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## Setting Rules for Detainees

Editorial  
Washington Post  
January 21, 2005

THE DECISION this week by a federal judge in Washington to throw out challenges to their detentions by inmates at the Guantanamo Bay, Cuba, naval base is no particular surprise. The Supreme Court ruled last year that the federal courts had jurisdiction to consider such challenges. But the justices coyly refrained from commenting one way or the other on the merits of any such challenge -- that is, on whether foreign detainees held outside the United States have any judicially enforceable rights. Lawyers for detainees have interpreted the high court's ruling expansively, and some lower-court judges appear sympathetic. But the government's more minimalist reading has a good deal of legal precedent behind it, too. So U.S. District Judge Richard J. Leon is not coming from left field in holding that -- notwithstanding the high court's ruling -- "no viable legal theory exists" under which the courts can declare detentions at Guantanamo unlawful.

The legal ambiguity the Supreme Court created on this point will persist until the justices themselves clarify matters. But whether or not the administration's detention policies are ultimately deemed lawful, they need to be changed -- and the courts are exactly the wrong institution to reform them. Current law does not adequately address the complex mass of questions posed by potentially lifelong detention of foreign nationals in an open-ended war at a base that is all-but-sovereign American territory. Letting the courts craft the regime that will govern this system risks -- if the courts are too aggressive -- judicial micromanagement of the president's war powers. If they are not aggressive enough, the risk is of injury to detainees who might have been wrongly rounded up. In fact, both problems could arise at once. The task of designing the appropriate legal processes to govern detentions -- and the appropriate measure of judicial review to oversee those processes -- belongs in Congress. If only to put itself on firmer legal footing as litigation over Guantanamo Bay continues, the administration needs to seek legislation and embrace some measure of statutory restraint.

This should not be a difficult call. Only the most doctrinaire civil libertarian would contend that foreign nationals making war on America in foreign theaters are entitled to the full protections of the criminal justice system. Congress would never require a system in which detainees could disrupt military operations by, for example, calling commanders from the field as witnesses. The question, rather, is whether three years into the war on terrorism, there will be any generally accepted legal framework for considering detention cases or whether long-term human storage will continue to be a matter of executive branch discretion -- subject only to a dialogue with unelected jurists.

The Bush administration will be tempted to see Judge Leon's opinion as a big win. But the military won at the lower-court level on the question of federal court jurisdiction as well -- only to be batted back by a Supreme Court wary of the administration's unilateral approach to detainee matters. That could easily happen again, particularly because revelations of prisoner abuse at Guantanamo Bay and in Iraq have made many people (including, we imagine, many judges) more suspicious of the administration's insistence that it alone knows best. If President Bush wishes to keep the courts out in the long run, he should be more willing in his second term to accept some reasonable system of review than he was in the first.