

The *Hamdan* dissents: US Supreme Court justices argue for presidential dictatorship

By John Burton
6 July 2006

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Three US Supreme Court justices filed dissenting opinions in last week's 5-3 ruling in the case of *Hamdan v. Rumsfeld*, which rejected President Bush's military commissions at the Guantánamo Bay prison camp.

All three dissenters—Clarence Thomas, Antonin Scalia and Samuel Alito—supported the administration's claim to virtually unlimited presidential powers. A fourth, Chief Justice John Roberts, recused himself from the high court proceedings because, in his previous capacity as a federal appeals court judge, he had already supported the administration's position in the *Hamdan* case.

The *Hamdan* case's significance is not so much in its expressed holdings—that any war crimes trial of Guantánamo Bay detainee Salim Ahmed Hamdan, allegedly a driver for Osama bin Laden in Afghanistan, must meet the due process standards of a military court martial—but in its implicit repudiation by the majority on the court of the claimed legal justification for much of the Bush administration's exercise of unbridled executive power in the name of waging an indefinite “war on terror.”

Relying on the Constitution's Article II designation of the president as the “commander in chief of the Army and Navy”—a provision intended to subordinate the military to civilian authority—and the supposed open-ended “war on terror,” the Bush administration claims unchecked military power to seize individuals of any nationality, including American citizens, anywhere in the world, including within the United States itself, and imprison them indefinitely, under the most brutal and inhumane conditions, where they are subjected to torture and other forms of abuse and degradation, without any constraint by domestic or international law.

From any legitimate legal perspective, the “war on terror” is not a real “war”—a state of belligerency between sovereign nations—but a metaphorical war, like the “war on drugs,” for example, and does not constitutionally trigger the executive's war powers. Moreover, its object is only a vague reference to a tactic, “terror,” rather than an identifiable organization or movement.

So-called anti-terror measures such as the military commissions in *Hamdan* can be easily turned from the reactionary Islamic fundamentalists of Al Qaeda to other targets, most importantly the growing domestic and international political opposition to US militarism, attacks on democratic rights, and the destruction of jobs, living standards and social programs.

Associate Justice John Paul Stevens' majority opinion rejected the Bush administration's arguments that the Supreme Court cannot challenge the president's claimed “wartime” powers, and mandated that any war crimes trials conform at least to the Uniform Code of Military Justice (UCMJ), that it be based on a charge recognized by

international law, and, most importantly, that it conform to the Geneva Conventions which, by virtue of Common Article 3, protect all persons captured by a signatory nation such as the United States.

The principle dissent was written by Associate Justice Clarence Thomas, joined by Associate Justices Antonin Scalia and Samuel Alito. (Alito recently replaced retired Associate Justice Sandra Day O'Connor.)

To underscore the vehemence of his opposition to the majority ruling, Thomas took the unusual step of reading his dissent from the bench.

What is most notable is the brazen fashion in which Thomas sets out a blueprint for military dictatorship, a system of “laws” where the president determines the scope of his own war powers and then is free to use them to establish military commissions, setting whatever procedures he chooses, and subject whomever he chooses to rigged trials for whatever he claims to be a war crime, with sentences up to the death penalty.

Ignoring the role of the Supreme Court as a check on presidential power, Thomas chastises Stevens for “flout[ing] our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs.” Underlying this purported obligation to defer to presidential decisions are, Thomas argues, “the structural advantages attendant to the Executive Branch—namely, the decisiveness, activity, secrecy, and dispatch that flow from the Executive's unity.”

Here, in a nutshell, is the nub of the deeply anti-democratic argument. The *Hamdan* dissenters reflect sentiments widely held by right-wing elements in the US ruling elite: to confront the growing domestic and international opposition to the consequences of its policies, the US government must free itself from the baggage of the legislative and judicial branches. It must act in “secrecy,” with “decisiveness” and “unity” of purpose, unencumbered by opposing viewpoints voiced in other branches of government, much less those expressed within the population as a whole.

The use of military commissions, such as those proposed by the Bush administration, which deny the accused independent judges, access to evidence, and even the right to attend the trial, flies in the face of the Fifth Amendment guarantee that “No person shall... be deprived of life, liberty, or property, without due process of law.”

Because there is no constitutional provision or act of Congress which authorizes the president to establish military commissions, Thomas adopts his doctrine from what he calls “the common law of war,” which, in turn, he claims “is derived from the experience of our wars and our wartime tribunals,” as well as “the laws and usages of war as understood and practiced by the civilized nations of the world.”

Setting aside the oxymoron of war “practiced by the civilized nations of the world,” Thomas here sets out a doctrine that allows the executive branch to ignore both domestic and international law, instead cherry picking its “rules” from “the experience of our wars and our wartime tribunals.”

