

## **Obama Upholds Detainee Policy in Afghanistan**

By CHARLIE SAVAGE, *New York Times*, February 22, 2009

WASHINGTON — The Obama administration has told a federal judge that military detainees in Afghanistan have no legal right to challenge their imprisonment there, embracing a key argument of former President Bush's legal team.

In a two-sentence filing late Friday, the Justice Department said that the new administration had reviewed its position in a case brought by prisoners at the United States Air Force base at Bagram, just north of the Afghan capital. The Obama team determined that the Bush policy was correct: such prisoners cannot sue for their release.

"Having considered the matter, the government adheres to its previously articulated position," wrote Michael F. Hertz, acting assistant attorney general.

The closely watched case is a habeas corpus lawsuit on behalf of several prisoners who have been indefinitely detained for years without trial. The detainees argue that they are not enemy combatants, and they want a judge to review the evidence against them and order the military to release them.

The Bush administration had argued that federal courts have no jurisdiction to hear such a case because the prisoners are noncitizens being held in the course of military operations outside the United States. The Obama team was required to take a stand on whether those arguments were correct because a federal district judge, John D. Bates, asked the new government whether it wanted to alter that position.

The Obama administration's decision was generally expected among legal specialists. But it was a blow to human rights lawyers who have challenged the Bush administration's policy of indefinitely detaining "enemy combatants" without trials.

The power of civilian federal judges to review individual decisions by the executive branch to hold a terrorism suspect as an enemy combatant was one of the most contentious legal issues surrounding the Bush administration. For years, President Bush's legal team argued that federal judges had no authority under the Constitution to hear challenges by detainees being held at the

military prison at Guantánamo Bay, Cuba, and elsewhere.

The Supreme Court rejected the Bush administration's legal view for prisoners held at Guantánamo in landmark rulings in 2004 and 2006. But those rulings were based on the idea that the prison was on United States soil for constitutional purposes, based on the unique legal circumstances and history of the naval base.

Rights lawyers have been hoping that courts would extend those rulings to allow long-term detainees being held at United States military bases elsewhere in the world to sue for release, too. There are about 600 detainees at Bagram and several thousand in Iraq.

Jack Balkin, a Yale Law School professor, said it was too early to tell what the Obama administration would end up doing with the detainees at Bagram. He said some observers believed that the Obama team would end up making a major change in policy but simply needed more time to come up with it, while others believed that the administration had decided "to err on the side of doing things more like the Bush administration did, as opposed to really rethinking and reorienting everything" about the detention policies it inherited because it had too many other problems to deal with.

"It may take some time before we see exactly what is going on — whether this is just a transitory policy or whether this is really their policy: 'No to Guantánamo, but we can just create Guantánamo in some other place,'" Mr. Balkin said.

After becoming president last month, Mr. Obama issued orders requiring strict adherence to antitorture rules and shuttering the Guantánamo prison within a year. He also ordered a review of whether conditions there meet the standards of humane treatment required by the Geneva Conventions, and a review of what could be done with each of the 245 detainees who remain at the prison.

On Friday, government officials said that a Pentagon official had completed the Guantánamo report, concluding that the site complies with the Geneva Conventions'

requirements for humane treatment — including procedures for force-feeding prisoners on hunger strike by strapping them down and inserting a nasal tube, a practice prisoners' lawyers have denounced. The report does recommend that some prisoners be given greater human contact, however.