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CivilLITIGATION

Closing Guantanamo: A legal conundrum

As the nation continues to focus on our economic woes, major legal and political decisions have been made regarding the U.S. detention camp at Guantanamo Bay with little or no attention.

Within days of taking office, President Obama signed an executive order calling for the closure of Guantanamo by January 2010. That decision — an Obama campaign promise — creates numerous legal and security issues; specifically, how to close the facility and what to do with the approximate 250 remaining inmates.

Even before Obama took office, the wheels of change began to turn regarding the status of detainees at Guantanamo. In June 2008, the U.S. Supreme Court, in a highly controversial opinion, ruled that Guantanamo Bay detainees are entitled to the Constitutional right of *habeas corpus* — the right to challenge the legality of their detention. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

In November 2008, the U.S. District Court in Washington D.C. held a seven-day hearing regarding the government's allegations against the six plaintiffs in *Boumediene*. Later that month, the court ruled that the government failed to show any reliable evidence justifying the detention of five of the six men. Surprisingly, the government did not appeal and, in December 2008, three of the five men returned to their homeland in Sarajevo, Bosnia, marking the first time the government released Guantanamo prisoners in response to a court order.

What happened to the other two men, including Lakhdar Boumediene? They remain at Guantanamo, despite winning their cases. In fact, since the landmark ruling in *Boumediene*, 23 men at Guantanamo in court were declared not to be enemy combatants. Still, 20 of the 23 remain imprisoned, in legal limbo. The problem is that arranging the transfer of the "freed" men to other countries involves sensitive political negotiation and poses a complicated legal challenge for the courts and the government.

The Bush administration had refused to admit any of the for-

mer detainees into the United States and President Obama has yet to make a decision on the issue. Most of the 20 men cannot be returned to their home countries because of the risk of torture or death there — 17 of the men are Muslim Uighurs from China, which has a history of repressive measures in dealing with its Muslim minority. We also have yet to find another country willing to accept them, although there has been some indication that Spain, France, Sweden and Portugal will consider offering asylum on a case-by-case basis.

As the issues continue to be wrangled with, Obama must redefine the U.S.'s counterterrorism policies and ensure the detention and prosecution of terror suspects meet appropriate ethical and legal standards. During his presidential campaign, he proclaimed the Bush administration had lost sight of those standards. At the same time, Obama knows that, political rhetoric aside, the country faces a constant threat of another terrorist attack and like Bush before him, and the presidents who will follow him, he is charged with preventing another 9/11.

Of course there is wide disagreement over what the balance should be between the rights of people perceived to be enemy combatants, and the protection of our country. While some view the courts' recent actions — in addition to *Boumediene*, see *Odah v. U.S.*, 2009 U.S. App. LEXIS 4538 (2009) — as upholding the Constitution and our country's guaranteed rights, others feel the decisions have jeopardized the country's safety, along with that of our troops now fighting in Iraq and Afghanistan, by vindicating our enemies' "new" constitutional rights.

Interviewed last month, former Vice President Dick Cheney, citing intelligence reports, said that at least 61 of the inmates released from Guantanamo during the Bush administration have "gone back into the business of being terrorists." Cheney said he feels the country may be "more concerned about reading the rights to an Al Qaeda terrorist than [we] are with pro-



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tecting the United States.” While Cheney’s numbers are difficult to prove and are being met with skepticism, there is at least one documented case of a released Guantanamo detainee returning to Al Qaeda.

In January, U.S. officials confirmed that Ali al-Shihri, a former Guantanamo detainee released to Saudi Arabia in 2007, resurfaced as the deputy leader of Al Qaeda’s Yemeni branch. Shihri had been accused of several peripheral terrorist activities, including meeting with a group of extremists in Iran. Those alleged acts eventually landed him at Guantanamo.

While the reasons for Shihri’s release mostly are confidential, government documents state that he claimed to have traveled to Iran only “to purchase carpets for his store,” and he denied knowledge of any terrorist activities. If released, he

claimed he wanted to return to his family in Saudi Arabia, and work at the family furniture store. Instead, he returned to Yemen, a known haven for jihadists, joined Al Qaeda, and now is a suspect in the September 2008 car bombings outside of the American Embassy in Sana that killed 16 people.

Ali al-Shihri’s case, and his reported actions following his release, illustrate the legal, political and philosophical issues the government and courts face upon the closing of Guantanamo. How the president, Congress and the courts ultimately will respond over the next nine months will be captivating, both legally and politically, and will have a lasting effect on the country’s future.

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