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## **Detainee Case Hits on Limits of Presidency**

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WASHINGTON, Jan. 9 -- When the Supreme Court agreed two months ago to hear an appeal from a Yemeni detainee at Guantanamo Bay, Cuba, named Salim Ahmed Hamdan, it was evident that an important test of the limits of presidential authority to conduct the war on terror was under way. Now that the final briefs have begun to arrive at the court, in advance of a late March argument, the dimensions of that test appear greater than ever.

Several of the two dozen briefs filed on Mr. Hamdan's behalf late Friday address an issue that was not even part of the case when the justices granted review on Nov. 7: whether the court has jurisdiction to proceed or whether Congress, in a measure that President Bush supported and signed into law on Dec. 30, has succeeded in shutting the federal courthouse doors on Mr. Hamdan and 150 other Guantanamo detainees whose cases are pending at various levels of the federal court system.

If that proved to be the case, the result would be "a nightmare scenario," a group of prominent law professors told the Supreme Court in one of the briefs. "The keys to the courthouse will be placed in the exclusive control of the executive," the brief says, creating "the legal equivalent of incommunicado detention of Japanese aliens in a relocation camp in Idaho." The professors were Burt Neuborne and Norman Dorsen of New York University, Judith Resnik of Yale, and Frank Michelman and David Shapiro of Harvard.

Another brief, filed by the Center for National Security Studies, a civil liberties group, and the Constitution Project, a bipartisan study group, asserts flatly that if the new law, the Detainee Treatment Act of 2005, does in fact strip the Supreme Court of jurisdiction over the Hamdan case, then the law is unconstitutional.

The Bush administration has not yet responded to such assertions; its brief is not due until early next month. But it appears both from the president's statement upon signing the measure, which originated as Section 1005 of a military spending bill, and from motions the administration has filed in the lower courts that government lawyers do take the view that the new law applies to pending cases and that the justices must dismiss the Hamdan appeal.

When he signed the bill into law, Mr. Bush added a written statement that said "the executive branch shall construe Section 1005 to preclude the federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in Section 1005."

The section provides that "no court, justice or judge shall have jurisdiction to hear or consider" habeas corpus petitions or "any other action" that relates to "any aspect of the detention" of individuals in military custody at the Navy base at Guantanamo Bay.

Boiled down, the question is whether this abolition of jurisdiction is prospective only, or whether it applies to pending cases. If the second case, the question is whether it applies only to the 150 or so Guantanamo cases pending in the lower courts, or whether it also divests the Supreme Court of jurisdiction to hear a case it has already agreed to decide. That conclusion would have significant implications for the separation of powers, among other issues.

The statute itself does not address these issues in its text; the accompanying legislative history contains statements from Democratic senators describing the bill as prospective only, and Republicans saying that it applies to pending cases.

The case before the Supreme Court, *Hamdan v. Rumsfeld*, No. 05-184, challenges the validity of the military commission procedure by which the administration proposes to try Mr. Hamdan and, currently, 11 other Guantanamo detainees on various terrorism-related charges.

Lawyers for Mr. Hamdan, once a bodyguard and driver for Osama bin Laden in Afghanistan, are arguing that the president lacked explicit and inherent authority to establish the military commissions. They also say the commissions' procedures fail to give defendants the protections to which civilian, military and international law entitle them.

In urging the justices to reject the case last fall, the administration argued that Mr. Hamdan should have to wait until after his trial to challenge the commission. But a pretrial challenge to the validity of detention is at the "historical core" of the writ of habeas corpus, the Center for National Security Studies-Constitution Project brief argues.

The brief notes that Congress has suspended the availability of habeas corpus only three times in the country's history, each time explicitly and for a limited period, and that the new law did not assert the existence of a "rebellion or invasion," the ground specified by the Constitution for suspending habeas corpus.

A brief submitted by a committee of the Bar of England and Wales, describing the ancient origins of habeas corpus, says that in "innumerable cases stretching back to early times," English courts have treated military detentions as "core areas requiring habeas review."