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## Beyond Guantanamo

**Legislation now making its way through Congress would seek to overmilitarize America's counterterrorism efforts, effectively making the U.S. military the judge, jury and jailer of terrorism suspects.**

October 07, 2011 | By Abner Mikva, William S. Sessions and John J. Gibbons

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A new shift in philosophy has begun to emerge among lawmakers in Washington. Legislation now making its way through Congress would seek to overmilitarize America's counterterrorism efforts, effectively making the U.S. military the judge, jury and jailer of terrorism suspects, to the exclusion of the FBI and local and state law enforcement agencies. As former federal judges, we find this prospect deeply disturbing. Not only would such an effort ignore 200 years of legal precedent, it would fly in the face of common sense.

The bill in question, the 2012 National Defense Authorization Act, would codify methods such as indefinite detention without charge and mandatory military detention, and make them applicable to virtually anyone picked up in anti-terrorism efforts — including U.S. citizens — anywhere in the world, including on U.S. soil. Such an effort to restrict counterterrorism efforts by traditional law enforcement agencies would sadly demonstrate that many members of Congress have very little faith in America's criminal justice system.

It is a fact that our criminal justice system is uniquely qualified to handle complex terrorism cases. Indeed, civilian courts have successfully overseen more than 400 terrorism-related trials, whereas military commissions have handled only six. While the use of military commissions may occasionally be appropriate under the Constitution, the Guantanamo military commissions remain subject to serious constitutional challenges that could result in overturned guilty verdicts. The simple truth is that existing federal courts operate under rules and procedures that provide all the tools necessary to prosecute terrorism cases and they are not subject to the same legal challenges as military commissions.

We need access to proven instruments and methods in our fight against terrorism. Stripping local law enforcement and the FBI of the ability to arrest and gather intelligence from terrorism suspects and limiting our trial options is counterintuitive and could pose a genuine threat to our national security. Furthermore, an expanded mandatory military detention system would lead to yet more protracted litigation, infringe on law enforcement's ability to fight terrorism on a local and state level, and invite the military to act as law enforcement within the borders of our states.

In the face of these disturbing developments, we are encouraged by the fact that the administration has expressed its own concerns. The Obama White House has raised strong objections to congressional efforts to undermine the use of our traditional criminal justice system, efforts that would effectively eliminate the administration's ability to leverage "the strength and flexibility" of the system to "incapacitate dangerous terrorists and gather critical intelligence." In previous statements, President Barack Obama said he intends to oppose any attempt to extend or expand such restrictions in the future. We submit to the president that the future is now.

We firmly believe the United States can preserve its national security without resorting to sweeping departures from our constitutional tradition. We call on Obama and Congress to support a policy for detention and trial of suspected terrorists that is consistent with our Constitution and maintains the use of our traditional criminal justice system to combat terrorism. Further restricting the tools at our disposal is not in the best interest of our national security.

*Abner Mikva is a former chief judge of the U.S. Court of Appeals in the District of Columbia and former counsel to President Bill Clinton. William S. Sessions is a former director of the FBI, federal judge in Texas and a member of the Constitution Project's Liberty and Security Committee. John J. Gibbons is the former chief judge of the U.S. Circuit Court of Appeals for the Third Circuit. All three are signatories to Beyond Guantanamo: A Bipartisan Declaration.*

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