforts aimed at closing down the detention facility at Guantanamo Bay and upheld the president's decision to convene military commissions to try some of the detainees as war criminals. (Related: [Our view](#))

So now critics are taking a new tack. They argue that even if the administration is acting within the law, we ought to abandon the policy because it's not the right thing to do. They apparently want detainees either to be charged with crimes in our regular criminal courts or else set free.

That simply is no way to fight a war. In response to the 9/11 attacks that killed thousands of Americans, our military has rounded up hundreds of al-Qaeda fighters. By holding these enemy combatants in custody for the duration of hostilities, the military is preventing them from renewing the attack and is operating the way every army operates. Given the manner of their capture, for many of the detainees it is unlikely that the military could meet the evidentiary standards required for conviction in a regular criminal court. But armies have never been held to that standard.

Moreover, every detainee who has protested his innocence has been afforded a hearing before a military tribunal. The tribunals have ordered the release of all those for whom there was not substantial evidence demonstrating their enemy combatant status. So there is little danger that the Guantanamo detainees include non-combatants who were mistakenly taken into custody.

Military commissions to bring war crimes charges against the most dangerous detainees have a pedigree that dates back to the Revolutionary War. The need for such commissions — an alternative to regular criminal trials that both provides flexibility and protects sensitive information from unwarranted disclosure — is well illustrated by the ongoing trial of Zacarias Moussaoui, who is awaiting sentencing for his part in the 9/11 plot. Proceedings in that trial have been delayed for years by the types of procedural obstacles that can be avoided in trials before military commissions.

*Richard Samp, chief counsel of the [Washington Legal Foundation](#), filed a "friend of the court" in support of the government in the Hamdan case.*