

# The US Supreme Court minority in *Hamdan*: executive rule in the “state of exception”

## Part 1

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The recent minority judgment of the US Supreme Court in *Hamdan v. Rumsfeld* sanctions unfettered executive power in the government’s bogus and never-ending “war on terror”. It expresses the extent to which the deep and radical shift in the politico-legal sphere has brought the liberal democratic system in the United States to the brink of complete collapse.

In intensely political judgments, the reactionary minority bloc comprising Justices Scalia, Thomas and Alito has given its judicial imprimatur to dictatorial presidential power, justified by the executive’s assertion of “exceptional conditions” arising from the threat of terrorism. Chief Justice Roberts previously decided the case in favour of the government in the Appeals Court below (he did not participate in the Supreme Court hearing). This means that four of the nine justices on the Supreme Court are activist supporters of the Bush administration’s authoritarian drive.

The emergence of such a bloc on the country’s highest court, holding radical ideological positions that are anathema to America’s liberal constitutional traditions, signifies a historical transformation of the political culture of the economic, political and judicial elites in the direction of dictatorship.

In the wake of 9/11, following the invasion of Afghanistan, the Bush administration decided to detain at Guantánamo Bay alleged Al Qaeda members who were picked up in the region in order to extract information from them in a legal black hole immune from the operation of law. After two years of brutal captivity without charge, the government finally convened military commissions. The procedure of the commissions, set down by the defence secretary and the president, departed in fundamental ways from normal military courts martial.

*Hamdan* challenged the legality of the military commissions. He did not challenge the legality of his detention or the right of the US government to try him as a war criminal. He claimed that the president’s military commissions violated the laws of the United States Congress, which required that he be tried in accordance with the established laws of war. The Supreme Court, by a 5-3 vote, agreed with him. It held that the president’s actions were illegal, and that the commissions were a violation of congressional statutes that had adopted the Geneva Conventions.

The chief legal point raised in the case concerned the separation of powers under the constitution and, in particular, the president’s powers in wartime. The difference between the majority and minority on the issue of executive power expresses an ideological division within the court that is perhaps unprecedented, in light of the historical context and the momentous issues at stake, since the court’s deep divisions over the question of slavery prior to the outbreak of the American civil war. In a sense, the history of the US Supreme Court is the history of the United

States. In its statements one finds refracted in the form of legal ideas the deep conflicts and tensions within American society as a whole.

If it were simply a matter of applying established legal principles concerning the constitution and the separation of powers, the legal dispute in *Hamdan*—while raising issues of great importance—could have been resolved. The fact that the court split so sharply, and the minority expressed its views so aggressively, indicates the depth of the political division and its irreconcilability. Moreover, that irreconcilability is all the more manifest because the minority maintains a position regarding the power of the executive in the alleged “war on terror” that must ultimately lead, by its own inner logic, to the extinction of the court as an independent, not to say assertive, institution in the American system of government. If the minority were to prevail, the court would ultimately operate as an administrative body enforcing dictatorial pronouncements.

Under the constitution the president has power to conduct war. But these presidential powers are not uncontrolled. The Congress as—at least formally—the peoples’ representatives in the legislative branch of government has power, through the enactment of statutory law, to control the president’s exercise of the war power in many respects, including the president’s power to establish military tribunals to try persons alleged to have committed war crimes. *Hamdan* therefore raised fundamental questions of political power within the democratic system.

After various trials of war criminals in World War II, the US Congress set out a legal framework for the establishment of military tribunals. In particular, it stipulated that such tribunals comply with the laws of war and that they could not depart from this requirement except in circumstances of absolute military necessity, which meant, quite clearly, in battlefield situations. These principles were enshrined in congressional statutes, which form part of US military law.

The majority in *Hamdan*, following customary legal principles and reasoning, held that President Bush’s military commissions did not comply with the laws of Congress because they did not provide fundamental procedural fairness as mandated under the Geneva Conventions’ laws of war and as required by Congress. In particular, the military commissions failed to provide basic elements of fairness such as the right to be present, to see and hear evidence and witnesses, to exclude unreliable evidence and other important rights. The majority concluded that the commissions failed to provide for “a regularly constituted Court affording all the judicial guarantees which are recognised as indispensable by civilised peoples”. Accordingly they were illegal and Bush had breached the law.

