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## **Legal challenges mount to Guantánamo tactics**

The most prominent case centers on Osama bin Laden's former driver and the military commission that would try him.

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Six months after losing two landmark US Supreme Court cases, government lawyers are once again on the defensive facing a new round of challenges to Bush administration tactics in the war on terror.

At issue in a string of federal court cases is to what extent US and international legal protections are available to the 550 suspected enemy combatants being held indefinitely at the Guantanamo Bay Naval Base in Cuba. How the judiciary answers that question could have ramifications far beyond Guantánamo Bay.

Most prominent among the cases is one dealing with an attempt by the US government to place Osama bin Laden's former driver on trial as an alleged war criminal. A federal judge has thrown the case out, but the government is appealing.

Ultimately at stake is a possible redrawing of the constitutional balance between executive, legislative, and judicial authority in times of national crisis.

"All of the questions that are thrown into play by the US detention policies in the war on terror are fundamentally separation of powers issues," says Joseph Margulies, who was part of the legal team that persuaded the Supreme Court to extend US federal court jurisdiction to detainees at Guantánamo in June.

Administration lawyers defend their hardfisted tactics as a necessary exercise of presidential war power in the face of an enemy that they say is plotting mass murder in an American city. The Constitution entrusts the president - not the courts - with the task of protecting the nation from foreign threats, they say.

The current legal challenges are taking place on two tracks. Both were prompted by Supreme Court decisions in June.

More than 50 Guantánamo detainees have filed suit in federal court in Washington, challenging the legal sufficiency of a Pentagon-drafted review system designed to determine each detainee's status as an enemy combatant. In addition, a second type of challenge is questioning the government's legal authority to place the Guantánamo prisoners on trial as war criminals. So far, 15 detainees have been designated for war-crimes trials before a military commission specially authorized for that task by President Bush.

Last month, a federal judge in Washington derailed the war-crimes trial process when he ruled that US officials had failed to comply with the requirements of the Geneva Conventions and were violating safeguards enacted by Congress.

The ruling by US District Judge James Robertson came in the case of Salim Ahmed Hamdan, a Yemeni who worked as a driver for Mr. bin Laden in Afghanistan.

Since June 2002, Mr. Hamdan has been held and interrogated at Guantánamo. In July he was charged with conspiring to commit terrorism by being a member of Al Qaeda and was among the

first four alleged Al Qaeda captives facing trial before the military commission. Hamdan denies any involvement in terrorism.

His lawyers challenged the legality of the commission process in papers filed not only with the commission in Guantánamo but also with Judge Robertson.

Robertson ruled that the Defense Department was violating the terms of the Geneva Conventions because it had failed to conduct a tribunal to determine whether Hamdan was entitled to prisoner-of-war status. Absent such a tribunal, the US government - as a signatory of the Geneva Conventions for treatment of war captives - is obligated to treat Hamdan as if he were a prisoner of war, the judge says. And if he is a prisoner of war, Robertson adds, he must be afforded the same high level of due process protections as would be afforded a US soldier in a court-martial.

Since the military commission set up to try suspected Al Qaeda members does not include all the due process safeguards of a court-martial, the commission process is itself illegal, the judge ruled.

Government lawyers say the judge overstepped his authority by invalidating military decisions made by the president in his capacity as commander in chief. The Bush administration says suspected Al Qaeda members are not entitled to Geneva protections because they are terrorists who target civilians rather than soldiers who comply with the laws of war.

Lawyers for the government are asking a federal appeals court panel in Washington to overturn Robertson's decision, while lawyers for Hamdan are asking the US Supreme Court to take up the case and affirm the federal judge.

The Supreme Court is expected to decide next month whether to take up the case. If it doesn't, the appeals court panel is set to hear oral argument March 8.

Stephen Saltzburg is an expert in military justice and a law professor at George Washington University Law School. He has mixed feelings about Robertson's decision: While he is glad a federal judge has acted forcefully in a way that addresses world concerns about US indefinite detention policy at Guantánamo, he doubts the decision will be upheld on appeal.

"It appears to be a decision in which a federal court is asserting the authority to review detention decisions of basically anyone seized anywhere by the US under any circumstances," Professor Saltzburg says. He adds that it is highly unusual for a federal judge to declare certain trial procedures illegal prior to a trial taking place.

Saltzburg says the Hamdan case illustrates the need for Congress to get involved. "Congress has been AWOL here," he says. "We need to have the legislative branch - our representatives - addressing some of these issues and having a debate over what we should be doing here."

Neal Katyal is on Hamdan's defense team and is a professor at Georgetown University Law Center in Washington. He says Congress has imposed limits on executive power through laws it has passed governing the military justice system. "We are not talking about [the president] trying to protect the peace," Mr. Katyal says. "We are talking about someone who is bypassing Congress entirely and setting up a whole new apparatus of justice."

In its brief to the federal appeals court, the Bush administration denounces Robertson's ruling as "an extraordinary intrusion into the executive's power to conduct military operations to defend the United States." Robertson "gave greater weight to advice the president did not adopt than to the president's own determinations," it says.

