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Legal activism aids terrorists

By: Daniel J. Popeo

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Since a suicide bomber's attempt to bring down a Detroit-bound airplane on Christmas Day, we've heard a lot about the counterterrorism community's supposed "failure to connect the dots." As a result, directives have been issued calling for improved information sharing and analysis, and agencies were ordered to review their procedures.

Such bureaucratic self-evaluation and narrow focus on the "dots," however, misses a much larger, more central piece of the puzzle — that a legalistic culture, driven by litigious activists, has infected and impaired our war on terrorism.

Since 9/11, America's soldiers, intelligence operatives and national security officials have not only had to worry about preventing the next attack, but also whether activist ideologues or unelected judges would subvert their decisions or actions.

These activists have scored some major victories in the past nine years. Their lawsuits have struck down portions of the Patriot Act, forestalled and frustrated invaluable wiretapping operations, and prevented testing of sophisticated naval sonar equipment. Another suit recently invalidated a federal law making it a crime to provide material support to terrorist groups. The Supreme Court will hear oral arguments on the government's appeal of that loss on Feb. 23.

This is the same Supreme Court which handed activists and their enemy combatant clients a stunning win in 2008 with its indefensible *Boumediene v. Bush* ruling. Six justices overruled the president and Congress, awarding terror suspects civilian legal rights, such as full access to our courts.

Armed with this ruling, scores of enemy combatants, represented by pro bono lawyers from top law firms, marched into federal court to challenge their detention.

The *Boumediene* ruling also advanced the notion that terrorism is a conventional law enforcement matter and terrorists, in turn, should thus be accorded full constitutional rights. Such an inapt approach to an unprecedented, unconventional war injects legalistic uncertainty into every facet of America's anti-terror efforts.

It is possible, for instance, that this lawyerization of anti-terror efforts led intelligence officials to gloss over warnings about the Christmas Day bomber. As *The Wall Street Journal's* Gordon Crovitz points

out, terrorist screeners apply a “reasonable suspicion” test to watch list determinations, a test that is disturbingly similar to the Fourth Amendment-based standard American police must follow when conducting a search or traffic stop.

This law enforcement mentality persisted after the thwarted airplane bombing when federal authorities quickly charged Umar Farouk Abdulmutallab with a crime. Such decisions, combined with the lawyers and the “right to remain silent” that accompany formal charges, deprive anti-terror officials of valuable intelligence assets and force us to bargain with terrorists for information.

Detroit could become the venue for a chaotic and dangerous criminal trial similar to that which New York City will experience when 9/11 mastermind Khalid Sheik Mohammed is tried. Such trials are a high-profile platform for anti-American ranting, not to mention an ideal opportunity for al-Qaida to learn more about our anti-terror tactics.

Meanwhile, federal courts have remained busy with enemy combatants’ challenges of their detention. On Dec. 20, six Guantanamo Bay detainees were returned to Yemen after a federal judge found that government officials lacked sufficient evidence to hold one of them as an enemy combatant. The Yemeni government released the men three weeks later.

And just two weeks ago, activist lawyers for enemy soldiers imprisoned at Bagram Airfield in Afghanistan argued that federal judges should be allowed to second-guess their detainment.

On Jan. 5, however, in a welcome pause for common sense, a panel of federal appeals court judges rejected one Guantanamo detainee’s plea for release. The panel firmly upheld the Commander-in-Chief’s detainment authority, stating that in the context of “wartime detention ... national security interests are at their zenith and the rights of the alien petitioner at their nadir.”

The court in this case got it right — judges should decline the invitation to appoint themselves as military officials and national security strategists. We cannot afford to have our judiciary and bickering lawyers deciding how America faces such deadly and fanatical enemies.

These terrorists have no respect for the freedoms that activists so fervently pursue for them, nor will such adversaries be deterred by our criminal justice system. Their goal is to deprive Americans of our most precious civil liberty — life.

The president had it right a few weeks ago when he said “we are at war.” This type of war cannot be fought, and America cannot be kept safe, when those fighting it are tied up in court or tied down by litigious activists.

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