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

Part 3

Richard Hoffman
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This is the third and final part of a three-part analysis. Part 1 *was published on Tuesday October 17 and* Part 2 *on Wednesday October 18.*

The deeply reactionary character of the US Supreme Court minority perspective is strikingly demonstrated in its preparedness to give the Bush war commissions—designed to be a Star Chamber enquiries—the sanction of the highest judicial body of the United States. Consistent with the lawless history of Guantánamo itself, the commissions had an executive procedure designed to guarantee convictions in order to further the government’s political purposes. Both military defence lawyers and prosecutors criticised them as incapable of providing a fair trial.

The Supreme Court majority pointed to features inconsistent with traditional judicial guarantees, including the following:

1. The admission of evidence obtained by torture;
2. The accused (and his counsel) had no right to see or hear the evidence given against him;
3. The accused could be excluded from the proceedings;
4. Any evidence which the presiding officer considered “probative to a reasonable person” could be admitted;
5. The presiding officer’s view that evidence would not be probative to a reasonable person could be overridden by a majority of the commission’s other members;
6. Unsworn testimony was admissible;
7. The accused could be denied access to any evidence classified by the prosecuting authorities as “protected information”;
8. A two-thirds vote of the military commission members could suffice for a conviction and for any imposition of sentence except sentence of death—which would require a unanimous verdict;
9. Any appeal was to be taken by a three-member review panel comprised of military officers chosen by the secretary of defense, only one of whom needed to possess experience as a judge.

The proposed military commissions offended every notion of procedural fairness in a system of adversarial litigation. That in 2006, high judicial officers would countenance such a medieval forensic procedure to formally establish the guilt or innocence of an accused person is testimony to the depth of their political commitment to the government’s policies and its anti-Enlightenment world outlook.

At the Nuremberg War Crimes Tribunal in 1946, the Nazi defendants were afforded very substantial procedural fairness in a trial conducted in open court before the whole world. The circumstances were truly exceptional; the defendants were men who were criminally responsible for the deaths of millions of people throughout Europe. The American prosecuting authorities were determined to ensure that the proceedings could never be assailed as having produced false verdicts. Robert Jackson, the US prosecutor at Nuremberg, said in his summing up:

“Let me emphasise one cardinal point. The United States has no interest which would be advanced by the conviction of any defendant if we have not proved him guilty on at least one of the counts charged against him in the indictment. Any result that the calm and critical judgement of posterity would pronounce unjust would not be a victory for any of the countries associated in this prosecution....

“Of one thing we may be sure. The future will never have to ask with misgiving: what could the Nazis have said in their favor? History will know that whatever could be said, they were allowed to say. They have been given the kind of a trial which they, in the days of their pomp and power, never gave to any man.

“But fairness is not weakness. The extraordinary fairness of these hearings is an attribute of our strength.”

What explains the historic change between the attitude of the American political and legal establishment to the war crimes tribunal that tried alleged Nazi war criminals and the Bush military commissions to try alleged Al Qaeda war criminals? The most fundamental factor is the decline of the United States from a victorious, confident bourgeois-democratic power about to experience massive economic expansion and success, to a nation in deep crisis, mired in debt, incapable of increasing the living standards of its people, confronting insurmountable world competition and scrambling to secure needed energy supplies—and the concomitant collapse of liberal-democratic ideology within the ruling elite.

Through the inexorable processes of world economic

development over the last 60 years, America has transformed into its opposite. Like Nazi Germany, it is no longer strong, confident enough or free enough to give a man a fair trial. Waging aggressive wars against small nations, destroying the rights of its citizens, embracing irrationalism and discarding the truth are signs that the ruling class, and the elites and judiciary who support it, have reached a historical dead-end and have become intellectually and morally bankrupt.

In a judgement characterised by a powerful mood of chauvinism and exceptionalism, the minority would not countenance the idea of the president being constrained by international conventions in the "new paradigm" circumstances of the "war on terror". Moreover, the minority rejected the very notion that the Geneva Conventions were "judicially enforceable" at all. This was pure cynicism. It is true that generally the Geneva Conventions are enforced through their diplomatic enforcement scheme, but in this case the Conventions' laws of war had been adopted by the Congress, ratified, and accordingly were part of American law.

The minority simply could not tolerate this political reality. Adopting the government's dismissive and arrogant attitude toward the Geneva Conventions, expressed best in Attorney General Alberto Gonzales's description of its provisions as "quaint" and "obsolete," the minority referred to its standards as "nebulous".

Applying phoney reasoning, the minority determined that the Conventions' Common Article 3 on military commissions was inapplicable because it related only to conflicts "not of an international character". Since the "war on terror" was being waged all over the world, its character was international.

It is elementary, however, as a matter of international law, that "international" means between sovereign nations, which clearly the war on terror is not. The minority simply adopted the administration's vulgar contention to avoid the application of Common Article 3.

Behind all the false reasoning and sophistry lies a deeply nationalistic and authoritarian world outlook. According to the minority, the president, expressing the "national will" in a time of emergency, has unfettered power as commander in chief. The minority declared:

"Our duty to defer to the President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict.

"No governmental interest is more compelling than the security of the Nation.

"Pursuant to [his] authority as Commander in Chief he has determined that the Convention is inapplicable here, explaining that 'none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world, because, among other reasons, al Qaeda is not a High Contracting Party.' ... The President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core exercise of his commander-in-chief authority that this court is bound to respect."

In other words, the Supreme Court's duty in the presidentially-declared "exceptional circumstances of terrorism" is to accept and sanction the president's will with respect to his view of law—no matter how incorrect, untruthful or absurd—and any acts the president directs on that basis—no matter how barbaric. There could be no clearer statement of the judicial sanction of a legal system based on the primacy of executive power and decision, and the abandonment of reason and truth as the foundation of law.

The prospect of dictatorship in the United States, unless halted by a mass socialist political movement of the working class is, as *Hamdan* and its antecedent political and legal developments show, very real. This prospect arises from the exercise of unchecked, lawless power in the interests of the ruling elites. Justice Felix Frankfurter, in an earlier Supreme Court case concerning the president's excessive war powers claims during the Korean War in 1952, made the following acute observation:

"A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing....

"The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley.... The accretion of dangerous power does not come in a day. It does come, however, slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."

With four of the nine judges of the US Supreme Court having joined in the vast attack underway on the liberal polity, under the guise of the "exceptional circumstances" that the administration asserts exist due to the "war on terror," it is surely no exaggeration to say that the United States is just one vote away from autocracy.

The Socialist Equality Party is campaigning in the 2006 elections on a political program to build a mass party of the American working class to take up a struggle against the policies of the US ruling class and the political elites.

Only the working class, the vast majority of the American people, organised in a political struggle to overthrow capitalism and establish a rational socialist economy and society that will bring an end to exploitation and war, can prevent the emergence of dictatorship in America.