Jack Thomas “control order” case

Australian government argues for mass detention power in “war on terror”

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24 April 2007

The Australian High Court is expected to hand down a decision soon that could have far-reaching consequences for civil and political rights. The case, *Thomas v Mowbray*, involves a constitutional challenge by a young Melbourne worker, Jack Thomas, to a “control order” imposed on him last August. His lawyers argue that the control order—a form of house arrest—amounts to unconstitutional detention without trial.

During the hearings before seven judges in December and February, the Howard government’s Solicitor-General David Bennett insisted that the “war on terror” justifies executive powers to detain not just individuals but thousands of people. Bennett advanced the proposition that the federal government could potentially round up and detain anyone “acting in any manner prejudicial to the public safety of the Commonwealth”.

Thomas was subjected to the control order just a week after an appeals court threw out his conviction on terrorism charges, because he had been tortured to obtain a confession. He became the first victim of police-state legislation jointly introduced by the Howard government and the state and territory governments in December 2005. Without any notice, let alone right for Thomas to object, a federal magistrate granted the 12-month order in a secret “ex parte” hearing.

The order—personally sought by Attorney-General Philip Ruddock—was a blatant political abuse. The government sought to reverse the humiliating setback that it suffered when all Thomas’s charges were dismissed. Rupert Murdoch’s newspapers had mounted a week-long witchhunt, openly demanding that Thomas be locked away by any means, irrespective of what judges or the law said.

The order deprived Thomas of the basic freedoms of movement and communication. He must remain in his house from midnight to 5 a.m. every day, and report to police three times a week. He cannot leave Australia, use any telephone or email service not approved by the Australian Federal Police, or communicate with specified individuals. A breach of these conditions could mean imprisonment for five years.

Control orders can be imposed without any conviction or even evidence of terrorist activity. The attorney-general only has to state that the order would “substantially assist in preventing” an unspecified “terrorist act”, or the person received training from an officially-declared “terrorist organisation”, and the order is “reasonably necessary” to protect the public from a terrorist act. A magistrate decides “on the balance of probabilities” after hearing only the government’s side of the case.

The government is preparing to clamp a similarly vindictive order on David Hicks, the Australian Guantánamo Bay detainee, as soon as he completes a nine-month jail term. After five and a half years of unlawful incarceration, Hicks was last month coerced into pleading guilty to a vague charge of “materially supporting a terrorist group”.

Throughout the *Thomas v Mowbray* hearings, Solicitor-General Bennett said anyone who opposed an almost unlimited interpretation of the federal government’s “defence power” was displaying “September 10 thinking”. He stated that the High Court had to take “judicial notice” of the September 11, 2001 attacks, and the growth of “fanatical ideological movements which compass the destruction of Western civilisation”.

Asserting that terrorism was “something new and evil,” Bennett declared: “One needs general powers to deal with a variety of threats that have largely replaced the quaintly old-fashioned idea of an invading army.”

Justice Kenneth Hayne asked Bennett whether his argument extended to passing legislation or regulations similar to the World War II national security regulations, which gave the defence minister powers to intern anyone considered a threat to Australia’s “safety or defence”.

(At the peak of the internment regime, in 1942, more than 12,000 people were subjected to indefinite detention in jails, military barracks and remote camps. They included political detainees as well as thousands of residents of German, Italian and Japanese descent.)

Bennett’s answer was “yes”. He presented a scare-mongering scenario, involving a terrorist armed with an atomic weapon. “To suggest that there is not an executive power of preventative detention in that situation would be ridiculous,” he insisted.

Bennett also told the judges they had to accept, virtually without question, any declaration by the government that a threat to national security existed. Referring to previous rulings where the High Court had dismissed challenges to activities by the intelligence services, ASIO and ASIS, he stated: “[T]he gravity of a risk to national security is not readily susceptible to judicial evaluation and assessment.”

This assertion amounts to handing to the government virtually unchecked power, including to detain without trial or rip up other basic rights. It is little different to the claims of absolute regal power that led to the English, American and French revolutions of the seventeenth and eighteenth centuries. In the 1640s, lawyers for Charles I maintained that “the King is the law” and therefore had the right to arbitrarily punish political opponents.

The solicitor-general specifically cited the September 2005 Council of Australian Governments communiqué, in which Prime Minister

John Howard and the state and territory leaders declared: "A terrorist attack in Australia continue to be feasible and could occur." The communiqué unveiled draconian new "counter-terrorism" laws, including control orders and "preventative detention".

