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Courts should get out of detention cases

By Daniel J. Popeo
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It's bad enough that the Supreme Court last June decided federal courts should be free to second-guess the military's decision that an individual it captures is an "enemy combatant" and thus subject to detention.

The court's decision in Boumediene v. Bush overturned not only a congressional statute but also several centuries of precedent holding that aliens being held oversees have no constitutional right to have their claims of innocence heard in the courts (a procedure known as habeas corpus review).

But now an army of federal district court judges in Washington, D.C., is threatening to go much further. They are seriously considering claims by detainees who seek to change the conditions of their confinement at Guantanamo Bay.

They are interfering with the military's right to transfer detainees to facilities and countries that the military deems more appropriate. They are even threatening to order the release of some Guantanamo Bay detainees into the United States. Enough is enough; it's time for the courts to stay out of affairs that historically — and for good reason — have been delegated exclusively to Congress and the president.

Establishing procedures for detaining enemy combatants is a delicate balancing process. On the one hand, reasonable people should be concerned by the possibility that someone detained at Guantanamo Bay never actually took up arms against the United States, and thus there needs to be a procedure for identifying the innocent.

On the other hand, others recognize that we are still at war, and thus we need to ensure that we do not adopt legal procedures that interfere with our ability to wage that war.

The president and Congress arrived at what they deemed the proper balance: They created a Combat

Status Review Tribunal system that allowed detainees to protest their designation as enemy combatants. Every Guantanamo detainee was afforded a CSRT proceeding, and a sizable number of them won their cases.

Moreover, Congress adopted a statute that permitted those unhappy with their CSRT verdicts to retain outside counsel and appeal their cases to the federal courts in Washington.

The Supreme Court overturned that system, and held that detainees should be allowed to protest their innocence by seeking habeas corpus review in federal district court. But at least the Supreme Court recognized that such review should be somewhat deferential to the factual determinations of military personnel.

Several federal district judges in Washington appear to be on the verge of going a good deal further in second-guessing the military. Some detainees do not like the way they are being treated at Guantanamo Bay, as though the military should be running a summer camp for wayward teens.

Military findings that the detainees include some of the world's most hardened terrorists have been borne out by recent history; as Justice Antonin Scalia pointed out in his Boumediene dissent, many of those released from Guantanamo have returned to Afghanistan to kill Americans.

Moreover, if federal judges start second-guessing the manner in which the military holds the detainees, they will be doing so in violation of a 2006 congressional statute, which decrees that no federal court shall have jurisdiction to hear challenges to "any aspect of the detention, transfer, treatment, or conditions of confinement" of those at Guantanamo Bay.

Perhaps most outrageously, several federal judges are now seriously entertaining the notion of ordering the release of some detainees into the United States. The detainees in question are Chinese Muslims affiliated with the East Turkistan Islamic Movement.
The group is fighting the Chinese government, but the U.S. military has determined that they have not fought against the United States. They are still being detained because neither they nor the United States has found a country willing to accept them.

But that certainly does not mean that these trained fighters — who have no connection whatsoever to the United States — have a constitutional right to release into U.S. society. Any judge recognizing such a right would be ignoring centuries-old law granting Congress and the president exclusive authority to decide who should be admitted to the United States.

The federal courts should decline this invitation to appoint themselves military officials and national security strategists. There is no basis in history, law, or common sense for the judges to second-guess determinations regarding how we confine enemy combatants and whether any of them should be allowed to walk freely on American streets.

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