

# Air Force colonel publicly rebukes US Supreme Court justice

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The growth of militarism within US society and the deepening assault on the constitutional principle of subordination of the armed forces to civilian government found stark expression Tuesday when the Air Force colonel in charge of prosecuting Guantánamo detainees upbraided a US Supreme Court justice for questioning the legal rationale for the military tribunals set up by President Bush in 2001.

Even more revealing, this act of public military insubordination provoked no protest within the political establishment or the media. Indeed, the provocative remarks of Col. Morris Davis went barely reported by most major print and broadcast media. The *New York Times* relegated the story to a brief at the bottom of page 18 of its Wednesday edition.

Davis read out his statement to reporters at the US Naval base in Guantánamo Bay, Cuba following a preliminary hearing for one of the 10—out of nearly 500—detainees who have been formally charged before the military tribunals.

Davis criticized remarks made by Justice Breyer during last week's oral arguments before the high court in the case of Salim Ahmed Hamdan, one of the 10 charged, who is challenging the legal limbo of a tribunal system that denies detainees basic rights under both US criminal law and the Geneva Conventions governing prisoners of war.

Noting that Justice Breyer had questioned whether the so-called "global war on terror" allows the Bush administration to claim virtually unlimited presidential war powers, Colonel Davis stated, "Towards the end of the argument Justice Breyer said, in talking about the current conflict, 'This is not a war, at least not an ordinary war.'"

The colonel continued: "A few hours after Justice Breyer said this is not a war, enemy combatants launched a major attack on coalition forces in southern Afghanistan," leading to 34 American, Canadian and enemy deaths.

Davis added that while a state of war might not be "readily apparent" to someone in Washington, where Justice Breyer lives, it was clear to those at Guantánamo. He cited a statement by one of the detainees, who objected to being "defended" before the tribunal by military officers, saying they were "his enemy."

The actual transcript of the Supreme Court hearing cited by Colonel Davis makes it clear that Justice Breyer was merely summarizing the arguments made by lawyers representing Hamdan, while asking the government's attorney to respond. "I take their argument as saying ... this is not a war, at least not an ordinary war," Justice Breyer had said.

Breyer had continued by noting that the principal charge brought against the defendants, "conspiracy," was not recognized under international law. He concluded, "If the president can do this, well, then he can set up [military] commissions to go to Toledo, and, in Toledo, pick up an alien, and not have any trial at all, except before

that special commission."

Whatever the context of Breyer's remarks, for an active duty military officer to call a press conference in order to "set straight" a sitting justice of the US Supreme Court is an extraordinarily brazen affront to the principle of civilian control of the military, a bedrock prerequisite for maintaining any semblance of democracy.

The US Constitution set up the Supreme Court as a co-equal branch of government with the presidency and the Congress, a tribunal of final appeal, whose decisions are binding as the law of the land. Ostensibly, whether the military tribunals are legal or not, and whether Davis will continue his role as prosecutor in these kangaroo courts, will be determined by its decision.

Military subordination to civilian control has rested historically on the rule of law, the defense of the constitution, and a concept of professionalism within the officer corps itself that eschewed direct and public involvement in political controversies. The attitude of an earlier generation of professional military officers was summed up by Gen. Omar Bradley, the World War II commander and first chairman of the Joint Chiefs of Staff: "Thirty-two years in the peacetime army had taught me to do my job, hold my tongue, and keep my name out of the papers."

As the Davis-Breyer exchange illustrates, all of these foundations have been severely eroded in recent years.

Colonel Davis is himself a key participant in a system that shamelessly repudiates the rule of law and which is founded on an implicit rejection of the constitutional principle of civilian control over the military.

The very statement that Davis honed in on—that the so-called war on terror is "not a war, at least not an ordinary war"—is at the heart of the lawless conduct of the Bush administration and the Pentagon, which finds its highest expression in the waging of illegal wars of aggression and in the detention of tens of thousands of people as "enemy combatants," an extra-legal category that denies them all rights, allowing them to be subject to torture and indefinite imprisonment without charges or trials.

There is no "war," in the sense that no war has been declared. The "war on terror" is not a defined conflict with spelled out objectives or even a concept of final victory. Rather, it is a propaganda slogan employed by the Bush administration to intimidate popular opposition to its policies and as a pretext to justify military aggression abroad and attacks on democratic rights at home.

Bush ceaselessly declares the US a "nation at war" and proclaims himself a "war-time president" to justify arrogating to himself extraordinary, extra-constitutional powers. At the same time, however, the government's attorneys argue in court that while they may

prosecute those they have illegally detained for alleged violations of the laws of war, these same laws have no application to Washington's own conduct and, in particular, its treatment of those whom it has taken prisoner.

