The US Supreme Court minority in Hamdan: executive rule in the "state of exception"

Part 2

Richard Hoffman
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This is the second in a three-part analysis. Part 1 *appeared on Tuesday October 17.* Part 3 *will appear on Thursday October 19.*

The US Supreme Court minority judges' invocation of extraordinary circumstances created by the "war on terror" to justify the transformation of the legal regime into a form of dictatorial rule has a frightening similarity to the process whereby basic constitutional rights were suspended on February 28, 1933 in Germany following the Reichstag fire.

On March 23, the Nazi-controlled Reichstag passed "enabling" legislation declaring that the executive had the power to make laws. The Act, referred to as "The Act to Relieve the Distress of the People and the Reich" cemented dictatorial power in Germany under Hitler. It essentially transformed into legislation legal opinions previously prepared by the leading Nazi jurist Carl Schmitt. These authorised executive rule because of the "state of exception" in Germany, namely its economic and political crisis and the alleged threat of revolution. Schmitt set out a "legal defence" of the enabling legislation in the *Deutsche Juristen Zeitung* on March 25, 1933 in which he opined that the executive prerogative was unlimited at a time of national crisis. (Cited in F Neumann, *Behemoth; The Structure and Practice of National Socialism*, London 1942).

Schmitt was a reactionary with a deep-felt hostility to the participation of the masses in the Weimar democracy after World War I. Like many right-wing intellectuals of his generation, he despaired at the liberalism, and instability, of the modern world, which he felt to be, with his strong Catholic middle class background, devoid of order and meaning. Schmitt loathed the cosmopolitan melding of liberalism, Protestantism and assimilated Jewish culture in Germany in the late 19th and early 20th centuries. His witnessing of the communist revolution in Bavaria in 1919 intensified his authoritarian support of the violent use of state power against socialist revolution.

Against the backdrop of the instability of the Weimar years, Schmitt developed increasingly dictatorial conceptions of state rule, based on "exceptions" and "emergencies" that justified deviations from the political "norm". In his work published in 1922 entitled "Political Theology," Schmitt expounded the idea of the "state of exception" (*Ausnahmezustand*). This theory was developed through a right-wing jurisprudential critique of "normativism" in positivist legal thought, which held that law was the expression of general abstract norms applicable in all circumstances. In particular, Schmitt developed the idea of the "state of exception" in a critique of the positivist legal theories of the Austrian legal scholar Hans Kelsen (who had Social Democratic sympathies and was an intellectual opponent of Schmitt).

Schmitt rejected the idea that abstract norms formed the basis of law. He maintained that "*like every other order the legal order rests on a decision and not a norm*". Sovereignty, according to Schmitt, was based on decision and not legality. Most significantly, Schmitt argued, the state confronted situations outside the norm that were exceptional. The Sovereign, he declared in his most notorious phrase, "*is he who decides on the state of exception"*. The exception could not be mediated by legal concepts and therefore all order was based on decision alone. There could be no "normative" regulation of exceptional situations. The authority that brought order to the exceptional state was the *sine qua non* of the legal order. In sum, Schmitt declared, *auctoritas non veritas facit legem*—authority not truth makes the laws. He was consciously preparing a radical theoretical framework for the violent Nazi destruction of liberal parliamentarism and the socialist movement.

As the Nazis consolidated power, Schmitt propounded theories in support of the "Fuhrerprinzip"—the leader principle. He claimed the fuhrer was the highest judge in the nation, from whom there lay no appeal. The leader was the embodiment of the peoples' will and therefore, Schmitt claimed, "law is the plan and the will of the leader" ("Fuhrer Schutzt das Recht" in *Positionen und Begriffe*, Berlin 1934*).*

In the epoch of imperialism, the dynamics of class society give rise to similar general political and legal phenomena in all capitalist countries. Under the immense pressures of class conflict, economic crisis and inter-imperial rivalry, the ruling class attacks democratic structures as it seeks to impose its will by means of force. At the same time, partisan lawyers develop "legal theories" to justify the radical transformation of the legal-constitutional system.

