

Homeland Security NewsWire

HSNW conversation with Shayana Kadidal Legal expert: NDAA does not comply with Constitution

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Shayana Kadidal, the senior managing attorney at the Center for Constitutional Rights, recently spoke with Homeland Security NewsWire's executive editor Eugene K. Chow; in the interview Kadidal discusses the legal challenges of closing Guantanamo Bay, the legal consequences of the recently passed National Defense Authorization Act (NDAA), and the Obama administration's position on transferring detainees

Homeland Security NewsWire: In relation to the detainees currently held at Guantanamo Bay, what are the legal consequences of the controversial National Defense Authorization Act (NDAA) that President Obama recently signed into law?

Shayana Kadidal: The transfer restrictions are the most significant provisions from the standpoint of the detainee litigation. (In my view, the "renewed AUMF" [Authorization for Use of Military Force] provision really does little to alter the current landscape as established by the Court of Appeals.) Similar provisions were put into place by the 2011 NDAA, and since those restrictions went into effect, on 7 Jan 2011, not a single detainee has been transferred out of Guantanamo – the longest period of time in the ten-year history of the prison without a transfer. (Yes, even in 2002 and 2003, President Bush transferred detainees out more frequently than President Obama has over the last year.) The new provisions are similar but with one important exception built in.

Both the 2011 and 2012 NDAA provisions mandate that the Defense Secretary certify that a foreign country that has agreed to receive a Guantanamo detainee has taken steps that will "ensure that the individual cannot engage or reengage in any terrorist activity." Of course, no one can "ensure" that in the future some person will not do any particular thing—it's a metaphysical impossibility to know that with certainty, and as a result, both Gates and Panetta refused and will continue to refuse to make such certifications, no matter how strict the restrictions on travel and police supervision a receiving country puts in place for released detainees. It is thus understandable that no one has been transferred since the 2011 provision became law (the last transfer out from Guantanamo took place two days before, on 5 January 2011).

However, the new law contains a "waiver" provision: if the Secretary is able to certify that the receiving country has taken steps to "substantially mitigate the risk" of harm to the United States, and determines that such a transfer is in the overall best "national security interests of the United States," then the transfer can go forward.

This “substantially mitigate” and “national security interests” test is, we understand, the same test applied for years by the Bush administration, and allowed 600 detainees to be sent home after they were cleared for transfer by the Defense Department. The current review process – the one implemented by the Guantanamo Review Task Force that President Obama set up on his second day in office – is far more rigorous than the Bush clearance process, involving unanimous consent by all relevant agencies – CIA, FBI, DIA/DOD, State, etc. – before a detainee is approved for transfer. Eighty-nine remaining detainees – the majority of the men left at Guantanamo – were approved for release by the Task Force.

We had lobbied to have the certification turn on the “substantially mitigate” and “national security interests” test rather than on the ludicrous “ensure that the individual cannot engage or reengage in any terrorist activity,” simply because it seemed more realistic. But it is worth noting that, politically, it will be much more difficult for any president to issue eighty-nine individual “waivers” of a standard put in place by congress than it would be to simply say that eighty-nine transfers met the official “certification” standard, simply because characterizing a release as based on a “waiver” makes the decision sound more discretionary, as if it were a pardon being issued.

The ultimate result of this provision, then, will be to increase the political cost to the president of taking any steps towards closing Guantanamo – a goal that he, John McCain, and President Bush supported during the last election because they all acknowledged that doing so was in the overall best national security interests of our country.

HSNW: In signing the NDAA, Obama expressed deep reservations about certain provisions, but guaranteed that the bill complied “with the Constitution, the laws of war, and all other applicable law.” From a legal standpoint is that statement correct?

SK: No. For starters, the notion that anyone who is “part of” a group “associated with” al Qaeda is detainable is so open-ended that no responsible judge would ever hold that it was consistent with the law of war.

HSNW: Has the NDAA made shutting down Guantanamo Bay, a pledge President Obama made three years ago, an even more difficult task?

SK: Yes, for the reasons I spelled out above, but I should add that I think it is wrong to assume that President Obama today feels the same way that candidates Obama and McCain both did three years ago. I believe that on almost every national security issue, the president and his advisors have decided that there is nothing to be gained from changing Bush administration practices. In their view, the last ten years are seen by the American public as ten years without another major terrorist attack on U.S. soil. Changing anything that the Bush administration claimed to be doing to prevent another 9/11 will, in the event of another attack, be a point that the President’s political opponents can use to accuse him of being responsible.

That is why we’ve seen a complete absence of leadership on these issues – from detention to surveillance to targeted assassination – from the President, and the Democrats in Congress have simply followed suit given the absence of cover from the White House.

HSNW: What are the key legal challenges that must be addressed before detainees can be transferred out of Guantanamo?

SK: The NDAA transfer restrictions, yes, but also the situation in Yemen. Hardly anyone has been sent home to Yemen in the last decade – less than 15 percent of the Yemeni detainees ever held at Guantanamo have been sent home. In part that is because the U.S. government has never trusted the Yemeni government to be able to monitor detainees sent home, so even the waiver standard in the 2012 NDAA restrictions may be difficult to meet; on top of that, the President issued a “temporary” moratorium on transfers to Yemen after the Christmas 2009 incident where a man supposedly trained in Yemen tried to bomb an airliner headed to Detroit. And about fifty-eight of the eighty-nine cleared men are from Yemen.

Of course, one might expect the courts to intervene given that men cleared for release have been held now for two years plus since their clearance decisions were made. But the standards for winning one’s habeas case set by the intermediate court of appeals – the D.C. Circuit – are effectively impossible to meet. The Circuit has overturned every detainee victory that the government has chosen to appeal. And the Supreme Court has effectively conceded its role as court of last resort because of Justice Kagan’s appointment – she has recused herself from every detainee case involving the merits of the detention standard, since before her nomination she was a lawyer representing the government in cases dealing with detainee affairs.

HSNW: Given the sharp criticism from both sides of the aisle of President Obama’s plan to try some terror suspects in U.S. federal courts, in your opinion is it feasible to end the practice of military tribunals? What are the main legal or political hurdles that must be overcome before fair trials can occur?

SK: Right now it appears that any trials that take place for Guantanamo detainees will be before a military commission, not a federal criminal court. I don’t expect this to change in the near future, barring a ruling from the D.C. Circuit that conspiracy and material support are not war crimes triable by commission.

Fairness isn’t really the ultimate problem with military commissions. The rules have been slowly evolving to approach the standards used in domestic federal criminal courts. But we don’t hold criminal trials just to make sure that the guilty are convicted. We also hold them to project the impression that we are a nation ruled by laws, that we offer equal justice to all accused, regardless of religion or national origin. And any military commissions — especially these ones, derived from the ones President Bush created by fiat and being held at the world’s most infamous prison — will never be regarded as legitimate by the people of the Arab world, who this same administration is trying desperately to establish legitimacy with.

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<http://www.homelandsecuritynewswire.com/bull20120208-legal-expert-ndaa-does-not-comply-with-constitution?page=0,0>