

US Supreme Court hearing on Guantánamo tribunals bares attacks on basic rights

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1 April 2006

The Bush administration's assumption of extra-legal authority to imprison and prosecute so-called enemy combatants without granting them recourse to either the US courts or the protections of the Geneva Convention was challenged before the Supreme Court March 28. The high court heard oral arguments in *Hamdan v. Rumsfeld*, the lead case challenging the legality of the Bush administration's plan to use military commissions to convict prisoners at Guantánamo Bay, Cuba, of purported war crimes.

The military commissions, comprised of hand-picked military officers, are kangaroo courts which the accused have no right to attend, which have no rules of evidence, and from which appeals are limited to a cursory presidential review and sign-off. (See "Military commissions' prosecutors charge: trials rigged against Guantánamo detainees") Created by presidential decree, they are neither authorized by Congressional legislation nor subject to judicial review. They violate on their face both the constitutional balance among the three branches of government and the Fifth Amendment right to due process of law.

Clearly emerging from the justices' comments during the unusual 90-minute session (arguments on a single case are usually limited to an hour) were the deepening divisions and growing disquiet within the ruling elite over the Bush administration's crude disregard for international law and constitutional traditions.

The case arises from the habeas corpus petition filed by Salim Ahmed Hamdan, a Yemeni driver for Osama bin Laden in Afghanistan prior to the September 11 attacks. He is one of 10 Guantánamo Bay prisoners currently charged by the Bush administration with conspiracy to commit terrorist acts. The Bush administration is proposing a life sentence for Hamdan if the charge is sustained.

Hamdan has denied in court papers that he is a member of Al Qaeda and claims he knew nothing about any plans to attack the United States, that his role was transporting field workers to and from bin Laden's farm. He says an Afghan paramilitary unit captured him and turned him over to the US military for a bounty. The Supreme Court hearing did not address the merits of his defense, however, only its jurisdiction to decide the legality of the charges themselves and the procedures proposed for adjudicating them.

The first federal judge to consider Hamdan's petition, James Robertson, held in November 2004 that Bush's military commissions would violate Hamdan's rights under the Third Geneva Convention, which provides that prisoners of war are entitled to the "same courts" and the "same procedure as in the case of members of the armed forces of the Detaining Power," and that establishing the military commissions through a presidential directive rather than an Act of Congress violates the separation of powers.

Last July, an all-Republican, three-judge panel of the United States Court of Appeals for the District of Columbia reversed Robertson's ruling on the specious grounds that US courts lack jurisdiction to hear claims under the Geneva Conventions. (See "US court upholds military trials for

Guantánamo prisoners".) Newly appointed Chief Justice John G. Roberts, Jr., joined in that decision and therefore is disqualified from participating in the Supreme Court review.

After the Supreme Court accepted the case, Congress passed the Detainee Treatment Act (DTA)—supposed anti-torture legislation—which includes several confusing provisions limiting court review over Guantánamo Bay habeas petitions. The scope, meaning and constitutionality of these unusual provisions have never been considered by any court.

Georgetown University law professor Neal Katyal represented Hamdan at the high court argument. He began by stating that his client wanted no more than that "the President try offenses that are, indeed, war crimes and conduct trials according to the minimum procedural requirements of the Uniform Code of Military Justice." He then challenged the Bush administration's contention that the DTA stripped the Supreme Court of jurisdiction, pointing out that the explicit language doing so was taken out of the bill's final version.

While the five more moderate associate justices, Stephen G. Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, David H. Souter and John Paul Stevens, appeared willing to exercise jurisdiction and decide the case, right-wing ideologue Antonin Scalia and newly appointed Samuel A. Alito indicated that they thought any court ruling should be delayed until the case works its way back after a final decision in the underlying case, a process that could take years. Associate Justice Clarence Thomas, who usually votes with Scalia, followed his custom of sitting mute through the argument.

