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## Guantanamo Detainee Issues Await New Supreme Court

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MIAMI - Even as senators questioned chief justice nominee John Roberts about abortion, privacy and precedent last week, his confirmation hearings foreshadowed Supreme Court challenges over President Bush's power to hold terrorism suspects indefinitely at the Guantanamo Bay naval base and to stage war-crimes trials.

If the Senate confirms Roberts, as is widely expected, he would join a high court that is being asked to decide some of the White House's most controversial antiterrorism policies.

Issues likely to come before a Roberts court include:

-Whether federal courts can review a Pentagon designation of a captive as an enemy combatant - a power the president gave the military after the Sept. 11, 2001, attacks.

-Whether the first U.S.-run Military Commissions since World War II meet constitutional standards to protect the rights of the accused.

At last week's hearings before the Senate Judiciary Committee, Republican and Democratic senators asked questions of Roberts that pointed to issues raised by President Bush's war-on-terrorism policies and practices.

Pennsylvania Sen. Arlen Specter, the committee's Republican chairman, for example, cited the "patchwork of confusion" over detainee rights at the Guantanamo Bay prison in challenging Roberts to achieve greater harmony on a Supreme Court that has tended toward 5-4 decisions.

Vermont Sen. Patrick Leahy, a Democrat, sparred with Roberts around the fringes of Guantanamo prisoners' rights to file habeas corpus petitions challenging their detention by the government. He invoked the late Chief Justice William Rehnquist's 1998 study on civil liberties in wartime, "All the Laws but One."

Roberts said he, too, had read Rehnquist's book, which dissected erosion of the Bill of Rights during the Civil War and World War II. But he did not tip his hand on how he might rule. Instead, he invoked the record of Justice Robert H. Jackson, who was described as the former Supreme Court justice he most admires.

As President Franklin D. Roosevelt's attorney general, Jackson was a dogged advocate of presidential power. Once on the high court, though, he ruled against President Harry Truman's bid to seize the steel mills during the Korean conflict.

"Are you sending us a message?" Leahy asked, hopefully, as laughter echoed through the Senate conference room where Congress has probed such presidential scandals as Watergate, Iran-contra and Teapot Dome.

Roberts explained his admiration of Jackson:

"Although he had strong views as attorney general, he recognized when he became a member of the Supreme Court that his job had changed."

At issue in the habeas corpus challenge is not whether Guantanamo captives can sue in civilian court for their freedom. The Rehnquist court ruled 6-3 that the base in Cuba falls under U.S. law. Now the Justice Department is arguing that while the captives can have lawyers and sue, civilian judges do not have the power to review, individually, why the Pentagon is holding each "enemy combatant." The president gave the Defense Department that power, the Bush administration says.

The issue could reach the Supreme Court this session or next. Either way, Roberts told the senators he could rule on the war powers of this president dispassionately, despite national passions over the Sept. 11, 2001, terrorist attacks.

"The obligation of the court to protect those basic liberties in times of peace and in times of war, in times of stress and in times of calm - that doesn't change," Roberts said.

Later, he told Wisconsin Democratic Sen. Russ Feingold that future generations might find flaws in the U.S. government's response to the Sept. 11 attacks, but he declined to speculate because of the civil liberties challenges that could come before the court.

"When you have the benefit of 50 or 60 years to look back, as opposed to the particular demands of the moment and the perceived demands, I'm sure it's a different perspective," he said.

Roberts is expected to recuse himself from one Supreme Court challenge - an appeal of his July ruling that restored the Pentagon's power to charge and try Salim Hamdan, a Yemeni who worked as Osama bin Laden's driver before the Sept. 11 attacks. Roberts and two other Washington, D.C., federal appeals court judges overruled a lower-court order that halted Hamdan's war-crimes trial.

Meantime, Roberts signaled that congressional support - or lack of it - for President Bush's detention policies could influence the coming Supreme Court challenges.

Asked by Republican Sen. Lindsey Graham of South Carolina, a former military lawyer, whether Congress can strengthen the executive branch's detention and interrogation powers, Roberts offered up Jackson's three-tiered analysis of presidential power:

"When it has the support of Congress, it's at its greatest, and, obviously, when it's in opposition to Congress, it's at its lowest ebb, as (Jackson) put it. And he described a middle area in which it was sometimes difficult to tell whether Congress was supporting the action or not."

In the earliest days of the prison camp in Cuba, Congress was mostly silent on Bush administration decisions to deny the captives prisoner-of-war status and instead call them "enemy combatants," to establish a war-crimes court in Guantanamo and to refuse detainees access to attorneys.

Now, nearly four years later, some senators have been toying with legislating changes in interrogation and detention policies - among them Republicans like Graham and former Vietnam-era POW John McCain, the Arizona Republican, who have declared themselves at times troubled by the processes the

Pentagon has created in Cuba.

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