Australian High Court radically expands scope of military power

Judges sanction "control order" on Jack Thomas

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13 August 2007

Australia's High Court on August 2 upheld the constitutional validity of a "control order" imposed on a Melbourne worker, Jack Thomas, sanctioning one of the central features of the 2005 Anti-Terrorism Act.

The ruling in *Thomas v Mowbray* has serious implications for fundamental legal and democratic rights. In effect, by a 5 to 2 majority, the court has legitimated the police-state measures, including detention without trial, that the Howard government and its state Labor counterparts have introduced since 2002 on the pretext of protecting ordinary people from terrorism.

In doing so, Australia's supreme court has for the first time condoned the extension of the federal government's "defence power" under the Constitution beyond war and external threats. Members of the court said the power, which was used in World Wars I and II to rule by executive decree and round up thousands of people regarded as threats to the war effort, could be invoked to combat not only terrorism but other internal "disturbances".

Several state Labor governments intervened in the case to defend their own identical control order provisions, which were introduced as part of the 2005 federal-state package of "anti-terrorism" laws. Their support for the Howard government's position underscores the bipartisan nature of the assault on basic civil liberties.

Thomas was subjected to the control order last August, just a week after a three-member panel of the Victorian Court of Appeal unanimously overturned his conviction on a charge of receiving money from a terrorist group, on the grounds that he had been tortured to obtain a confession. Without any notice, let alone allowing Thomas the right to object, a federal magistrate granted the interim 12-month order in a secret "ex parte" hearing conducted on a Sunday.

Even though he has not been convicted of any offence, 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.

The order—personally sought by Attorney-General Philip Ruddock—demonstrates how the "anti-terror" powers can and will be used for political purposes. In this case, the Howard government has used them to reverse the humiliating setback it suffered when the charges against Thomas were dismissed.

Control orders can be imposed without any evidence of terrorist activity. The attorney-general only has to state that the order would "substantially assist in preventing" an unspecified "terrorist act", or that the person received training from an officially-declared "terrorist organisation", and the order is "reasonably necessary" to protect the public from a terrorist act.

After hearing just the government's side of the case, a magistrate decides "on the balance of probabilities" to issue an interim control order. An appeal can be made to a court, but only after the order has already commenced, and in any such hearing the person under house arrest can be denied access to the "security" material on which the government's allegations are based.

In drafting the legislation, the federal and state governments agreed to bypass Canberra's lack of constitutional power to make such laws, on the assumption that the defence power could not support the measures on its own. To overcome the problem, the states referred parts of their law enforcement and policing powers to the federal parliament.

However, when *Thomas v Mowbray* was argued in the High Court, the Howard government's top lawyer, Commonwealth Solicitor-General David Bennett QC, declared anyone who opposed an almost unlimited interpretation of the defence power was displaying "September 10 thinking". He insisted 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".

The High Court majority essentially endorsed these assertions. Two judges, Michael Kirby and Kenneth Hayne, dissented, but only Kirby rejected the radical widening of the defence power. Led by Chief Justice Murray Gleeson, the majority gave the federal government a virtual carte blanche to use the power for "the military and naval defence of the Commonwealth" for domestic purposes.

Although the judges used varying formulations, their language was sweeping. Justice Ian Callinan, who was the most vociferous supporter of the terror laws, said the defence power could apply whenever "the Commonwealth or its people" were "at risk of danger by the application of force" in situations where the Commonwealth military and naval forces could "better respond, than state police and agencies alone".

In a joint judgment, Justices William Gummow and Susan Crennan spoke of "the defence of the realm against threats posed internally as well as by invasion from abroad by force of arms". These propositions are broad enough to sanction the use of the military to suppress political protests and civil unrest.

Gummow and Crennan cited a 1781 English case, where a judge, Lord Mansfield, denounced a mass demonstration outside parliament that had demanded the repeal of a statute. Mansfield and his fellow judges decided unanimously that "an attempt, by intimidation and violence, to force the repeal of a law, was levying war against the King; and high treason".