Katyal responded forcefully to the suggestion that any ruling be deferred, pointing out that the government was preparing 75 different cases for the "first wave," and that because "a final decision requires the sign-off of the President of the United States ... effectively, this reading would give a litigant the ability to block federal court review for all time."

Katyal then explained that Hamdan faced not only procedures outside the laws and Constitution of the United States, but a war-crime charge not recognized by international law.

"The only charge in this case is one of conspiracy," Katyal pointed out, "and conspiracy has been rejected as a violation of the laws of war in every tribunal to consider the issue since World War II." He then listed war crimes tribunals in Nuremberg and Tokyo as well as the more recent international tribunals for alleged war crimes in Rwanda and the former Yugoslavia.

Criminal law defines "conspiracy" as an agreement to do an illegal act, regardless of the consequences. Other crimes require the commission of an illegal act, or at least the attempt to do so. Katyal explained that "the standalone offense of conspiracy is rejected by international law because it's too vague.... The world rejects conspiracy, because if it's adopted it allows so many individuals to get swept up within its net."

"Allowing this charge of conspiracy would open the floodgates to the president to charge whatever he wants," Katyal argued, highlighting the

motive underlying the military commissions and their thoroughly despotic character.

He continued, “The problem with it is compounded by the fact that the tribunal itself is charging a violation of the laws of war, when the military commission has never operated to try violations of terrorism in stateless, territoryless conflicts.” In other words, the so-called “war on terror” is not an actual “war” at all—a state of belligerence between nations—but a metaphorical “war” supposedly directed against a network of shadowy organizations which engage in terrorist acts.

Katyal concluded by pointing out the fundamental contradiction between the Bush administration’s claim that it has the power to convict someone for violating the laws of war while also denying them the procedural protections provided by those same laws of war—the Geneva Conventions. The prisoners at Guantánamo Bay are being held in flagrant disregard of the Conventions, which require that all captives are presumed to be prisoners of war with full protections until a competent tribunal determines otherwise, bar interrogations and torture, and guarantee humane housing conditions and Red Cross or Red Crescent access.

The administration’s case, argued by Solicitor General Paul D. Clement, boiled down on every issue to the assertion of unbridled executive power.

In response to a question as to whether “conspiracy” is a recognized war crime, for example, Clement stated that the executive, rather than international treaties, can define war crimes “as a matter of pure constitutional power.” This statement embodies the Bush administration’s ongoing attack on the separation of powers. Under generally accepted constitutional principles, violations of law are defined by the legislative branch and are interpreted by the judiciary. Here, Clement is saying that the president’s authority as commander-in-chief of the armed forces gives him essentially dictatorial powers over all aspects of government.

Justice Souter, an appointee of the first president George Bush who has staked out a somewhat independent position on the high court, pressed Clement on the role of international law: “What do you make of the argument that Mr. Katyal just alluded to, that if you take—as you do—the position that the commissions are operating under the laws of war, you’ve got to accept that one law here is the Geneva Convention’s right to a presumption of POW status . . . Don’t you go from the frying pan into the fire?”

Clement responded that a prisoner could bring the claim the Geneva Conventions apply “to the military commissions, but they could adjudicate it and say that the Geneva Conventions don’t apply here, for any number of reasons,” adding “the position of the executive” is “the Geneva Conventions don’t apply.”

Souter focused on the glaring contradiction in the Bush administration’s position: “For purposes of determining the domestic authority to set up a commission, you say, the president is operating under the laws of war recognized by Congress, but for purposes of a claim to status, and, hence, the procedural rights that go with that status, you’re saying the laws of war don’t apply. And I don’t see how you can have it both ways.” Clement responded, “The fact that the Geneva Conventions are part of the law of war doesn’t mean that [Hamdan] is entitled to any protection under those conventions.”

Clement could not be more explicit. According to the Bush administration, once designated as an “enemy combatant” in the “war on terror,” a Guantánamo Bay prisoner is consigned to a legal limbo outside the protections both of domestic and international law.

