Supreme Court rules against Bush administration's military commissions

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30 June 2006

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The US Supreme Court on Thursday struck down by a 5-3 vote the Bush administration's use of military commissions to try prisoners at Guantánamo Bay, Cuba. The decision rejected the Bush administration's use of the category of "enemy combatant" to place its captives in a legal black hole, unprotected either by the US criminal justice system or international treaties on the laws of war.

While the decision was a judicial rebuke to the Bush administration, it did not order the release of any of the more than 400 prisoners still held at the US military base. Nor did it address the Bush administration's claim that it can hold captives there or at other US facilities around the world for the duration of "active hostilities" in the so-called "war on terror," i.e., indefinitely.

Nevertheless, the high court ruling outlawed the Bush administration's efforts to convene kangaroo courts where the accused do not have the right to see the evidence against them, cross-examine witnesses or seek judicial review for purported war crimes carrying sentences up to and including execution.

At a pre-scheduled joint press conference with visiting Japanese Prime Minister Junichiro Koizumi, held Thursday morning shortly after the court handed down its ruling, Bush responded to questions about the decision, stating several times that "We take the findings of the Supreme Court seriously"—a dismissive concession given that rulings of the highest court in the country immediately become the law of the land. Indicating that his administration would seek to circumvent the substance, if not the letter, of the ruling, Bush said he intended "to work with the Congress to determine whether or not the military tribunals will be an avenue in which to give people their day in court."

Senator John Warner, Republican of Virginia, who chairs the Senate Armed Services Committee, had declared even before Bush's statement, "I'm sure we will look at the means to provide them justice under our law," and Senate Majority Leader Bill Frist, Republican of Tennessee, promised to introduce legislation to "try terrorists only before military commissions, not in our civilian courts."

The case was brought by Salim Ahmed Hamdan, a Yemeni, captured by US-allied militia forces following the November 2001 American invasion of Afghanistan. He was transferred to Guantánamo Bay in June 2002 and was among the first five prisoners to be accused of war crimes and subjected to a military commission.

Bush ordered the creation of the military commissions after the terrorist attacks of September 11, 2001 to try prisoners whom it labeled "enemy combatants," rather than "prisoners of war." The invention of the category "enemy combatant" and the establishment of military commissions were designed to evade the rights and protections granted to captured soldiers and fighters under the Geneva Conventions, as well as due process provisions of US law.

Since Hamdan was charged, five more Guantánamo prisoners have been charged, and the government is claiming that as many as 70 more prisoners will be tried for war crimes.

Alleged to have been a driver and bodyguard for Osama bin Laden in Afghanistan, Hamdan is facing a sentence of life imprisonment.

That the rules of the Bush administration's military commissions provide no semblance of due process is obvious. Hamdan did not have the right to see and hear the evidence against him, and could be excluded from his trial altogether. Some of the most vociferous objections against the commission procedures were raised by Lt. Cmdr. Charles Swift, a Navy officer appointed to represent Hamdan, and even the government's own prosecutors emailed complaints to their supervisors that the procedures were unfair. (See "Military commissions' prosecutors charge: trials rigged against Guantánamo detainees").

The exhaustive 73-page majority opinion in *Hamdan v. Rumsfeld* was authored by Associate Justice John Paul Stevens, the high court's senior member and, dating back to the theft of the 2000 election by a five-person Supreme Court majority allied to Bush and the Republicans, the most strident opponent of Bush administration power grabs. Stevens was joined by fellow liberals David Souter, Ruth Bader Ginsburg and Stephen Breyer, and the crucial fifth vote was provided by Anthony M. Kennedy, who has emerged as the swing justice since the retirement of Sandra Day O'Connor earlier this term.

Each of the three extreme right-wing associate justices wrote dissents, defending the Bush White House's assertion of virtual dictatorial "war-time" powers. While that of newly appointed Samuel A. Alito, Jr., was, like the man himself, cold and technical, Antonin Scalia's wondered aloud where "the court derives the authority—or the audacity—to contradict" the Bush administration.

Clarence Thomas, to reinforce his opposition to the majority ruling, took the unusual step of reading his dissent from the bench.