The supposed legal grounds for Bush's assumption of unprecedented powers—subject to neither congressional approval nor review—is invariably given as Article 2 of the US Constitution, which declares that among the president's functions is that of "commander-in-chief" of the US military. This argument turns the significance of this constitutional principle inside out. The designation of the president as commander-in-chief was an explicit constitutional declaration of the military's subordination to civilian control, not the investment of the presidency with dictatorial powers.

The Bush administration's perverse claim that the president is commander-in-chief not merely of the armed forces, but of the US and its population, has served to further undermine civilian control of the military.

The Guantánamo military tribunals that Colonel Davis is determined to defend against Supreme Court interference are the epitome of lawlessness, improperly subjecting civilian prisoners to military justice while at the same time depriving them of all rights as POWs under the Geneva Convention.

These prisoners have been subjected to indefinite detention, now entering its fifth year, as well as to torture, humiliation, and violent forced feedings. The idea that they could receive fair trials at Guantánamo Bay is ludicrous on its face.

The military tribunals, or commissions as the Pentagon prefers to call them, are operating without any defined rule of law. At a pre-trial hearing earlier this week, the presiding military judge refused to answer when a defense lawyer asked him if he was operating under international law, military law, or federal statutes.

These ill-defined rules would apparently allow the use of confessions or other evidence extracted through torture, a practice that has been rejected under US law since the country's founding.

Speaking last month at Case Western law school in Cleveland, Ohio, Colonel Davis stressed that there was a "tremendous gray area" in defining interrogation methods as torture. As an example of what he would call torture, he cited sticking a needle in someone's eyeball. He offered no opinion on the use of "waterboarding," which induces near-drowning, "stress positions," beatings, sexual humiliation, sleep deprivation and other techniques employed by the US military and CIA interrogators at Guantánamo, Abu Ghraib, Afghanistan's Bagram air base, and in the network of secret prisons that together hold well over 15,000 detainees in the "war on terror."

The tribunal's arbitrary proceedings also deny detainees the right choose their own attorneys or represent themselves, prevent them from challenging the validity of unsubstantiated and hearsay evidence presented against them, allow for their exclusion from their own trials, and allow the use of secret evidence on "security" grounds.

Among the first to be chosen to face this drumhead justice is Omar Khadr, a 19-year-old Canadian who was captured by the US military in Afghanistan when he was 15 years old. He is charged with conspiracy, murder, and attempted murder for allegedly throwing a grenade during a firefight with US Special Forces troops, who raided a compound where he was staying. That such a normal battlefield action, carried out in the context of a US invasion, can be turned into a war crime is entirely bound up with the Bush administration's designation of Khadr and other detainees as "enemy combatants," a category with no standing in either US or international law.

When the Canadian press published articles drawing attention to Khadr's youth and the ordeal of his prolonged detention—much of it in solitary confinement—Davis made a public statement calling the coverage "nauseating" and declaring Khadr "guilty" and "a terrorist." The military tribunal dismissed a charge by Khadr's lawyer that this outburst constituted prosecutorial misconduct that had prejudiced his client's right to a fair trial. The military judge held that Davis's statements were justified by the lawyer's own description of the proceedings as a "sham."

Undoubtedly, the kind of police-state powers granted to those running these military tribunals have emboldened at least some of them, like Davis, to the point that they feel entitled to publicly denounce any suggestion that they should be subject to normal civilian legal standards—even when it comes from the US Supreme Court.

This attitude has been further encouraged by the spinelessness of the Supreme Court itself—which in its most recent action refused to hear the case of José Padilla, the US citizen who was seized by federal agents, declared an enemy combatant by the president, and held in a Navy brig without charges or a hearing for three and a half years. It has likewise been fed by the cowardice of the Democratic Party, which has sought to prove itself even more obsessed with "national security" than the Bush White House, while bowing continuously to the military.

The growth of the military's influence and the erosion of civilian control have been developing within American society for decades. US militarism today, however, has a far greater and more threatening weight than it did 46 years ago, when then President Eisenhower gave his farewell address urging the American people to beware of the growth of the "military-industrial complex." It has been encouraged by the uncontrolled growth of the military budget and the long series of undeclared wars and military interventions waged by US imperialism.

Under the Bush administration, this growth of American militarism has reached a qualitatively new level, as the American ruling elite has consciously decided to utilize US military superiority as a means of asserting global economic hegemony and laying claim to markets and resources, above all oil, at the expense of American capitalism's rivals in Europe and Asia.

That an Air Force colonel and military prosecutor feels confident that he can publicly upbraid a US Supreme Court justice is symptomatic of the ominous threat posed to the basic democratic rights of the American people. The unrestrained growth of militarism carries with it the danger that the constitutional principle of the control of the military by the elected civilian representatives of the people will be supplanted by the domination of the military over the people themselves—that is, dictatorship.



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