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COURT UPHOLDS DETENTION OF ENEMY COMBATANTS AT GUANTANAMO (*Boumediene v. Bush*)

The U.S. Court of Appeals for the District of Columbia Circuit today dismissed challenges to the American military's detention of enemy combatants at Guantanamo Bay, Cuba, ruling that federal law bars such challenges when filed in the form of *habeas corpus* petitions.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a series of briefs in the cases -- now known as *Boumediene v. Bush*. The court agreed with WLF that recent congressional legislation deprives federal courts of jurisdiction to hear such *habeas corpus* claims and that Congress acted within its powers in adopting that legislation.

WLF also argued that the U.S. Constitution does not extend protections to aliens not living in the United States, and thus that the detainees' claims based on the U.S. Constitution should be dismissed for failure to state a claim. WLF argued that the protections of the Constitution are reserved for U.S. citizens and others, such as resident aliens, who have contributed to American society and thus have a legitimate basis for invoking constitutional protections. In light of its jurisdictional rulings, the appeals court did not need to reach those alternative arguments.

"Throughout our history, the courts have never allowed nonresident aliens to invoke the U.S. Constitution as a basis for challenging their detention by American authorities," said WLF Chief Counsel Richard Samp after reviewing the appeals court decision. "To allow enemy combatants to use the U.S. Constitution to challenge their detention would be a sure-fire way to undermine American military strength, by diverting the attention of field commanders from the military offensive abroad to the legal defensive at home," Samp said.

As part of the on-going war against militant Islamists, the U.S. military has taken into custody numerous al Qaeda and Taliban operatives. Several hundred of those operatives are being detained at Guantanamo Bay. In June 2004, the U.S. Supreme Court ruled that several statutes grant federal courts jurisdiction to hear habeas corpus petitions filed by Guantanamo Bay detainees who seek release. It remanded those claims to the district court in the District of Columbia to determine whether any such petitions stated a valid

claim for relief. Petitions seeking release from custody were subsequently filed by nearly all of the detainees.

In October 2004, the federal government filed motions to dismiss each of the petitions. Two federal district judges ruled on those motions, and they arrived at conflicting results: one held that Guantanamo Bay detainees are not protected by the U.S. Constitution (and thus dismissed cases assigned to him), while the other reached the opposite conclusion. Both judges' rulings were appealed to the D.C. Circuit.

Congress later adopted legislation -- the Detainee Treatment Act of 2005 and Military Commission Act of 2006 -- to repeal the statutes on which the Supreme Court had relied to find jurisdiction.

In its first brief filed with the appeals court, WLF argued that controlling precedents, established during past wars, make clear that nonresident aliens being held as enemy combatants are not entitled to any constitutional protections. WLF argued that the Supreme Court did not change that precedent when it ruled in 2004 that the federal courts have jurisdiction to hear challenges to detention brought by Guantanamo Bay detainees. WLF also argued that even if detainees were entitled to Due Process Clause protections, they have already received all the process that could possibly be due them under the Constitution. WLF noted that the American military has established the Combatant Status Review Tribunal (CSRT) system for adjudicating detainees' claims that they never fought for either the Taliban or al Qaeda. All of those still being detained at Guantanamo Bay have been determined by a CSRT to be enemy combatants who took up arms against the United States or its allies. WLF argued that the CSRT system satisfies the detainees' due process concerns, because it ensures that all detainees have a fair opportunity to contest their detention, including the right to appeal CSRT decisions to the D.C. Circuit. None of those issues were addressed by today's decision. Instead, the appeals court agreed with arguments raised by WLF in its second brief: Congress did not violate the Constitution by repealing *habeas corpus* jurisdiction over this case. An appeal by the detainees to the U.S. Supreme Court is likely.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a considerable portion of its resources to promoting America's national security. WLF filed its briefs on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site.