

No federal court for Guantánamo detainees

In a major victory for Bush, an appeals court upheld a 2006 law restricting detainees' access to US courts.

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WASHINGTON

Detainees being held at the prison camp at Guantánamo Bay, Cuba, have lost their bid for access to US courts to challenge their open-ended detention in the war on terror.

In an important ruling announced Tuesday, a divided federal appeals court panel here dismissed cases filed by 63 detainees raising fundamental legal challenges to various aspects of the Bush administration's approach to the war.

The ruling applies to every pending or future case – in effect closing all but a few doors to the courthouse for those being held at Guantánamo.

"Federal courts have no jurisdiction in these cases," the appeals court declared.

The ruling is expected to be quickly appealed – perhaps to the full US Circuit Court of Appeals for the District of Columbia – or directly to the US Supreme Court.

"This is just a stop along the way to the Supreme Court," says David Remes, a lawyer at Covington and Burling in Washington, D.C., who represents 17 Yemenis being held at Guantánamo Bay.

At the center of the appeals case was the assertion that the newly enacted Military Commissions Act of 2006 (MCA) was an unconstitutional suspension of the writ of habeas corpus. Lawyers for the detainees argued that their clients enjoyed a constitutional right to challenge their open-ended detention before a neutral judge. If the Bush administration's position prevailed, they said, it would mean that terror suspects at Guantánamo could be tossed into a legal black hole.

Two of the three appeals-court judges disagreed. They ruled that Congress did not violate constitutional protections when it passed the MCA. The law was approved in part to overturn last summer's decision by the Supreme Court in *Hamdan v. Rumsfeld*, which overturned the military commission process proposed by the administration. Congress later passed the MCA.

"Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*. Everyone, that is, except the detainees," writes Judge Raymond Randolph in an opinion joined by Judge David Sentelle.

Judge Randolph says the detainee arguments are "creative but not cogent." He adds, "To accept them would be to defy the will of Congress."

In a dissent, Judge Judith Rogers said that she agrees that Congress attempted to withdraw federal court

jurisdiction to detainee cases by passing the MCA. But she says Congress violated the suspension clause of the Constitution when it passed the law. The suspension clause says that those held by the US government have a right to challenge the legality of their detentions in court unless Congress has specifically suspended that right because of rebellion or invasion.

"The suspension clause is a limitation on the powers of Congress," Judge Rogers writes. "It is only by misreading the historical record and ignoring the Supreme Court's well-considered and binding dictum in *Rasul v. Bush*" that the court can conclude that it lacks jurisdiction to hear the detainees' cases.

In that decision, the Supreme Court ruled that some rights extend to detainees at Guantánamo Bay. But the court did not detail the extent of those rights.

Most analysts emphasized the interim nature of the ruling. They view the 25-page panel opinion and 34-page dissent as a prelude to a major constitutional showdown at the nation's highest court.

"What's critical is [that] this case is going to the Supreme Court for final resolution," says Carl Tobias, a professor at the University of Richmond Law School. "We have a very splintered DC Circuit opinion."

Richard Samp, chief counsel at the Washington Legal Foundation, praised the appeals court ruling as "sound." But he too predicts the case is headed to high court.

"The issue of who does the writ of habeas corpus apply to has divided a lot of legal scholars and is something that is up in the air and will have to be decided," he says.

About 400 detainees are currently held at Guantánamo Bay. According to MSNBC.com, 110 are labeled ready for release. Among the others, only several dozen are likely to face trial before special organized military commissions. For those remaining, there appears to be no end in sight to their detention.

Writing for the panel, Judge Randolph said that Congress could not have been clearer about its intent when it passed the Military Commission Act. The law says the repeal of habeas jurisdiction in Guantánamo cases applies in all cases without exception. "It is almost as if the proponents of these words were slamming their fists on the table shouting, "When we say 'all,' we mean all – without exception!"

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