

The New York Times

Court Endorses Law's Curbs on Detainees

By **STEPHEN LABATON**
February 21, 2007

WASHINGTON, Feb. 20 — A divided federal appeals court on Tuesday upheld a new law stripping federal judges of authority to review foreign prisoners' challenges to their detention at Guantánamo Bay, Cuba.

The decision set the stage for a third trip to the Supreme Court for the detainees, who will once again ask the justices to consider a complex issue that tests the balance of power among the White House, Congress and the courts in the murky context of the fight against international terrorism.

It also prompted some senior Democratic lawmakers, who have fought the Bush administration on the matter before and who now hold sway in Congress, to vow enactment of a law more favorable to the prisoners.

The Supreme Court previously ruled twice that federal statutes empowered the courts to consider Guantánamo prisoners' habeas corpus petitions challenging the grounds for their detention. In response to those rulings, Congress twice rewrote law to limit the detainees' avenues of appeal. The most recent rewriting was at issue in Tuesday's 2-to-1 decision.

That law, the Military Commissions Act of 2006, was signed by President Bush last October. Its enactment followed the Supreme Court's rejection of his administration's earlier arguments that the right of habeas corpus — the

fundamental right, centuries old, to ask a judge for release from unjust imprisonment — did not apply to foreigners being held outside the United States as enemy combatants.

The new law explicitly eliminated the federal courts' jurisdiction over habeas challenges by such prisoners. It instead set up military panels to review the justification of detention in individual cases, with limited right of appeal to the courts afterward.

In its ruling Tuesday, the United States Court of Appeals for the District of Columbia Circuit found that the new law did not violate the constitutional provision that bars the government from suspending habeas corpus except in "cases of rebellion or invasion." Two of the three appeals court judges, citing Supreme Court and other historical precedent, held that the right of habeas corpus did not extend to foreign citizens detained outside the United States.

The majority decision was written by Judge A. Raymond Randolph, whose two earlier opinions on habeas corpus and Guantánamo prisoners had also favored the Bush administration. Those opinions were reversed by the Supreme Court, but on statutory grounds rather than constitutional ones.

The dissenting judge on Tuesday, Judith W. Rogers, said the new law did violate the constitutional provision restricting the suspension of habeas corpus.

Administration officials welcomed the decision as a vindication of its position on the rights of detainees, after years of its halting efforts to create a legal process that would withstand tests in court.

“The decision,” said Erik Ablin, a Justice Department spokesman, “reaffirms the validity of the framework that Congress established in the Military Commissions Act permitting Guantánamo detainees to challenge their detention through combatant status review tribunals with the opportunity for judicial review before the D.C. Circuit.”

Tony Snow, the White House spokesman, said at his daily news briefing, “The court decided the position that we put forward.” He declined to say more.

Lawyers representing the detainees vowed to seek a new review by the Supreme Court.

Shayana Kadidal, a lawyer at the Center for Constitutional Rights, which represents many of the detainees, said, “This decision empowers the president to do whatever he wishes to prisoners without any legal limitation as long as he does it offshore.”

Mr. Kadidal said the ruling encouraged “a contempt for international human rights law” and “such notorious practices as extraordinary rendition”: sending terrorism suspects abroad for interrogation, where, rights advocates say, they may face torture.

Democrats now in control of Congress said they would move quickly on legislation they recently introduced that would unambiguously give federal courts the right to consider detainees’ habeas petitions.

“The Military Commissions Act is a dangerous and misguided law that undercuts our freedoms and assaults our Constitution by removing vital

checks and balances designed to prevent government overreaching and lawlessness,” said Senator Patrick J. Leahy, the Vermont Democrat who heads the Senate Judiciary Committee.

Last week Mr. Leahy joined a group of other Senate Democrats, including Christopher J. Dodd of Connecticut, Russell D. Feingold of Wisconsin and Robert Menendez of New Jersey, in introducing the legislation restoring habeas rights for the Guantánamo prisoners. Senator Arlen Specter of Pennsylvania, the Judiciary Committee’s ranking Republican, also endorsed that measure last week, and said Tuesday that he believed the dissent from the new appeals court decision would ultimately prevail in the Supreme Court.

But other Republican lawmakers, including Senators John Cornyn of Texas and Lindsey Graham of South Carolina, both of whom also serve on the committee, applauded the ruling.

The decision, *Lakhdar Boumediene v. George W. Bush*, involved a consolidation of the cases of 63 detainees, all from foreign countries, who had sought review in two federal district courts. One judge had ruled that she had the authority to consider the cases, while another had ruled that he did not, and granted the administration’s motion to dismiss the inmates’ habeas petitions.

Writing for the appeals court, Judge Randolph first turned to the statutory issue. He said arguments put forward by the detainees’ lawyers that the new law was not meant to apply to the prisoners at Guantánamo Bay “are creative but not cogent.” Congress, he said, clearly meant to keep the federal courts from considering the detainees’ cases.

Turning to the question of whether Congress had acted within the Constitution, he said there had been no earlier cases in which a court had granted a habeas corpus petition for a foreign national held at an overseas military base. The Constitution, he said, “does not confer rights on aliens without property or presence within the United States.”

The opinion was also signed by Judge David B. Sentelle.

In her dissent, Judge Rogers said: “Prior to the enactment of the Military Commissions Act, the Supreme Court acknowledged that the detainees held at Guantánamo had a statutory right to habeas corpus. The M.C.A. purports to withdraw that right but does so in a manner that offends the constitutional constraint on suspension.”