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Capture of Baradar Shows Need for Legal Framework for Treatment of Detainees

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It is important to give credit where credit is due: Capturing Afghan Taliban leader Abdul Ghani Baradar is a good thing. As the Taliban's top military commander and influential leader, he no doubt knows a great deal about plans, programs, finances, and capabilities of the Taliban, both in Afghanistan and perhaps Pakistan. He may even have timely information about al-Qaeda, information that the U.S. can use immediately.

But the capture of Baradar, the result of a secret joint operation by Pakistani and U.S. forces, also raises other inter-related questions that go to the heart of President Obama's approach to counterterrorism and his ever-shifting detention policies.

Questions Remain. The Baradar case came dangerously close to the very scenario the Administration has been desperately hoping to avoid: coming into possession of a high value terrorist outside of Afghanistan whom the U.S. must capture and interrogate for intelligence purposes and then detain without charge for a period of time.

It appears the Administration chose to avoid that situation here. According to news reports, Baradar was captured in Karachi by the Pakistani Security Forces, is being interrogated by Pakistani and U.S. interrogators, and will end up in Pakistani custody. Most likely, the Pakistanis would not have it any other way. Pakistani authorities are also probably reluctant to hand him over to the U.S., especially given their own intelligence links to the Afghan Taliban leadership. If, however, the Pakistanis would

not have opposed such a move, why did the U.S. not assert control over Baradar?

For starters, the Obama Administration decided from day one not to transfer any detainees to Guantanamo Bay, Cuba. Second, the Administration has been reluctant to send detainees captured outside of Afghanistan to the U.S. detention facility in Bagram, Afghanistan. The reason is simple: A federal judge ruled that such detainees could contest their detention in U.S. federal court through the habeas corpus process.

Thus, it is no coincidence that the Administration has increased Predator drone strikes on suspected terrorists, as reported recently in *The Washington Post*. It is indisputable that by killing terrorists, the U.S. government obtains less intelligence from them than if they were captured and lawfully interrogated. But as Andy McCarthy correctly points out, "Dead terrorists don't recidivate, don't rejoin the jihad, and don't kill more innocent people."

Drone strikes have effectively put al-Qaeda on the run and disrupted their ability to plan, coordinate, and carry out terrorist attacks against the U.S.

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According to news reports, the U.S. has taken out at least 17 senior Taliban and al-Qaeda leaders through the targeted use of drones.

Even so, there are terrorists that, because of who they are and what they know, the U.S. will want to capture and interrogate—e.g. Osama bin Laden, amongst others.

However, in the absence of a comprehensive detention and interrogation framework—and a place to detain terrorists that the Administration is willing to use—it is easier to contend with terrorists from 30,000 feet.

No Plan or Policy. But there is another aspect of the Baradar capture and interrogation that should not go unnoticed.

Recall that as a presidential candidate, Barack Obama ran against what he called the excesses of the Bush Administration's detainee policy. Claims that the Bush Administration routinely facilitated torture by outsourcing its interrogation program are still fresh in the public's mind.

Yet when faced this time with a real-world test of whether to kill or capture a high-value detainee and interrogate him using Army Field Manual techniques, the President and his national security team took a third way: capture, but allow the Pakistanis to interrogate the terrorist. In not asserting that the United States has control of Baradar and allowing the Pakistanis to take charge, the Obama Administration can skirt the requirement under applicable Defense Department instruction that requires humane treatment and interrogation only using the soft Army Field Manual techniques. Assuming the U.S. even had a choice, if America had asserted effective control of Baradar, then the Pakistanis would have to follow U.S. rules. By not asserting effective control, the Pakistani interrogators are not so constrained.

On national security matters, candidate Obama ran on a platform of restoring America's tarnished image. A key tenant of that platform was banning

the outsourcing of interrogations to countries with, say, "aggressive" interrogation programs.

"It Depends." If polled on this issue, many Americans would possibly support allowing the Pakistanis to interrogate Baradar. But that is not the point.

Rather, the point is this: The Administration seems to have no policy or plan in place to deal with the very real possibility that the U.S. will capture high-value terrorists outside of Afghanistan and that these terrorists will need to be interrogated for intelligence purposes.

It was only a few months ago that Attorney General Eric Holder inadvertently exposed the Administration's weakness regarding how to handle high-value terrorists captured outside Afghanistan. Testifying before the Senate Judiciary Committee, Holder mangled an answer to a question posed by Senator Lindsay Graham (R-SC): When asked what the plan was if or when the U.S. captures Osama bin Laden, Holder responded, "It depends."

Common-Sense Framework Needed. The Administration has had ample time to develop a durable, comprehensive legal framework for the detention and interrogation of high-value detainees. For a variety of reasons, all of which falls on their shoulders, they have failed to do so. The Baradar situation should serve as a wake-up call and force the Administration to put in place a common-sense framework for the long war.

Last May, President Obama rightly stated that the U.S. needed a narrowly crafted statute authorizing prolonged detention. He apparently changed his mind last September under pressure from his left. Yet within the last week, it has become clear that the President is once again in favor of such a statute. There is no time to waste, especially because there are other Baradars out there whom the U.S. needs to detain and interrogate.

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