Moreover, consistency with those historical precedents is not even required. According to Thomas, “the common law of war is marked

by two important features. First, as with the common law generally, it is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present.”

In other words, past experience can be ignored whenever convenient to do so, leaving the executive free to make the law up as it goes along.

“Second,” Thomas continues, “the common law of war affords a measure of respect for the judgment of military commanders... In recognition of these principles, Congress has generally left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the law of war.”

Here Thomas is asserting that the life and liberty of everyone on earth is within the discretion of the US president and his military command staff, subject only to their interpretations of the “common law of war.”

Who can be subjected to these military commissions? Thomas cites four factors from William Winthrop’s 1920 treatise *Military Law and Precedent*: “the (1) time and (2) place of the offense, (3) the status of the offender, and (4) the nature of the offense charged,” and then concludes that the president has unreviewable authority to deem each factor established, thus making the reach of military commissions unlimited.

As for time and place, Thomas refers to “Hamdan’s charging document,” where “the Executive has determined that the theater of the present conflict includes Afghanistan, Pakistan and other countries... and that the duration of that conflict dates back (at least) to Usama bin Laden’s August 1996 ‘Declaration of Jihad Against the Americans.’”

“These judgments pertaining to the scope of the theater and duration of the present conflict are committed solely to the President in the exercise of his commander-in-chief authority,” Thomas writes, condemning Stevens’ opinion for its “willingness to second-guess the Executive’s judgments in this context.”

Persons triable before a commission, the third factor, include, according to Thomas, “individuals of the enemy’s army who have been guilty of illegitimate warfare or other offences in violation of the laws of war,” as well as “irregular armed bodies or persons not forming part of the organized forces of a belligerent who would not be likely to respect the laws of war.”

Here Thomas ignores the most fundamental notion of due process, that a person is presumed innocent, and that guilt can be established only after a fair hearing. According to Thomas, those already deemed “guilty of illegitimate warfare,” presumably at the direction of the president and his military commanders, can then be subjected to military commissions. Even if the accused has not actually done anything, he can still be hauled before a commission if he would “not be likely to respect the laws of war.”

There are no legal limits restricting what the president can do to such people, Thomas claims in a particularly bloodthirsty passage, because, “according to Winthrop, such persons are not ‘within the protection of the laws of war’ and therefore are ‘liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by military commission.’ This consideration is easily satisfied here, as Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war.”

Why is Hamdan “an unlawful combatant” subject to military commission or worse? Because the executive branch has so charged. There is an unmistakable *Alice-in-Wonderland* quality to Thomas’

circular argument. Perhaps, Thomas insinuates, Hamdan should be thanking his lucky stars he has not already been lined up against a wall and shot.

Finally, Thomas turns to the fourth factor, the nature of the offense charged, condemning Stevens for imposing a requirement that precedents establishing war crimes “be plain and unambiguous,” labeling it “a pure contrivance, and a bad one at that.” (Stevens’ opinion rejected the stand-alone “conspiracy” charge against Hamdan on the basis that it “does not appear in either the Geneva Conventions or the Hague Conventions—the major treatises on the laws of war.”)

Calling the rule that war crimes must be clearly established by law, treaty or precedent “inconsistent with the nature of warfare, which also evolves and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate,” Thomas limits the Supreme Court’s role to “whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.”

After reviewing the four factors, Thomas opens the doors wide open for war crime tribunals by deliberately conflating the September 11 terrorist attacks with the indigenous resistance to US imperialism’s invasion and occupation of Iraq.

“We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy,” Thomas writes, “who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers.”

Thomas then turns from the jurisdiction of military commissions to their procedures. He condemns the Supreme Court majority for finding that an act of Congress, the UCMJ, provides the rules. Instead, according to Thomas, the president “as Commander in Chief... may, in time of war, establish and prescribe the... procedure of military commissions.” In other words, after defining who goes to trial on what charges, the president can then set rules to make sure that the outcome will meet his political agenda.

What about the protections of international treaties such as the Geneva Conventions? That too is solely a matter of presidential discretion, according to Thomas. Rejecting Stevens’ conclusion that, at minimum, Common Article 3 protects captives who do not fall within the definition of “prisoners of war” under the Third Geneva Convention, Thomas writes, “Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States,” President Bush “accepted the legal conclusion of the Department of Justice that common Article 3 of Geneva does not apply to Al Qaeda detainees.” It is the high court’s “duty to defer to the President’s understanding of Common Article 3,” Thomas concludes.

The provision of Common Article 3 which, according to Thomas, Bush can ignore prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

That four Supreme Court justices openly endorse unchecked presidential power to capture, imprison, prosecute and execute for alleged war crimes anyone, anywhere, without regards to the Constitution, laws of Congress or international treaties such as the Geneva Conventions, is a telling commentary on the state of democracy in the US.