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The President and the Courts

Editorial
New York Times
March 20, 2006

Since the Republican majority has decided to allow President Bush to usurp Congress's role in matters of national security, the battle to save the constitutional balance of powers moves to the judiciary. A critical test of judicial independence will come this month, when the Supreme Court hears arguments in a case that has become a focus of Mr. Bush's imperial vision of the presidency.

Salim Ahmed Hamdan, a Yemeni national accused of having been a bodyguard and driver for Osama bin Laden in Afghanistan, has been detained since 2002 in Guantanamo Bay. He filed suit to challenge the legitimacy of the military commission that upheld his designation as an "unlawful enemy combatant" -- a term Mr. Bush invented after 9/11 to deny the protections of the Geneva Conventions, international statutes or United States law to certain prisoners.

Mr. Hamdan argued, rightly, that the commissions are not legitimate because prisoners are routinely barred from seeing evidence, much less confronting their accusers or having access to real legal representation. But his case has now become a much larger battle over the principle of habeas corpus, which is embedded in the Constitution and says that a prisoner cannot be denied the right to challenge his detention. Mr. Bush's decision after 9/11 that he had the power to put prisoners beyond the reach of the law at his choosing was the first attempt to suspend habeas corpus on American territory since the Civil War.

The Supreme Court two years ago emphatically rejected the president's claim that its jurisdiction did not extend to Guantanamo. Seeking to reverse that ruling, the White House in December helped push through a special amendment as part of the deal that also saw Mr. Bush sign a watered-down ban on torture of military detainees. The amendment, sponsored by Senator Lindsey Graham, a Republican, and Senator Carl Levin, a Democrat, stripped Guantanamo detainees of the normal rights of judicial review. It also designated a single appellate court to conduct a limited review of decisions by the military commissions, and left "enemy combatants" held without a trial in a seemingly inescapable legal black hole.

As soon as Mr. Bush signed this law, he declared that the administration was going to apply it to all pending cases, about 160 or so, and the solicitor general told the Supreme Court it no longer had a right to hear *Hamdan v. Rumsfeld*. This is court-stripping -- the attempt by another branch of government to prevent the court from deciding a particular issue. The White House tried to justify this outrageous tampering with the judiciary by ignoring the new law's actual language and legislative history to argue that the new legislation took away the power of the courts to hear not just future cases but also cases already filed and accepted for review. The Supreme Court responded by adding the jurisdictional objection to the list of issues it will consider when the case is heard on March 28.

At a minimum, we hope the court will rule that Congress and the president may not deny the justices the power to review pending cases. But it should also reject the defective military commissions, as well as the idea of denying access to the courts for future valid claims brought by Guantanamo detainees, including claims of torture.

If Congress wants to take the extreme step of suspending the Supreme Court's jurisdiction over habeas corpus, especially pending appeals, it must say so in unmistakable terms, which it has not done. Both the text and the legislative history of the Graham-Levin amendment demonstrate

an intention to avoid touching pending cases. Moreover, the Constitution itself requires an "invasion" or a "rebellion" as a prerequisite for suspension of habeas corpus. It's hardly likely that the founding fathers intended to give Congress the right to eliminate judicial review during an ongoing international struggle against terrorism that may well go on for generations.

The retired Justice Sandra Day O'Connor observed in a recent speech that the framers created three separate and equal branches of government because they knew that preserving liberty requires that no single branch or person can amass unchecked power. According to NPR's Nina Totenberg, who heard the speech, Justice O'Connor cited Republican court-stripping efforts as an example of dangerous overreaching. "It takes a lot of degeneration before a country falls into dictatorship," Justice O'Connor said, "but we should avoid these ends by avoiding these beginnings."

The president seems to forget that and Congress clearly will not remind him. The nation cannot afford for the Supreme Court to forget as well.