This is what is happening in the United States. Through the continuous invocation of the "war on terror" as an exceptional condition, the Bush regime, as the political representative of the most ruthless and aggressive elements of American capital, is seeking to suspend or destroy the constitutional foundations of the United States, erect dictatorial government and wage aggressive war to reorganise America and the world in its own interests.

Hamdan indicates that the United States is on the threshold of the complete collapse of liberal democracy, with a powerful section of the federal judiciary being prepared to function as an executive court in a 'state of exception', carrying out the "judicial administration" of the government's dirty work.

In the sanctioning of uncontrolled executive power, a number of features of the minority judgment stand out:

1. The invocation of exceptional circumstances justifying unchecked executive power;

2. The preparedness of the minority to sacrifice the independent function of the Supreme Court in the constitutional system;

3. The adoption of an intellectual and cultural attitude that is antithetical to the traditions of the Enlightenment, which formed the basis of Anglo-American public law.

Historically, modern democratic law, and particularly public law, emerged through the force of humanity and reason against arbitrary power. The idea of inalienable rights gained momentum through the seventeenth and eighteenth centuries with the advance of secularism and democracy against the power of church and monarchy. The content of democratic law was the conception of the natural rights of mankind, not bestowed by a divine or stately benefactor, but inherent because of human dignity and nothing more.

Traditionally (although increasingly less so under the impact of the general social and intellectual decomposition of bourgeois society) the Enlightenment provenance of modern democratic law—especially in the English-speaking legal system—has been associated with a type of intellectual reasoning in judging that includes objectivity, calm, dispassionate critical analysis, balance and proportionality, disinterestedness, the acceptance of uncertainty, an aversion to absolutist conceptual thinking and, above all, a strong element of procedural fairness grounded in a culture of individual rights against the state.

What one finds in the minority judgment, however, especially in the very lengthy dissent of Justice Thomas, is the opposite. One finds aggressive argumentation, interest, absolute certainty and palpable hostility to any opinion that differs from his own. Moreover, Thomas does not endeavour to conceal his personal contempt for the defendant in quite emotional terms. At one point, in a particularly vengeful and vicious passage, he expresses the view that members of Al Qaeda are outside the law and really just deserve to be summarily executed. He declares:

> "Military commissions have jurisdiction over individuals of the enemy's army who have been guilty of illegitimate warfare ... [and] 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 ... such persons are not within the protection of the laws of war and were 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."

And this statement was made before any evidence had been adduced against Hamdan at a trial.

Justice Scalia, as is customary, displays his usual attitude of sneering ridicule and contempt toward the constitutionalist judges.

The minority considered that the court was displaying "audacity" in reviewing the president's "will" with respect to the military commissions, revealing a deeply felt hostility toward judicial review as a legitimate, not to say vital, element in the democratic system of accountability to constitutional norms. Primary in the minority judgment is the unchallengeable power of the president in war and foreign policy. Referring to the Authority to Use Military Force issued by the Congress after 9/11—which in fact says absolutely nothing about the trial of alleged war criminals held by the US after 5 years, 5,000 miles from the theatre of conflict—the minority declares:

> "Hamdan's military commission can plainly be sustained [under the Authority]. In such circumstance, as previously noted, our duty to defer to the Executive's military and foreign policy judgment is at its zenith ... military and foreign policy judgments ... are and should be undertaken only by those who are directly responsible to the people...."

Elsewhere, Justice Thomas speaks of "the illegitimacy of today's judicial intrusion onto core executive prerogative in the waging of war...." Turning the whole rationale of the separation of powers on its head, he disingenuously refers to Madisons' "Federalist No. 47" essay as support for unfettered executive authority, unchecked by judicial power. This is contrary to the conception of the separation, and judicial control, as the peoples' guarantee against tyranny. As Hamilton wrote in the "Federalist No 78":

> "The independence of the Judges is requisite to guard the Constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures ... have a tendency to occasion dangerous innovations in the Government and serious oppressions.... Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."

References:

Heinrich Meier, *The Lesson of Carl Schmitt*, Chicago 1988.

Jan-Werner Muller, *A Dangerous Mind; Carl Schmitt in Post War European Thought*, Yale University Press 2003.

Franz Neumann, *Behemoth; The Structure and Practice of National Socialism*, London 1942.