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## **Guantanamo Detainee's Appeal is About Limits to Presidential Power**

Editorial

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Mar. 30--The Supreme Court heard oral arguments on Tuesday in the case of an al-Qaida suspect captured in Afghanistan. Salim Ahmed Hamdan, a citizen of Yemen, was seized in late 2001 and is being held at Guantanamo Bay naval base. He admitted to being a driver for Osama bin Laden, but said he was not involved with terrorist acts. His habeas corpus petition challenges the legality of the Bush administration's plan to try him on conspiracy charges before a military tribunal, as opposed to having his case in the federal courts. However, Mr. Hamdan's case also is about the separation and balance of powers among the branches of the federal government.

Two years ago, the Supreme Court ruled in a separate case about Guantanamo detainees. In that matter, the court said a state of war "is not a blank check for the president" and ruled against the President's claim that prisoners should not be able to go to court to challenge their detentions. However the justices didn't spell out how such appeals would proceed.

Solicitor General Paul Clement on Tuesday asked the justices not to hear the Hamdan case at all. He argued that since Congress passed the Detainee Treatment Act in December, saying detainees may not appeal to court until after their cases go through the tribunal process, the Supreme Court should not touch Mr. Hamdan's case. However, that law was passed after the Court had agreed to hear Hamdan vs. Rumsfeld, and it was amended specifically to keep that case before the Court.

A majority of the justices were clear that they want to hear the case, and for more reasons than the timing or text of that particular law. This case is part of a broader debate over whether there are limits to a president's authority in time of war. President Bush has asserted for his administration very broad powers, ranging from handling detainees to ordering telephone taps without court warrants. The special nature of "the war on terrorism" since 2001 leaves the nation with scant guidance in history and legal precedent, so claims for new powers must be tested against the Constitution -- a task to which the Supreme Court is uniquely suited. Thus, an attempt to keep the justices out of the matter was bound to create a chilly atmosphere for the case itself.

Judging by their questions on Tuesday, five of the justices not only wanted the case but seemed inclined to again rein in the White House. That decision will be made by only eight justices, because Chief Justice John Roberts has disqualified himself. He already has ruled in favor of the administration as a lower-court judge.

That may be one justice too many. During a speech at the University of Freiburg in Switzerland on March 8, Justice Antonin Scalia said it was "crazy" to give someone captured on a battlefield a civilian trial. He did not specifically speak of the Hamdan case, but its particulars line up with the comments he made prior to hearing the Hamdan arguments. Justice Scalia did recuse himself once before after making public comments about the Pledge of Allegiance and then getting a pledge case before the court. And then there was his 2004 hunting trip with Vice President Cheney prior to hearing a case involving the vice president. Justice Scalia's instincts regarding his own potential for conflicts of interest do not inspire confidence.