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 Thursday, October 15, 2009

Guantanamo detainee al Mutairi's release a welcome blow to government detention power

12:39 PM ET

Gabor Rona

[International Legal Director, [Human Rights First](#)]: "On October 9, the Department of Justice announced the **transfer** of Guantanamo detainee Khalid Abdullah Mishal al Mutairi, to his home state, Kuwait. "On July 29, 2009, a federal court ruled that al Mutairi may no longer be detained under the Authorization for the Use of Military Force (AUMF) and ordered the government to release him from detention at Guantanamo Bay," said the Department of Justice press release.

"May no longer be detained" is disingenuous spin, consistent with the Bush administration's Defense Department's traditional and casual insistence that those found to have been wrongly detained are "no longer enemy combatants." What Judge Kollar-Kotelly found was that "there is nothing in the record beyond speculation that Al Mutairi did, in fact, train or otherwise become a part of (al Wafa or al Qaida)." But perhaps the most ominous (for the government, that is) part of the ruling was her rejection of the government's expansive theory of detention powers. She wrote:

The Court agrees that the President has the authority to detain individuals who are "part of" the Taliban, Al Qaeda or associated enemy forces, but rejects the Government's definition insofar as it asserts the authority to detain individuals who only "substantially supported" enemy forces or who have "directly supported hostilities" in aid of enemy forces. While evidence of such support is undoubtedly probative of whether an individual is part of an enemy force, it may not by itself provide the grounds for detention.

The Supreme Court in [Boumediene](#) did not assign a detention standard to the habeas cases brought by Guantanamo detainees. District Judges have had to pave their own way. But if anything like Judge Kollar-Kotelly's vision sticks, the government can expect to continue to lose many more habeas claims than it wins.


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Al Mutairi is not the intractable case. He was returned to his country of origin. But his case does suggest several insights into what the United States must do to dispose of the remaining 200 or so Guantanamo detainees, many of whom cannot be repatriated due to non-refoulement obligations, and to solve the problem of bringing the suspected criminals among them to justice.

I use the term dispose, with all its distasteful implications, purposefully. Innocent Guantanamo detainees are the bastard offspring of America's "war on terror." They pay a price not for what they did, but for our desire to bury the injustices to which we have relentlessly subjected them. Guilty detainees evoke less sympathy, but the rights to fair trial and freedom from arbitrary detention do not discriminate between innocent and guilty, except in the Bizarro world of those who first label a man a terrorist and therefore determine that he's not entitled to the same judicial guarantees as we accord suspected child rapists and serial killers, in order to determine if he is, indeed, a terrorist.

As to both innocent detainees deserving of resettlement and those rightly suspected of crimes for which they should be tried, the administration's noble and rational task of emptying Guantanamo could benefit from more responsible reporting by mainstream media and more displays of courage by our elected officials.

The Toronto Star reported on October 11 that an unnamed US official found it "puzzling" for Canada to publically reject the notion of accepting any Guantanamo detainees. Although Canada's reticence to consider accepting even its own national, Omar Kahdr, is irresponsible as well as puzzling, what is even more striking is the expectation of American officials that other countries should take detainees cleared for release while the US refuses to accept any. Of course, other countries' leaders may not be facing the amount of political baggage heaped upon the Obama administration by the domestic fear-mongering lobby. Even as to "cleared" detainees, such as al Mutairi, the notion of "worst of the worst" dies hard when opponents of the administration's plans to close Guantanamo still refer to all the detainees as "terrorists" (or worse yet, "the terrorists"). But there is overwhelming evidence that many of the detainees are not terrorists; that instead, they are the victims of arbitrary detention. This notion began to take root after Prof. Mark Denbeaux of Seton Hall Law School released his first study of the detainee population in February 2006, which suggested that the majority of detentions were supported neither by evidence of membership in al Qaida or the Taliban, nor by evidence of hostile acts against US or coalition forces. More recently, the government's pitiful won/lost record to date in habeas cases (8/30) mirrors Denbeaux's findings. All this suggests there must be some explanation for US reluctance to accept detainees other than that they are the "worst of the worst." One possibility, as mentioned, is that we do not want the living proof of our misconduct in our midst.

Another possibility is that the press is not meeting its obligation to inject truth into a debate being hijacked by fear mongers. While the

mainstream media dutifully report the resistance to bringing any detainees to US soil – even suspected criminals for trial, let alone exonerated ones for resettlement – the fact that so many have been wrongly deprived of liberty from the get go remains comparatively unreported. More specifically, the rightful scorn with which habeas judges have reacted to the paltry evidence offered by the government in so many cases is little noted, except in the blogosphere. And while retired military leaders, whose efforts have been organized by Human Rights First, have received some ink for their advocacy in support of Guantanamo's closure, it has mostly been in the context of transferring those suspected of crimes to continued detention for trial in the United States, proper.

Yet another factor is the cold calculation no doubt made by many in elected office that rectitude is politically too risky. The President's Detention Task Force, in its Preliminary Report of July 20, 2009 expressed its preference for a presumption in favor of federal court trials, rather than military commissions. But on the tender question of the moral obligation to resettle innocent detainees in the United States, the administration has been less vocal, particularly after the craven backlash that began and continues in Congress about the dangers of bringing "the terrorists" into "your backyard."

How disappointing that the administration did not conduct a stronger full court press for resettlement of the Uighurs in Washington, D.C., where a Uighur community exists and had extended a willing hand. Had President Obama and others spoken more forcefully of our moral obligation to solve the problem we created, many things might now be different. Perhaps other countries would have more willingly stepped up to the plate for other detainees. The "keep Gitmo alive" lobby could have better been confronted by the human face of its erroneous and unjust assumptions. The notion that Guantanamo detainees are all, somehow, less deserving of a fair shake than our home-grown "worst of the worst" would be unmarketable. And thus, resistance to bringing the accused 9/11 co-conspirators to US soil for trial in federal courts would diminish, thereby lessening the felt need to continue operating our kangaroo-court system of military commissions. And we might not now have so many misguided souls in Congress oblivious to both the systemic failure of military commissions (3 convictions, only one of which was in a contested trial) and the nearly 200 individuals tried for terrorism offenses in our federal courts during the last decade, and expressing their resolve that military commissions are more appropriate than federal courts. Also, there would be one less category of individual to put in the "can't try 'em, but can't release 'em" basket.

Most of all, we might now have been looking at a date more certain for the end of Guantanamo as a lightning rod for anti-Americanism and for the beginning of America's trek back to its previous position of authority as an advocate for human rights worldwide.

Maybe it's too late to mount a successful campaign to resettle in the United States those innocent detainees who cannot be repatriated. But it's not too late for the administration to stop defending indefensible

positions on detention authority and for the mainstream media come clean as it has not done to date with the American people, and thereby the world, about the human cost of the unlawful, unjust and counterproductive adventure that was, and is, Guantanamo."

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