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## **COURT URGED TO UPHOLD DETENTION OF ENEMY COMBATANTS AT GUANTANAMO**

*(Al Odah v. United States)*

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the District of Columbia Circuit to dismiss challenges to the American military's detention of enemy combatants at Guantanamo Bay, Cuba.

In a brief filed in *Al Odah v. United States*, WLF 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.

"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 filing WLF's brief. "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 federal courts have 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 have now been filed by nearly one hundred alleged Taliban and al Qaeda fighters.

In October 2004, the federal government filed motions to dismiss each of the petitions. Two federal district judges have ruled on those motions, and they arrived at conflicting results. Judge Richard Leon dismissed the petitions assigned to him, ruling *inter alia* that Guantanamo Bay detainees are not protected by the U.S. Constitution. Judge Joyce Hens Green denied the motion to dismiss the petitions assigned to her; she ruled: (1) the Guantanamo Bay detainees are entitled to Fifth Amendment due process protections; (2) the government has not to date

provided the detainees with due process; and (3) the government has violated the detainees' rights under the Geneva Conventions. Both judges' rulings have been appealed to the D.C. Circuit.

In its 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 last June in *Rasul v. Bush* that the federal courts have jurisdiction to hear challenges to detention brought by Guantanamo Bay detainees. WLF argued that nothing in the *Rasul* decision suggests that the Supreme Court intended to do anything more than open the courthouse door to litigation; it certainly did not indicate that Taliban and al Qaeda fighters are entitled to assert constitutional rights.

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. It is uncontested that the military is authorized to detain enemy combatants until hostilities cease. 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.

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 brief 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.