

# Los Angeles Times

COM

TUESDAY, MARCH 28, 2006

COPYRIGHT 2006/78 PAGES/CC

## High Court to Review Guantanamo Case

### Challengers say military tribunals permit Bush to act as lawmaker, prosecutor, judge and jury. Congress has complicated the debate.

By DAVID G. SAVAGE  
Times Staff Writer

WASHINGTON — In a long-awaited test of executive power, the Supreme Court today will take up a constitutional challenge to President Bush's decision to try alleged war criminals before specially arranged military tribunals at Guantanamo Bay, Cuba.

It is an authority the president's lawyers say is part of his power as commander in chief. The challengers, including current and former military lawyers, say the tribunals are unfair and unconstitutional because they permit the president, acting through Defense Secretary Donald H. Rumsfeld, to act as lawmaker, prosecutor, judge and jury.

But this momentous dispute over the role of law during wartime may well end in a non-decision, thanks to a late intervention by Congress.

In December, lawmakers heaped praise on themselves for outlawing the use of torture against prisoners. They did so by adding an amendment sponsored by Sen. John McCain (R-Ariz.), a former prisoner of war, to a military spending bill. At the same time, they inserted a provision in the bill saying that detainees at the Navy base at Guantanamo Bay had no right to have their claims heard in federal court.

The second provision went a long way toward voiding the first, lawyers say, since detainees would no longer have a venue in which to argue allegations of torture.

The Bush administration says the high court should dismiss the challenge to the military tribunals brought on behalf of Salim Ahmed Hamdan, a one-time driver for Osama bin Laden, because Congress stripped the court of the authority to decide it. His legal claim "is jurisdictionally foreclosed," at least for now, the administration told the justices.

Human rights lawyers who have spent four years seeking a legal showdown over the administration's handling of the Guantanamo detainees concede that congressional intervention has set back their cause.



Associated Press  
**DETAINEE:** Salim Ahmed Hamdan is suing the U.S.

Now, the amendment on detainee rights will be an important part of today's debate before the court.

It is "a direct assault on the core jurisdiction of the Federal courts," said Deborah Pearlstein, director of the U.S. law and security program for Human Rights Watch. "It would mean we have established a right without a remedy."

The amendment, attached to the Detainee Treatment Act of 2005, was sponsored by Sens. Lindsey Graham (R-S.C.), Jon Kyl (R-Ariz.) and Carl Levin (D-

*"It has never been the case that when you captured a combatant, you have to give them a jury trial in your civil courts. Give me a break."*

Justice Antonin Scalia, in a speech in Switzerland

Michigan). The two Republicans say it strips judges of the authority to hear any writ of habeas corpus filed by a prisoner at Guantanamo. Levin says the restriction applies only to newly filed claims, not to the pending dispute before the Supreme Court.

It is the latest in a long series of setbacks and delays for the hundreds of men who have been held at Guantanamo — 517 of whom are still there, more than four years after U.S. forces helped topple the Taliban regime in Afghanistan.

In November 2001, Bush issued an executive order saying that suspected foreign terrorists captured by U.S. forces would be tried in military tribunals for "violations of the laws of war." Administration lawyers said these terrorists were not entitled to the protection of the Geneva Convention because they were not part of a recognized military force, nor were they entitled to the protections of U.S. criminal law because they were not Americans.

But some experts in military law criticized the proposal, arguing that it allowed Pentagon authorities to make up the rules as they went along. They said that suspected terrorists and war

criminals should be tried under the rules for courts-martial, as prescribed by the Geneva Convention.

An actual trial has yet to take place under the new system. Only 12 men have been charged with a terrorism or war crime. Hamdan, a native of Yemen, told his lawyer he was hired for \$200 a month to work as a driver for Bin Laden. However, the administration accused him of conspiring with the Al Qaeda leader to carry out terrorist attacks against the United States.

His lawsuit, *Hamdan vs. Rumsfeld*, contends that military tribunals are unconstitutional because they allow the president, through his subordinates, to define the crime, pick the prosecutor and pick the judges who will act as jury.

"Here, the president exercises legislative, executive and judicial powers," a violation of the Constitution's separation of powers doctrine, said Georgetown University law Center professor Neal K. Katyal, who represents Hamdan.

But Bush's lawyers say the commander in chief has always played the lead role in deciding how war criminals are treated and tried. Moreover, they say

Congress has endorsed the president's action, most recently in the Detainee Treatment Act in December.

Because he sat on the appellate court that heard Hamdan's case last year, voting to uphold the legality of the tribunals, Chief Justice John G. Roberts Jr. has recused himself. His absence could result in a 4-4 split — and no decision.

Justice Antonin Scalia is expected to participate, although his decision is not much in doubt. Two years ago, he dissented when the high court ruled that prisoners at Guantanamo had a right to challenge the legality of their detention in federal court.

In remarks two weeks ago to students at the University of Freiburg in Switzerland, Scalia scornfully dismissed the notion that "enemy combatants" had a right to a court hearing.

"War is war, and it has never been the case that when you captured a combatant, you have to give them a jury trial in your civil courts. Give me a break," he said, in comments first reported Sunday by Newsweek.

On Monday, the Center for Constitutional Rights in New York, which represents some of the Guantanamo detainees, called on Scalia to step aside.

"Before we have even made our arguments in court, a justice has publicly announced his conclusion," said Barbara Oshansky, a deputy legal director for the group. "I expect Justice Scalia to do the right thing and recuse himself."