

Gitmo returns to high court

Detainees seek right to challenge status

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WASHINGTON — In its six years of existence, the prison at Guantanamo Bay, Cuba, has served as a vivid, and divisive, symbol of the government's war on terror, with other nations condemning it, presidential candidates championing it and the Pentagon simply wanting to get on with the business of emptying it.

The Supreme Court on Wednesday will take another shot at resolving some of the questions surrounding the prison camp, which for many critics has become an international symbol of unchecked executive power and human-rights abuses. The fate of hundreds of prisoners, some suspected of being hardened terrorists, could ultimately depend on the court's decision.

This is the fourth time the justices have addressed the propriety of the alternative legal mechanism set up by the Bush administration to try suspected terrorists. The principal issue Wednesday will be whether the detainees have the right to challenge their detention in federal court, through a procedure known as habeas corpus.

"It will be six years without anyone at Guantanamo having a fair hearing before a fair court," said Michael Ratner, president of the Center for Constitutional Rights, a New York advocacy group that represents some of the detainees. A habeas action allows a prisoner to require the government to provide some basis for his continued imprisonment, but it does not require proof of guilt.

The issue appeared settled in 2004, when the Supreme Court ruled that detainees were enti-

pled to access to the courts. Congress reacted by passing a law that stripped detainees of habeas corpus rights. Now the court must decide whether Congress' action was constitutional.

Quest for clarity

But the overarching goal is to provide some clarity to a muddled process, one that has yet to result in the prosecution of a single detainee. While the Pentagon has sent hundreds of prisoners back to their home countries and elsewhere, those who have been kept in their cells for years are scarcely closer to an ultimate adjudication than they were when they arrived.

Part of the problem has been the string of defeats the White House has suffered at the hands of the Supreme Court. Along with the 2004 ruling on habeas rights, the justices in 2006 invalidated the military commission system the Pentagon intended to use to try the detainees. Fittingly, also on Wednesday, a tribunal is scheduled to hold a hearing for one Guantanamo detainee, Salim Ahmed Hamdan, under a set of revised procedures in an attempt to comply with the court's holding.

But a new ruling in favor of the detainees could complicate that plan, because it would allow an inmate to also litigate his detention in federal court, potentially delaying an ultimate resolution. If the government prevails, however, the hearings can move forward without worry of more proceedings.

The detainees want the habeas option because, for the most part, they have not seen what evidence the government has against them. Ratner is confident that if the habeas claims go forward, the government will drop many of the cases for lack

of evidence.

But John Yoo, a former high-ranking Justice Department official who was involved in crafting legal policy for Guantanamo, said the prisoners do not deserve the same rights as accused criminals in the American justice system.

"The detainees are prisoners captured in wartime, and hence can be held because they pose a future threat to the security of the country," he said. "They are not suspects being punished for past crimes who have a right to a criminal trial."

The lead plaintiff in Wednesday's case, Lakhdar Boumediene, is an Algerian national and a citizen of Bosnia-Herzegovina who was arrested in Bosnia in 2001 by local authorities. Once that nation's Supreme Court ordered him released for lack of evidence, Bosnian police turned him over to the United States. He was transferred to Guantanamo in 2002.

Constitutional argument

Lawyers for the detainees argue that even though Congress stripped detainees of their statutory right to challenge their detention, they still may do so under a separate right granted in the Constitution.

The administration, alternatively, contends that the Constitution does not extend to foreign nationals held in outposts like Guantanamo Bay. And even if it did, it argues, the review procedures in place at the facility provide an adequate substitute for a federal court proceeding. The detainees claim those procedures are rigged in favor of the government.

Yoo said judges should not be allowed to second-guess military decisions made in wartime. "Reading habeas so broadly



would invite a level of judicial micromanagement over military operations that could interfere with the most effective prosecution of a war," said Yoo, a law professor at the University of California, Berkeley. He pointed to a Supreme Court decision at the end of World War II that refused to provide habeas rights to German prisoners of war.

The justices may be more divided on the habeas issue than they were in 2004, when six of them sided with detainees. Since then, Chief Justice John Roberts Jr. and Justice Samuel Alito have joined the court, which means that, once again, Justice Anthony Kennedy may cast the deciding vote in what could be a 5-4 decision.

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