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Impact of Detainee Act Debated in Court

Panel to Decide Whether It Has Jurisdiction Over Bids for Freedom

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Bush administration lawyers argued yesterday that a new law forces the dismissal of more than 200 lawsuits filed in federal courts on behalf of detainees held at Guantanamo Bay, Cuba, urging a federal appellate court to instead adopt a far more limited process that still would give the prisoners access to judicial review.

The U.S. Court of Appeals for the District of Columbia Circuit will decide whether the Detainee Treatment Act of 2005 retroactively stripped the court of jurisdiction to hear habeas corpus cases challenging detentions at the military prison in Cuba. Lawyers representing the detainees argued that the new law does not apply to pending cases, while the government has maintained that all cases essentially should be wiped away.

The Detainee Treatment Act was designed to pull what some senators believe are frivolous cases out of U.S. courts and instead grant detainees two other options: access to the federal appeals court to challenge the military determination that they are "enemy combatants" and the right to appeal verdicts reached in future military trials.

The three-judge appellate panel questioned government lawyers about the authority the court actually would have in its limited review role. Judge Judith W. Rogers asked whether the court would have the power to order a detainee's release if it found problems with a detainee's enemy combatant status as determined by a military Combatant Status Review Tribunal.

"Yes, subject to a few qualifications," said Gregory G. Katsas, a Justice Department lawyer. Katsas said the Defense Department would have the option of fixing any flawed process first. "If a CSRT determination is made, and that is that he is not an enemy combatant, that person is turned loose."

Judge A. Raymond Randolph likened the new court review process to a modification of habeas corpus rather than its abolition but said he sees no remedy for detainees in the new law. He said the new law appeared to shift habeas cases from the District Court to the Court of Appeals.

Thomas B. Wilner, who was arguing on behalf of the detainees, said he would not object if the cases were transferred from one court to another.

But he said he worries that the law is unclear and might restrict the court from truly examining the facts of a detainee's combatant status.

Currently, the military is holding 10 detainees at Guantanamo Bay who have been cleared for release, and federal courts have been powerless to order them freed. There are about 490 detainees at Guantanamo Bay.

In a related matter, the Uyghur American Association is planning to file a brief with the the Supreme Court today supporting the release of two countrymen who remain at Guantanamo Bay despite having been cleared of ties to terrorism by the U.S. military. A U.S. District Court judge recently found that there is nothing to support holding the two Chinese Muslims but said he has no authority to order their release.

Attorneys for the Uighurs have taken the unusual step of asking the Supreme Court to rule before the appellate court enters a judgment, arguing that their clients uniquely face indefinite detention even though they are innocent.

In a draft of the brief provided to The Washington Post, the UAA urges the court to allow the Uighur detainees to join the Uighur community in the Washington area, where they would live in a form of parole.

Uighurs have been battling Beijing for a separate homeland in China and face torture or execution if repatriated there, according to the U.S. government. But U.S. officials have been unwilling to release the Uighurs in the United States and have not been able to find another country to accept them.

Also yesterday, Pentagon officials said that they are considering issuing a written instruction to military commissions at Guantanamo Bay that would formally ban the use of evidence obtained from detainees by torture in upcoming trials.

Bryan Whitman, a Pentagon spokesman, said prosecutors have agreed not to use such evidence, but officials are developing language to put it in writing.