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Justices to Weigh Detainee Rights

In Reversal, Court Agrees to Hear Case

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The Supreme Court yesterday reversed itself and agreed to consider whether detainees at Guantanamo Bay have been unfairly barred from the federal courts by the Bush administration and Congress, a move that may finally determine legal rights for foreign-born terrorism suspects.

The case, which could become one of the most important of the court's next term, will address whether subjecting the detainees to military commissions instead of allowing them access to federal courts violates the Constitution. In April, the court decided not to hear an appeal from the detainees.

Yesterday's decision to change course and hear the case was so unusual that lawyers and court experts went to the archives to try to find the last time it happened. The only consensus was that it had been decades.

"The Supreme Court is going to decide the simple question: Does the Constitution protect the detainees?" said [Georgetown University](#) law professor Neal K. Katyal, who successfully argued a detainee case that the court decided just a year ago. In that case, the justices said [President Bush](#) did not have authority to set up the military tribunals that the administration thought should hear the cases against the detainees.

In April, three justices -- [David H. Souter](#), [Ruth Bader Ginsburg](#) and [Stephen G. Breyer](#) -- said they were eager to hear the appeals, which presented questions that "deserve this court's immediate attention." It takes four justices to agree to take a case.

Justices [John Paul Stevens](#) and [Anthony M. Kennedy](#) said at the time that they would continue to monitor the legal proceedings involving the detainees. It takes five votes to rehear a denial, so perhaps the two justices concluded that they have seen enough. The court's order is silent on which justices agreed to hear the case.

The Bush administration had urged the court not to take the appeals. "The grant of a petition for rehearing from a denial of certiorari is an extraordinary remedy, warranted only where there have been 'intervening circumstances of a substantial or controlling effect' or 'other substantial grounds not previously presented,'" [Solicitor General Paul D. Clement](#) told the court this month, adding that petitioners had shown neither.

David Remes, a lawyer for some of the detainees who brought the case, said the court did not have to make the decision to take the case now, "so what obviously happened is the justices decided to confront the issue sooner rather than later."

[Department of Justice](#) spokesman Erik Ablin said, "We are disappointed with the decision, but are confident in our legal arguments and look forward to presenting them before the Court."

The court's action comes as Congress and the [White House](#) are looking for ways to close the military prison at [Guantanamo Bay, Cuba](#), and transfer the approximately 370 prisoners there to military prisons in the United States.

[Defense Secretary Robert M. Gates](#) reiterated yesterday that he, Bush and members of Congress all seek

to close the [Cuba](#) facility, which opened in January 2002. But he said legal obstacles stand in the way.

"The biggest challenge is finding a statutory basis for holding prisoners who should never be released and who may or may not be able to be put on trial" because, for example, evidence against them involves sensitive intelligence sources, Gates said at a Pentagon news briefing.

Gates, who has pressed for closing the facility since he came to office in December, said that "people are working harder on the problem."

Rep. [James P. Moran](#) Jr. (D-Va.) said Democrats are considering a plan to cut Guantanamo's budget by half, which would keep the prison afloat for several more months and give the administration time to transfer the detainees. Moran said there is concern among some lawmakers that an immediate shutdown would put into question the secure detention of the prison's most dangerous inmates.

In a letter to Bush released yesterday, more than 140 House members joined Moran in calling for the facility's closure and said detainees should be allowed to protest their detentions in federal courts through habeas corpus petitions.

The Supreme Court had twice ruled that Guantanamo detainees had access to federal courts to contest their incarcerations, but the court also made clear that Congress could weigh in on the issue. Lawmakers did so last fall by approving the Military Commissions Act, which stripped habeas corpus rights and mandated special military trials for the detainees.

In February, the U.S. Court of Appeals for the [District of Columbia Circuit](#) upheld the habeas corpus provision of the act, and that case is what the court agreed to hear yesterday.

The appeals court is also considering how to handle the detainees' challenge of the Combatant Status Review Tribunals, which determine whether they are to be held as enemy combatants.

The detainees' lawyers say the panel's use of mostly classified evidence makes it impossible for the suspects to defend themselves. The lawyers filed an affidavit last week with the court from an Army reserve officer and lawyer who said the tribunal's members rely on vague information and are pressured into ruling against the suspects.

Remes, the lawyer in the habeas corpus case, said that the affidavit shows what a "sham the process is" and that he believes it played an important role in the justices' decision to take the case now.

When the court hears the appeal sometime in the fall, it will be the first time that [Chief Justice John G. Roberts Jr.](#) participates in a case involving detainees. He recused himself from an earlier case because he had been involved in it while an appeals court judge.

The cases consolidated by the court are *Boumediene v. Bush* and *Al Odah v. U.S.*

Staff writer Ann Scott Tyson and staff researcher Julie Tate contributed to this report.

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