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Shadow Falls Over U.S. Military Tribunals

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GUANTANAMO BAY NAVAL BASE, Cuba -- A shadow of uncertainty has crept over U.S. military war crimes trials of suspected terrorists as the Supreme Court deliberates a detainee's challenge of the process.

"I could be looking for a job come June," said Air Force Col. Morris Davis, the chief military prosecutor.

Pretrial hearings on this isolated military base are slowly proceeding, even as some Supreme Court justices appear troubled by plans to hold the war-crimes trials and angered by the government's claim that a new law deprives them of the authority to hear a challenge filed by a former driver for Osama Bin Laden.

On Dec. 30, President Bush signed into law the Detainee Treatment Act, which says "no court, justice or judge shall have jurisdiction to hear or consider ... an application for a writ of habeas corpus filed" for a Guantanamo Bay detainee. A writ of habeas corpus allows a prisoner to contest the legal basis for his detention.

The new law also says courts cannot hear "any action against the United States or its agents" relating to Guantanamo Bay detainees. The law gives only the U.S. Court of Appeals for the District of Columbia Circuit narrow oversight powers.

Critics say the Bush administration's move to curtail the judiciary's oversight of the military tribunals threatens American principals.

"The administration is trying to take the war on terror outside the rule of law. The rule of law is the most sacred standard we hold as American norms," said Margaret Satterthwaite of New York University School of Law and faculty director of its Center for Human Rights and Global Research.

Lawyers for detainee Salim Ahmed Hamdan, a former driver for Osama bin Laden, argued to the Supreme Court that Bush overstepped his authority when he ordered Hamdan and other alleged enemy combatants to face special military trials.

Justices Stephen Breyer, Ruth Bader Ginsberg and David H. Souter expressed outrage last month over the Bush administration's claim that the new law retroactively voids hundreds of lawsuits, and the case's outcome may hinge on moderate Justice Anthony M. Kennedy, who also raised concerns about the new law.

But another justice has said foreigners waging war against the United States have no rights under the Constitution.

"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," Justice Antonin Scalia was quoted as telling an audience at the University of Freiberg in Switzerland on March 8.

The balance of power between the executive, the judiciary and the legislative in the United States is at stake in the case, said Jamil Dakwar, a staff attorney of the American Civil Liberties Union who is monitoring the pretrial hearings here.

"The ACLU is concerned about losing the bedrock of the U.S. system," Dakwar said in an interview. "Once you start to strip ... habeas corpus rights and the independence of the judiciary, it is a slippery slope, leaving the executive branch with excessive power."

Davis said he expects the justices will rule against Hamdan.

"I am optimistic the Supreme Court will see this as a fair process and that Bush was acting within his authority," the chief prosecutor said at a briefing Tuesday.

The justices will rule in the case before the Supreme Court goes on its three-month break in late June. Davis said that even with the decision pending, "we are preparing cases and readying to move forward."

The military tribunals were holding pretrial hearings this week for four of the 10 detainees who have been charged with crimes so far.

"We're trying to move things along and not just sit here and let people bide their time," Davis said.

The uncertainty over the military tribunals was highlighted Wednesday during a pretrial hearing here when the defense attorney for Canadian teenager Omar Khadr, 19, accused of killing a U.S. soldier in Afghanistan, asked the judge to halt proceedings because of a lack of established rules for the trials.

"Sir, you should halt these proceedings ... until the government gets the rules together," said Army Capt. John Merriam. The judge said he would rule later.