

Holding Terrorists Accountable

THE ISSUE:

The United States is at war. Since the September 11, 2001, attacks, the United States has detained alien unprivileged belligerents under the law of war and the congressional Authorization for Use of Military Force (AUMF). Although the Supreme Court has held that the AUMF allows the government to detain the enemy without charge, it has issued a series of decisions that have invaded the traditional province of the elected branches of government. This overreach by the Court has created dangerous uncertainty for those who are charged with prosecuting the war. The President must seek and Congress must pass appropriate legislation that defines who the enemy is and the rights he has, regardless of where he is captured or held. All lawful tools within the province of the executive branch must be utilized, including military commissions and, in limited appropriate cases, referral of cases to the federal court. The President should immediately provide the military commissions with the best resources our country has to offer, including the best federal prosecutors and defense counsel.

THE FACTS:

- **Judicial Encroachment.** In 2008, the Supreme Court for the first time in history extended the writ of habeas corpus to alien unprivileged belligerents apprehended and detained abroad. This decision and related decisions reflect a Court choosing to make policy in an unprecedented way where no guidance exists from the elected branches.
- **No Statutory Definition.** The executive branch has failed to seek, as promised, an appropriate statute defining the rights of detainees. As a result, much has been left to federal judges, allowing them to fill in the gaps in current law with policies that reflect their own will.

- **Lack of Proper Facilities in the U.S.** There is no courtroom capable of handling the sensitive information and security needs of holding and trying terrorists within the United States, even on military bases. Guantanamo Bay is currently equipped to meet these security challenges.
- **Criminal Justice–Only Mentality.** The Christmas Day bomber and Times Square bomber both were Mirandized shortly after they were captured. The Obama Administration’s starting point in terrorism cases is to treat terrorists as mere criminals, not as unlawful enemy soldiers with valuable intelligence. This is dangerous and ill conceived, because dealing with an unconventional enemy requires the use of all lawful tools at the government’s disposal, including interrogation for intelligence purposes and the use of military commissions.
- **Skirting Issues, Losing Assets.** The United States, under President Obama, has purposefully allowed captured terrorists to go into the custody of other countries in order to avoid the difficult issues involved in apprehending and holding more detainees in a system that lacks useful definitions. This has the effect of reducing American access to the potentially critical intelligence information gleaned from these individuals.
- **Refusing to Provide Experienced Prosecutors.** Attorney General Eric Holder has refused to provide experienced federal prosecutors to the Office of Military Commissions, despite being asked to do so by the Department of Defense.

THE SOLUTIONS:

- **Congress Must Enact Appropriate Legislation.** This includes defining the rights and privileges of unprivileged belligerents, including current detainees and future cap-

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tures, and providing clear distinctions among unprivileged belligerents, POWs, and domestic criminals.

- **Fully Resource Commissions.** Attorney General Holder must send the best federal prosecutors to commissions.
- **Keep Guantanamo Open Until It Is No Longer Needed.** The detention facility at Guantanamo Bay is first-rate, and detainees are well treated. Congress should deny funds to close the facility until it is no longer needed.
- **Do Not Import Terrorists into the U.S.** Before moving to close Guantanamo and transfer any remaining detainees to the United States, Congress must define their rights and privileges. Otherwise, it is likely that the courts will declare that they enjoy the exact same ben-

efits that the Constitution, the Bill of Rights, and various statutes provide to typical civilian, criminal defendants, even when lawful POWs have never had such rights in our courts or any other court in the world.

- **Conduct a Comprehensive Review of Detainees and Diplomacy.** The Administration should conduct a review of all detainees released or transferred from Guantanamo to evaluate the actual recidivism rate. The review must include an analysis of the diplomatic agreements the United States had with the countries that received detainees from Guantanamo to ensure compliance with the assurances by the receiving country. This review should be reported to committees of jurisdiction in Congress, utilizing classified hearings.