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Detainees Barred From Access to U.S. Courts

By **CHARLIE SAVAGE**

WASHINGTON — A federal appeals court ruled Friday that three men who had been detained by the United States military for years without trial in Afghanistan had no recourse to American courts. The decision was a broad victory for the Obama administration in its efforts to hold terrorism suspects overseas for indefinite periods without judicial oversight.

The detainees, two Yemenis and a Tunisian who say they were captured outside Afghanistan, contend that they are not terrorists and are being mistakenly imprisoned at the American military prison at [Bagram Air Base](#).

But a three-judge panel of the United States Court of Appeals for the District of Columbia ruled unanimously that the three had no right to [habeas corpus](#) hearings, in which judges would review evidence against them and could order their release. The court reasoned that Bagram was on the sovereign territory of another government and emphasized the “pragmatic obstacles” of giving hearings to detainees “in an active theater of war.”

The [ruling](#) dealt a severe blow to wider efforts by lawyers to extend a landmark 2008 Supreme Court ruling granting habeas corpus rights to prisoners at Guantánamo Bay, Cuba. A lower court judge had previously ruled that the three Bagram detainees were entitled to the same rights, although he had found that others captured in Afghanistan and held there were not.

A lawyer for the detainees, Tina Foster, said that if the precedent stood, Mr. Obama and future presidents would have a free hand to “kidnap people from other parts of the world and lock them away for the rest of their lives” without having to prove in court that their suspicions about such prisoners were accurate.

“The thing that is most disappointing for those of us who have been in the fight for this long is all of the people who used to be opposed to the idea of unlimited executive power during the

Bush administration but now seem to have embraced it during this administration,” she said. “We have to remember that Obama is not the last president of the United States.”

Senator [Lindsey Graham](#), Republican of South Carolina and an influential lawmaker in the long-running debate over detentions, called the ruling a “big win” and praised the administration for appealing the lower court’s ruling.

“Allowing a noncitizen enemy combatant detained in a combat zone access to American courts would have been a change of historic proportions,” he said. “It also would have dealt a severe blow to our war effort.

“There is a reason we have never allowed enemy prisoners detained overseas in an active war zone to sue in federal court for their release. It simply makes no sense and would be the ultimate act of turning the war into a crime.”

It was not entirely clear how the ruling might affect detention policies for terrorism suspects caught outside Afghanistan or Iraq. While the Obama administration has stepped up the use of [Predator drone](#) strikes to kill terrorism suspects and has relied on other countries, like Pakistan, to hold and interrogate suspects who are captured alive, it is not known whether the United States has directly captured anyone outside Afghanistan or Iraq recently — and, if so, where it has taken them.

A Justice Department spokesman, Dean Boyd, would not comment on the decision.

David Rivkin, who filed a friend-of-the-court brief on behalf of the [Special Forces Association](#) urging the court to side with the government, said the ruling would have broad significance by removing doubts over whether the United States could capture and interrogate terrorism suspects without worrying about having to collect, in dangerous situations, evidence that would later stand up in court.

“This is an excellent decision,” said Mr. Rivkin, who was a White House lawyer in the administration of the first President Bush. “It has restored a considerable degree of sanity to what threatened to be a crazy legal regime that would have deprived the United States, for the first time in history, of the opportunity to capture and detain — outside of the United States, in theaters of war — high-value combatants. That has been solved, and it will apply to many other situations in the future.”

The case was brought on behalf of a Tunisian man who says he was captured in Pakistan in 2002, a Yemeni man who says he was captured in Thailand in 2002, and another Yemeni man who says he was captured in 2003 at another location outside Afghanistan that has not been

disclosed. (The government has disputed the second Yemeni's claim.)

The men's case was originally heard by Judge [John D. Bates](#) of the Federal District Court, an appointee of former President [George W. Bush](#). The Bush and Obama administrations had both urged Judge Bates not to extend habeas corpus rights beyond Guantánamo, arguing that courts should not interfere with military operations inside active combat zones.

But in April 2009, Judge Bates ruled that there was no difference between the three men who had filed suit and Guantánamo prisoners. His decision was limited to non-Afghans captured outside Afghanistan — a category that fits only about a dozen of the roughly 800 detainees at Bagram, officials have said.

In urging the appeals court to let Judge Bates's decision stand, lawyers for the detainees argued that reversing it would mean that the government would be able "to evade judicial review of executive detention decisions by transferring detainees into active combat zones, thereby granting the executive the power to switch the Constitution on or off at will."

But in the appeal panel's decision reversing Judge Bates, Chief Judge David B. Sentelle said there had been no such gamesmanship in the decision to bring the three detainees to Bagram because it happened years before the Supreme Court's Guantánamo rulings.

Still, he left the door open to approving habeas corpus rights for prisoners taken to prisons other than Guantánamo in the future, writing, "We need make no determination on the importance of this possibility, given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than speculation."

Ms. Foster vowed to keep fighting. But Mr. Rivkin said that the detainees' chances for overturning the decision were dim because the three appeals judges spanned the ideological spectrum: Chief Judge Sentelle, appointed by President [Ronald Reagan](#); Judge Harry T. Edwards, appointed by President [Jimmy Carter](#); and Judge David S. Tatel, appointed by President [Bill Clinton](#).

It could also be difficult to win a reversal by the Supreme Court, where five of the nine justices supported giving habeas rights to detainees in the Guantánamo case. Among the narrow majority in that case was Justice [John Paul Stevens](#), who is retiring.

The nominee to replace him, [Elena Kagan](#), who as solicitor general signed the government's briefs in the case, would most likely recuse herself from hearing an appeal of the decision, and a four-four split would allow it to stand.

