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Terrorist on Your Street?

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On March 22, a federal judge in the District of Columbia ordered that Mohamedou Ould Slahi, one of the most dangerous terrorists being held at Guantanamo Bay, be released. Although the Obama Administration has decided to appeal the decision, if the court's order stands several issues will have to be addressed, including where Slahi will go, and, if no other country will take him, whether Slahi will eventually be released inside the United States.

The Administration and Congress need to address this issue by providing legislation specifically authorizing prolonged detention and common-sense definitions of the word *enemy* so federal judges will not be able to make up the rules and definitions of terrorist detention on the fly—like they have been doing for some time.

Precedent in Place? Slahi is not someone Americans should want released. According to the 9/11 Commission Report, Slahi played a significant role in recruiting four of the September 11 conspirators, including Ramzi Binalshibh and Mohammed Atta, and arranging for them to travel to Afghanistan for training. Three of those recruits turned out to be the suicide pilots of American Airlines Flight 11, United Airlines Flight 175, and United Flight 93. Slahi also admitted that he was part of the global jihad and swore an oath of allegiance to Osama bin Laden.

The issue is not only that Slahi should not be released in the U.S.; the fact that no foreign country will likely agree to take him must also be addressed. Such a situation, however, is not unprecedented. For example, last October, one federal judge in the District of Columbia ordered that Chinese Uighurs detained at Guantanamo be released into the U.S. after the government decided that it would no longer consider them to be enemy combatants.[1] The D.C. Circuit Court of Appeals reversed that ruling, holding that the federal courts lacked the power to review the executive branch's decision to exclude the Uighurs from the country.[2]

In ordering the release of the Uighurs, the federal court in the District of Columbia "[d]rew" on the principles established in two decisions of the Supreme Court in non-terrorist cases involving immigration law and concluded that the power of the President to "wind up" detentions during wartime has limits.[3]

The first was *Zadvydas v. Davis*, in which the Court held that resident aliens who had been ordered removed from the country because of their criminal conduct but could not be deported because the U.S. could not find a country to accept them could not be detained indefinitely.[4] Instead, the *Zadvydas* Court held that they could be detained for only six months before they had to be released into the U.S., albeit subject to supervised release under special conditions. The Supreme Court did say, however, that it was not considering "terrorism or other special circumstances where special arguments might be made for heightened deference to

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the judgments of the political branches with respect to matters of national security."[5]

The second case that the federal court drew on was *Clark v. Martinez*. In *Clark*, the Supreme Court reaffirmed and extended its previous decision holding that the six-month time limit also applied to aliens who have not yet gained admission to the country.[6]

The petitioners in the Uighur case were detained terrorists, not immigrants facing deportation either because of their criminal conduct inside the U.S. or because they had not yet been admitted. In *Zadvyda*s, the Court said that it was talking about common criminals who had already been convicted of their crimes, not terrorists. The Court's decisions, however, required that Zadvydas and the other immigration detainees be released into the U.S. because no other country would or could take them.

Furthermore, in the immigration cases, the Court created a time limit on the power to detain. In the 2005 decision, it noted the government's concern with the security of the national borders "if it must release into the country inadmissible aliens who cannot be removed." The Court explained, "If that is so, Congress can attend to it."[7] The danger is that the Supreme Court will create a time limit on the power to detain the terrorists now held at Guantanamo Bay just like it created one in the immigration context.

Tough Challenge for the Administration. As noted above, Attorney General Eric Holder has announced that the government will appeal the order to release Slahi. To say that the Attorney General will have his work cut out for him would be an understatement.

The D.C. Circuit court might have reversed the order to release the Uighurs, but the Supreme Court was ready to review that ruling. Nobody knows how the Court would have ruled if it had not backed off or what it will do if it is asked to consider Slahi's case. Furthermore, the willingness of some of the federal district court judges in the District of Columbia to extend and affirm limits on detention raises serious questions. Consequently, Congress and the Administration should not leave it to the courts to determine how long the U.S. can hold the Guantanamo detainees.

Rather, the Administration and Congress should craft, once and for all, a narrowly tailored, durable legal framework for protecting the people of the U.S. from detainees who have no business being here. Military detention is "a time-honored, legal, proper national security tool during armed conflict,"[8] but more is needed to ensure that those bad actors involved with terrorism who cannot be prosecuted can, nonetheless, be detained for as long as necessary to protect U.S. national interests. Specifically, the White House (or Congress) should:

- Establish a "lawful, durable, and internationally acceptable" framework for the continued detention of terrorists who are now in U.S. custody, as well as those who will come into U.S. custody in the future;[9]

1. *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33, 38 (D.D.C. 2008).
2. *Kiyemba v. Obama*, 555 F. 3d 1022 (D.C. Cir. 2009). The Supreme Court was poised to review the D.C. Circuit's ruling but sent the case back to the lower courts when it became clear that 12 of the 17 Uighur detainees had been placed outside the U.S. after their release was ordered. *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010).
3. *In re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d at 38.
4. *Zadvydas v. Davis*, 533 U.S. 678 (2001).
5. *Ibid.*, at 696.
6. *Clark v. Martinez*, 543 U.S. 371 (2005).
7. *Clark*, 543 U.S, at 727.
8. Charles Stimson, "Holding Terrorists Accountable: A Lawful Detention Framework for the Long War," Heritage Foundation *Legal Memo* No. 35, January 23, 2009, at *http://www.heritage.org/Research/Reports/2009/01/Holding-Terrorists-Accountable-A-Lawful-Detainment-Framework-for-the-Long-War.*
9. *Ibid.*, at 6.

- Provide for the identification of the persons who will be subject to detention, considering such criteria as, among other, "dangerousness, membership in or support for an organization such as al-Qaeda, past acts, and future intentions";[10]
- Provide for a hearing at or near the time of capture if there is a question as to a detainee's legal status (similar to the Article 5 hearing provided to prisoners of war under the Geneva Conventions);
- Allow for a defined period of lawful interrogation for those initially detained;
- Provide for an Article 5 hearing before a military judge and for appellate review of any decision, with qualified, free appellate counsel provided to the detainee;
- Provide for periodic review of the basis for detention; and
- Establish a national security court, like the Foreign Intelligence Surveillance Court, that will have the expertise to evaluate the basis for continued detention.

Inaction Not an Option. Doing nothing is not an option. That would amount to punting the issue to the federal courts,[11] which lack the constitutional warrant and the expertise needed to act in this arena. For those and other reasons, the courts have no business deciding detainee policy. Period.

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10. *Ibid.*
11. Charles Stimson, "Punting National Security to the Judiciary," National Review Online, September 25, 2009, at *http://article.nationalreview.com/407917/punting-national-security-to-the-judiciary/charles-cully-stimson* (April 20, 2010).