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## Justices Hint That They'll Rule On Challenge Filed by Detainee

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WASHINGTON, March 28 -- As the justices of the Supreme Court took their seats Tuesday morning to hear Osama bin Laden's former driver challenge the Bush administration's plan to try him before a military commission, one question -- perhaps the most important one -- was how protective the justices would be of their jurisdiction to decide the case.

The answer emerged gradually, but by the end of the tightly packed 90-minute argument, it was fairly clear: highly protective.

At least five justices -- Stephen G. Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, David H. Souter and John Paul Stevens -- appeared ready to reject the administration's argument that the Detainee Treatment Act, passed and signed into law after the court accepted the case in November, had stripped the court of jurisdiction.

It was less certain by the end of the argument how the court would then go on to resolve the merits of the case, a multipronged attack on the validity of the military commissions themselves and on their procedures. Lawyers for the former driver, a Yemeni named Salim Ahmed Hamdan who is charged with conspiracy, also argue that he cannot properly be tried before any military commission for that crime because conspiracy is not recognized as a war crime.

Solicitor General Paul D. Clement was on the defensive throughout his argument. His stolid refusal to concede that any of the government's positions, on the jurisdictional as well as ultimate questions of the case, might present even theoretical problems provoked the normally soft-spoken Justice Souter into an outburst of anger.

What appeared to trouble Justice Souter most was Mr. Clement's discussion with Justice Stevens about whether Congress's removal of the federal courts' jurisdiction to hear habeas corpus petitions from detainees at the naval base at Guantanamo Bay, Cuba, amounted to "suspending" the writ of habeas corpus.

Suspending habeas corpus is an action, limited by the Constitution to "cases of rebellion or invasion," that Congress has taken only four times in the country's history. Habeas corpus is the means by which prisoners can go to court to challenge the lawfulness of their confinement, and its suspension is historically regarded as a serious, if not drastic, step.

Mr. Clement's position was that Congress had not in fact suspended habeas corpus, but that it might constitutionally have done so given "the exigencies of 9/11." Addressing Justice Stevens, the solicitor general said, "My view would be that if Congress sort of stumbles upon a suspension of the writ, that the preconditions are satisfied, that would still be constitutionally valid."

Justice Souter interrupted. "Isn't there a pretty good argument that suspension of the writ of habeas corpus is just about the most stupendously significant act that the Congress of the United States can take," he asked, "and therefore we ought to be at least a little slow to accept your argument that it can be done from pure inadvertence?"

When Mr. Clement began to answer, Justice Souter persisted: "You are leaving us with the position of the United States that the Congress may validly suspend it inadvertently. Is that really your position?"

The solicitor general replied, "I think at least if you're talking about the extension of the writ to enemy combatants held outside the territory of the United States ---- "

"Now wait a minute!" Justice Souter interrupted, waving a finger. "The writ is the writ. There are not two writs of habeas corpus, for some cases and for other cases. The rights that may be asserted, the rights that may be vindicated, will vary with the circumstances, but jurisdiction over habeas corpus is jurisdiction over habeas corpus."

Justice Breyer, in his questioning of Mr. Clement, practically begged the solicitor general to endorse an alternative approach that would allow the court to avoid "the most terribly difficult and important constitutional question of whether Congress can constitutionally deprive this court of jurisdiction in habeas corpus cases."

The alternative at hand was the one offered by Mr. Hamdan's lawyer, Neal Katyal, a law professor at Georgetown University. That was to interpret the Detainee Treatment Act as applying only prospectively, stripping federal courts of hearing future cases brought by the detainees but allowing the Supreme Court to continue with at least this one.

The argument was a textual one, based on a slight change in wording from the measure originally proposed by Senator Lindsey Graham, Republican of South Carolina, to the version the Senate eventually passed after Senator Carl Levin, Democrat of Michigan, and others raised objections to taking the Hamdan case away from the Supreme Court.

Mr. Graham, who filed a brief in this case, and the administration maintain that the change was immaterial. But the justices appeared ready to embrace the ambiguity if it would allow them to retain jurisdiction and proceed with the case.

Only eight justices will vote in the case, Hamdan v. Rumsfeld, No. 05-184. Chief Justice John G. Roberts Jr. is not sitting, because he was a member of the three-judge panel of the federal appeals court here that rejected Mr. Hamdan's challenge to the military commissions in a decision last July.

Of the other members of the court, Justice Antonin Scalia appeared most supportive of the administration. He intervened several times to offer Mr. Clement a helping hand, something the solicitor general rarely needs but accepted gratefully.

For example, Justice Kennedy was questioning Mr. Clement on the government's position that even if the court had jurisdiction, it should abstain from ruling on the validity of the military commission until after Mr. Hamdan's trial.

Justice Kennedy said he found the argument troubling, pointing out that Mr. Hamdan was arguing that because the commissions lacked the procedures required by the Geneva Conventions, they were invalid. "The historic office of habeas corpus is to test whether or not you're being tried by a lawful tribunal," Justice Kennedy said. "And he says, under the Geneva Convention, as you know, that it isn't."

Mr. Clement replied that Mr. Hamdan could raise that argument later, before the military commission itself. He predicted that the argument would fail and said that in any event, there was no reason "why that claim has to be brought at this stage."

Justice Scalia then jumped in to support the solicitor general. "In the normal criminal suit," he said, "even if you claim that the forum is not properly constituted, that claim is not adjudicated immediately."

Along with Justice Scalia, Justice Samuel A. Alito Jr. also appeared to support the argument that the court should allow the trial to go forward. Justice Clarence Thomas alone asked no questions.

Mr. Clement argued that the detainee law would allow a detainee to argue in federal court, after a conviction by a military commission, that the commission's procedures were illegal or unconstitutional.

Justice Ginsburg then asked him to "straighten me out." She said, "I thought it was the government's position that these enemy combatants do not have any rights under the Constitution and laws of the United States."

"That is true, Justice Ginsburg," the solicitor general answered.

Mr. Hamdan's lawyer, Mr. Katyal, appeared to get traction with his argument that conspiracy, with which Mr. Hamdan and nine other detainees awaiting military commissions have been charged, is not an appropriate crime for a trial before a military commission. If a majority agrees, this might provide a narrow way of resolving the case.

In many respects, the argument marked a resumption of the encounter between the court and the Bush administration two years ago, in cases that led to the court's rejection of the administration's claim to broad authority to proceed without judicial oversight. The administration was once again seeking "fundamentally open-ended authority," the "blank check" the court had rejected then, Mr. Katyal said.