Clement’s clumsy doubletalk kept digging him into a deeper and deeper hole. When Justice Breyer asked whether construing the DTA to limit judicial review would force the justices to decide “the most terribly difficult and important constitutional question of whether Congress can constitutionally deprive this Court of jurisdiction in habeas cases,” Clement responded that “the standards and procedures” to be used by the military commissions “are consistent with the Constitution and laws of the

United States.”

Justice Ginsburg jumped in, asking Clement to “straighten me out” because “I thought that it was the government’s position that these enemy combatants do not have any rights under the Constitution and laws of the United States.”

“That is true,” Clement responded.

When Clement argued that when enacting the DTA Congress “sort of stumble[d] upon a suspension of the writ” of habeas corpus—a constitutional power granted only in cases of “Rebellion or Invasion”—Justice Souter became visibly agitated, wagging his finger while saying, “Isn’t there a pretty good argument that a suspension of the writ is just about the most stupendously significant act that the Congress of the United States can take? And, therefore, we ought to be at least a little bit slow to accept your argument that it can be done from pure inadvertence.”

Near the conclusion of Clement’s argument, Breyer summed up, from Hamdan’s perspective, the government’s position and its far-reaching consequences for democratic rights: “Look, you want to try a war crime. You want to say this is a war crimes tribunal. One, this is not a war, at least not an ordinary war. Two, it’s not a war crime, because [the charge of conspiracy] doesn’t fall under international law. And, three, it’s not a war crime tribunal or commission, because no emergency, not on the battlefield, civil courts are open, there is no military commander asking for it, it’s not in any of those in other respects, like past history. And if the President can do this, well, then he can set up commissions to go to Toledo, and, in Toledo, pick up an alien, and not have any trial at all, except before that special commission.”

Breyer should not have limited his statement to aliens. At least one US citizen, Jose Padilla, was picked up on US soil and imprisoned as an “enemy combatant” without rights under either domestic law or the Geneva Conventions.

Justice Scalia functioned throughout the hearing as if he were a second lawyer for the Bush administration, repeatedly intervening to bail Clement out of tough spots. When other justices were challenging Clement on the ad hoc composition of the commissions, he blurted out, “This is not, you know, a necktie party,” using a colloquialism for lynching.

There were serious questions raised about Scalia’s participation in the case. According to *Newsweek* magazine, on March 8 Scalia told an audience at the University of Freiburg in Switzerland, where he was once a student, that he was “astounded” by the “hypocritical” reaction of Europe to the Bush administration’s claim that Guantánamo Bay prisoners have no legal rights. Of people like Hamdan, Scalia said, “If he was captured by my army on a battlefield, that is where he belongs. I had a son on that battlefield and they were shooting at my son, and I’m not about to give this man who was captured in a war a full jury trial. I mean, it’s crazy.... Give me a break.”

One of Scalia’s sons, Matthew, served with the US military in Iraq. There appear to be no captives from Iraq at Guantánamo Bay.

Among those calling for Scalia’s disqualification were retired US generals and admirals who filed an amicus curiae “friend of the court” brief supporting Hamdan. (They are concerned that the US denial of Geneva Convention rights to its prisoners will place US captives in jeopardy during future conflicts.) They asked that Scalia be disqualified for his demonstration of “personal bias” and comments which “give rise to the unfortunate appearance that, even before briefing was complete, he had already made up his mind.”

Scalia, whose long history of dishonest, brutish and unethical conduct is well documented, seems to be sinking to new depths. The *Boston Herald* reported that on March 26, after a special mass for lawyers and politicians at Cathedral of the Holy Cross, he responded to a question about those who might question his impartiality on church-state issues by coupling the rhetorical question, “You know what I say to those people?” with the

obscene under-the-chin Italian hand gesture favored by television gangster
Tony Soprano.



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