The majority judgments made very clear that what was at stake in this politico-legal controversy was the continued existence of the liberal-democratic rule of law, and, in particular, legal control over the executive itself. Justice Stevens declared:

“in undertaking to try Hamdan and subject him to criminal punishment, the executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”

Justice Breyer concurring declared:

“Congress has denied the President the legislative authority to create military commissions of the kind at issue here ... whereas here no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.”

Justice Kennedy, a conservative judge, similarly rejected the executive’s claim to unfettered powers and found that the commissions breached the law, which could form the basis for federal prosecutions of executive officials involved. Following a review of the structure and procedure of the commissions, Kennedy concluded:

“In sum, as presently structured, Hamdan’s military commission exceeds the bounds Congress has placed on the President’s authority. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.”

The judgment of the minority in *Hamdan* is a radical attack on the legal traditions of the United States. At the heart of the ideas that informed the constitutional and legal principles of government lay distrust of the state and its motives.

The minority invoked the administration’s claimed “exceptional circumstances” arising from the “war on terror” to sanction extraordinary action by the executive “in the nation’s interest” and to “protect the people” without judicial scrutiny. It uncritically adopted the government’s assertion of the existence of exceptional circumstances that justified departures from the customary laws of war and entitled the executive to do as it thought fit in the “war on terror”.

Justice Thomas declared, at times quoting directly from President Bush:

“The legitimate uses of the great power of war ... increase or diminish as the necessity of the case demands.... The jurisdiction of our common law war courts has been adapted in each instance to the need that called it forth ...

“The president has found that the war against terrorism ushers in a new paradigm ... Our nation recognizes that this new paradigm—requires new thinking in the laws of war.

“The judgement of the political branches ... is supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydraheaded enemy, who lurks in the shadows ...

“... this determination [not to apply courts martial procedure] is precisely the kind for which the judiciary has neither aptitude, facilities nor responsibility and which ... belong in the domain of political power not subject to judicial intrusion or enquiry.”

Justice Thomas, joined by Scalia and Alito, sought to justify departures from the law with regard to military commissions by cynically invoking the legal tradition of the development of the common law. Thomas said:

“The plurality’s newly minted clear-statement rule is also fundamentally inconsistent with the nature of the common law which, by definition, evolves and develops over time and does not, in all cases, ‘say what may be done....’ Similarly, it is 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’s reasoning is in fact a specious caricature of the process of development of the common law. As the majority view made clear,

ordinary rules of long standing were applicable to determine the case. No innovations in the law, or “evolution” were required. The common law develops in a fairly conservative way through the growth of principles in a process that historically has, until fairly recently, extended liberty and rights in a constantly evolving society.

But the norms and values that sustain democratic legal concepts of rights and fair procedure remain constant over time, because they are grounded in ideas of universal application that have been the bedrock of Anglo-American law for centuries. A departure from these underlying conceptual foundations and legal values is not a development of the common law, but a repudiation of it. Distinctions between norms of command and authority on the one hand, and rights and constraints on power on the other, are not eviscerated in the development of the common law. What the minority is really doing under cover of the notion of “the development of the common law,” is to transform the current system into one based on concepts of order and authority totally alien to America’s legal heritage. Such concepts are, in fact, consistent with the reactionary Germanic legal concept of *Staatsrecht*, in which public law is viewed from the perspective of executive power, and not as the emanation of the peoples’ natural inalienable rights.

It is worth noting that Justices Thomas and Scalia’s judicial records clearly demonstrate that they are self-proclaimed literalists or strict constructionists on constitutional questions, opposed to the evolution of the law or its expansion consistent with changing social values or circumstances. Accordingly, it was completely cynical for them to invoke changed circumstances to justify departures from established constitutional meaning.

In fact what the minority is attempting to accomplish is identical to what Justice Department lawyers tried to accomplish in the spurious legal opinions they crafted to justify torture and illegal detention by the executive. One of the chief architects of the torture memos, John Yoo, said it openly in May 2002 when he spoke of the treatment of the Guantánamo detainees. He said: “What the administration is trying to do is create a new legal regime.”

The minority’s so-called development of the common law is the judicial echo of the Bush administration’s effort to create a new reactionary legal regime based on the destruction of the Bill of Rights. For a high court judge in 2006 to refer to the trial of an accused by a Star Chamber-style military commission as an evolutionary development of the common law is a grotesque perversion. On the contrary, it is the judicial sanctioning of the implementation of a legal system that has far more in common with the legal procedures and ideas of the Third Reich than the traditions and customs of the common law.



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