Bennett said the court had to place "great weight" upon this assessment by "nine Executive Governments". Actually, the communiqué, which was followed a month later by a dubious "alert" issued by Howard, was a political bid to bolster the "war on terror". The state and territory Labor governments joined hands with Howard's Liberal-National Coalition to pledge to push through unprecedented laws in the face of vehement opposition from the legal profession, civil liberties organisations and ordinary people.

Bennett made a frontal attack on two significant High Court rulings. The first was the *Communist Party* case of 1951, where the court rejected a bid by the Menzies government to rely on the defence power to outlaw the CP. The court's decision has long been regarded as a bulwark against unfettered executive power. Menzies tried to overturn the ruling by calling a referendum to give the government the power it sought, but voters defeated his plan.

Speaking on behalf of the Howard government, Bennett submitted that "the case would very clearly have gone the other way," if the Menzies government had proven that banning the CP was necessary to prevent a threat to "the life of the nation". Chief Justice Murray Gleeson expressed support for this view, saying, "The *Communist Party* case did not decide that the government could not protect the country against communism."

Likewise, Bennett criticised the 1992 decision in *Lim*, where the court rejected a challenge to the mandatory detention of asylum-seekers, but stated that Australian citizens (as distinct from refugees) could not be detained by purely administrative authority. Bennett said the judges had expressed the law "far too widely" in declaring that only courts, not the executive, could order the punishment or detention of citizens. Bennett's argument effectively overturns the ancient principle of *habeas corpus*—no detention without trial.

The solicitor-general argued that no actual war was needed to invoke the "defence power" or an associated "implied protection of the nation power". That was another "quaint old-fashioned concept". All that was necessary was a threat that federal authority could be "overthrown, thwarted or undermined". Bennett cited *Sharkey*, a 1949 sedition case in which Lance Sharkey, the general secretary of the Communist Party, was jailed for 18 months for telling a *Daily Telegraph* reporter that the CP would welcome Soviet troops in the hypothetical event that they entered Australia in pursuit of aggressors. The solicitor-general said the defence power similarly could be invoked if feelings of "ill will and hostility" were promoted to "endanger the peace, order or good government".

The hearings featured discussion on calling out the military for internal use, breaching another centuries-old principle. Asked by Chief Justice Gleeson, a Howard government appointee, whether the army could be sent to deal with a threat to blow up the atomic installation at Lucas Heights, on Sydney's outskirts, Bennett again answered in the affirmative. He received support from Justice Ian Callinan, another Howard appointee. Callinan earlier stated that the "defence power has to be the most flexible of all the powers" because the nation faced "absolutely unique" circumstances, unparalleled in history.

Justice Michael Kirby voiced some reservations about the propositions enunciated by Bennett and Callinan. He pointed out terrorism had existed for centuries, and that communists and anti-colonial liberation movements had been labelled "terrorist" in the past. He suggested that the United States had become "completely obsessed with September 11," whereas more people died every day from AIDS than died on 9/11. He objected that the "rantings" of Islamic fundamentalists quoted by Bennett hardly posed a threat to "Australia's existence as a nation and its constitutional stability".

These comments raised traditional legal and judicial objections to claims of the need for unbounded executive power. Yet, Kirby was pilloried by the Murdoch media and members of the Howard government. Treasurer Peter Costello said Kirby lacked sympathy for the victims of 9/11. A government backbencher, Don Randall, described Kirby's comments as "frightening" and branded him a "judicial activist". An *Australian* editorial thundered that Kirby represented "the pampered elite, shielded from global reality by the freedoms bestowed on them". The judge was "out of touch with the community he is supposed to serve".

These denunciations are tantamount to contempt of court. They were clearly calculated to apply the maximum pressure on the judges to dismiss Thomas's legal challenge and clear the way for a vast expansion of executive rule. Bennett compounded the affront several weeks later at the annual Australian Legal Convention, where he derided anyone who opposed using the defence power to enact control order legislation as "luddite", "silly" and "very September 10".

Australian Council for Civil Liberties president Terry O'Gorman said Bennett had breached protocol by pre-empting the pending High Court ruling. The *Australian* immediately sprang to Bennett's defence, saying he had the right to speak out.

As for the Labor party, its backing for using the "war on terror" as a vehicle for sweeping aside fundamental legal and democratic rights was highlighted when state Labor governments intervened in *Thomas v Mowbray* to support the Howard government. Their intervention sought to justify their own, matching control order legislation.