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The Law vs. the Government

Editorial
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IF POLITICS MAKES FOR strange bedfellows, as the saying goes, so does the law. In Tuesday's arguments of a landmark Supreme Court case challenging President Bush's power to deal with "enemy combatants" any way he sees fit, several justices appeared to be allied with Osama bin Laden's former driver. That may be because the court itself, and the nation's judicial branch, seemed to be as much in the government's cross hairs as any alleged terrorist.

In the aftermath of the 9/11 terrorist attacks, both the White House and Congress have tried to curtail judicial review of proceedings against detainees picked up on the battlefield (a somewhat amorphous concept in this war) and now held at Guantanamo Bay or elsewhere. Salim Ahmed Hamdan, the plaintiff in the case, is to be tried by a special military tribunal that does not provide the same procedural safeguards accorded defendants in a court-martial, or as required under the Geneva Convention. His lawyers are challenging the legality of this makeshift judicial system, but late last year Congress passed a law limiting access to the federal courts for those detained in the war on terrorism.

The arguments before eight justices -- Chief Justice John G. Roberts Jr. recused himself because he ruled on this case while an appellate judge -- exposed the case's procedural and jurisdictional complexities.

Did Congress intend to impose its new limits on judicial review to cases already being litigated? Based on the tenor of their questions, a majority of the justices appeared offended by the government's notion that Congress can retroactively take away someone's right to his day in court. Indeed, it is not clear that Congress could do so under the Constitution, even for future cases.

For their part, justices Antonin Scalia and Samuel A. Alito Jr., comparing this case to run-of-the-mill criminal cases, suggested that Hamdan should not be bringing this suit until convicted of a crime, if then. But that makes no sense if the issue at stake is the legal competence of the tribunal itself. There have been military tribunals in the past for enemy combatants who were not prisoners of war covered by the Geneva Convention, most recently during World War II. But there is some doubt whether Hamdan can be tried solely on conspiracy charges in such a court. Conspiracy is not recognized as a "crime of war" that these tribunals are designed to adjudicate.

It is always dangerous to make assumptions about the outcome of a case based on the justices' questions. But it was heartening to hear a majority of justices practically bristle at the government's assertion that the court should have no say on the boundaries of presidential authority in this war. The court should not allow the other two branches of government to usurp its constitutional role.