Thomas called the decision "untenable" and "dangerous," and accused "those justices who today disregard the commander-in-chief's wartime decisions" of hampering "the president's ability to confront and defeat a new and deadly enemy."

Chief Justice John G. Roberts, Jr., who ruled for the Bush administration against Hamdan while still a justice on the Court of Appeals, was not eligible to participate in the Supreme Court's review.

The six opinions—Kennedy and Breyer drafted separate concurrences—exposed the deep, almost violent divisions that have arisen within the US ruling elite over the most fundamental issues of democratic rights and due process. The opinions suggest they were written by judges barely able to speak to one another, and acutely aware of the conflicted views among the powerful elites with whom they hobnob in Washington, DC.

The case was not, as sometimes portrayed in the media, a frontal attack on the Guantánamo Bay facility itself or the legality of the Bush administration's policy of capturing people anywhere in the world and jailing them indefinitely. Those issues remain.

Hamdan argued simply that if he was going to be charged with war crimes carrying the possibility of life imprisonment, his trial should at least conform to the rules of a court martial constituted pursuant to the United States Uniform Code of Military Justice (UCMJ), and be based on a charge, unlike the conspiracy count against him, that is actually recognized as a war crime by international law.

In his majority opinion, Stevens began by overruling both of the Bush administration's jurisdictional arguments that the Supreme Court should not even rule on the merits of Hamdan's claims. First, he dismissed its assertion that the Detainee Treatment Act (DTA), a law passed by Congress last December, divested the high court of jurisdiction. He then rejected the claim that the court should wait until the military commission reached a final decision on Hamdan before reviewing the matter.

Hamdan should know in advance, Stevens wrote, whether he "may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction."

Turning to the merits of the claims themselves, Stevens began with the premise underlying much of the Bush administration's attack on democratic rights—that the president's role as "'commander in chief' of the Armed Forces" frees him from any congressional or judicial restraint. The president's role is limited, Stevens pointed out, by Congressional power to "declare war" and "make rules concerning captures on land and water," to "define and punish... offenses against the law of nations," and "to make rules for the government and regulation of the land and naval forces."

The rules that Congress imposed here, Stevens explained, were the UCMJ's due process requirements. Stevens rejected the position, widely relied on by the Bush administration—for example, in its recent defense of the National Security Agency domestic eavesdropping program—that the Authorization to Use Military Force enacted by Congress shortly after the September 11 attacks freed Bush from the restrictions of legislation like the UCMJ.

Noting that military commissions have no constitutional basis, Stevens pointed out the absurdities in the Bush administration's argument that one was necessary for Hamdan because he was captured near a battlefield. "Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001."

In fact, Stevens added, "None of the overt acts that Hamdan is alleged to have committed violates the law of war." The alleged war crime of conspiracy, he observed, "does not appear in either the Geneva Conventions or the Hague Conventions—the major treatises on the laws of war."

Stevens concluded, "At a minimum, the government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here." As an example, he cited "The International Military Tribunal at Nuremberg," which, "over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes, and convicted only Hitler's most senior associates of conspiracy to wage aggressive war."

In the final and most far-reaching part of the ruling, Stevens overruled the Court of Appeals, which had held that Hamdan could not invoke the protection of the Geneva Conventions in US courts. (See: "US court upholds military trials for Guantánamo prisoners").

Breaking through the Bush administration's circular reasoning, which placed "enemy combatants" in legal limbo, unprotected either by criminal law or international law, Stevens explained that a governmental decision to take people out of the protection of the criminal justice system and subject them to military justice necessarily meant that there must be full compliance with the laws of war.

Stevens concluded that, at minimum, and regardless of whether Hamdan qualified as a "prisoner of war" under Article 2 of the Geneva Conventions—the Bush administration argued that he fought for Al Qaeda rather than Afghanistan and was therefore not affiliated with a signing power—he was entitled to the protections of Article 3, which covers captives in conflicts "occurring in the territory" of a signing power, which would include Afghanistan. In particular, Article 3 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."

As Stevens noted, "The commission that the president has convened to try Hamdan does not meet those requirements."