Gummow and Crennan also relied upon a 1532 Act, which declared that the English people were bound to bear "a natural and humble obedience" to the King, as well as God. Such trawling back through the legal texts to the days of the absolute monarchy highlights the deeply reactionary

character of the High Court decision. It represents a reversion to absolutist conceptions of the state in relation to the "war on terror".

During the hearings, Solicitor-General Bennett argued that the "war on terror" justified executive powers to detain not just individuals but thousands of people. Bennett said the federal government could potentially round up and detain anyone "acting in any manner prejudicial to the public safety of the Commonwealth". None of the majority judges opposed that proposition. Hayne said it "need not be decided" in the case at hand.

The majority judgments declared that the court was obliged to accept as "notorious facts" that the Commonwealth faced unparalleled dangers from terrorism. Ordinarily, courts require evidence to substantiate the claims made by litigants, including governments. In criminal cases, it is up to the prosecution to prove its charges "beyond a reasonable doubt" and in cases involving deprivation of liberty it has been accepted, until now, that governments must prove their allegations.

In *Thomas v Mowbray*, however, the judges broadened the concept of "constitutional facts" to simply accept, as a matter of "judicial notice," all the assertions made by the federal and state governments and their security and spy agencies, such as the Australian Security Intelligence Organisation (ASIO).

Callinan was the most vehement, declaring it was "blindingly obvious" that "groups of zealots forming part of, or associated with Al Qa'ida" were "making common cause of hatred against communities posing no threat to them" and "planned to undertake violent, literally suicidal attacks upon even the institutions and persons of those communities". Callinan acknowledged that the evidence was "hearsay"—not normally admissible in a court of law.

The judge also claimed it was a matter of public record that "in Australia there have been persons convicted or charged of conspiring or planning to undertake terrorist activities in this country". As a matter of fact, only one person currently stands convicted of a terrorist offence in Australia, Sydney architect Faheem Khalid Lodhi, and he has appealed.

The High Court majority embraced the "war on terror" in another way as well. Five judges said there was no objection to courts carrying out the sort of functions assigned to them by the control order law. Thomas had argued that the procedures—secret "ex parte" hearings, without the person affected being present or even told of the hearing—involved the courts in exercising executive functions that were incompatible with the independence of the judiciary and hence violated the Constitution's separation of powers.

Chief Justice Gleeson gave Thomas's arguments short shrift. Gleeson relied on a so-called "chameleon principle," which asserts that some governmental powers can be exercised administratively, judicially or legislatively. This line of reasoning seriously erodes the separation of powers principle, by which the courts are meant to act as a check on the executive.

The decision has torn asunder the half century-old proposition, adopted by the High Court in the Communist Party case of 1951, that the defence power cannot be used for domestic political purposes. In that case, the court rejected the attempt of the Menzies government to ban the Communist Party during the Korean War. That stand was vindicated when Menzies called a referendum to override the decision and was defeated, despite his efforts to whip up a red-baiting campaign in the context of the Cold War. None of today's judges mentioned the referendum, which gave a clear public verdict against the unfettered use of the defence power.

Justice Kirby condemned his fellow judges, saying: "I did not expect, during my service, I would see the Communist Party Case sidelined, minimised, doubted and even criticised and denigrated in this Court". He said the majority view was "further evidence of the unfortunate surrender of the present court to demands for more and more governmental powers, federal and state, that exceed or offend the constitutional text and its abiding values".

On the defence power, Kirby's specific concerns were two-fold. Firstly, he expressed reservations about the potential expansion of military power. "Not since Cromwell has our constitutional tradition seen the military taking a leading role part in civilian affairs," he commented. Secondly, he objected that the defence power could become a vehicle for Canberra to acquire general power over all aspects of society, overriding the states. This second objection was in line with his concerns about the extinguishment of states' rights, raised in last year's WorkChoices industrial relations case.

Kirby also voiced concern that the "reputational capital" of the courts as independent and impartial would be squandered if the courts were seen as "no more than pliant agents" of the executive. Similar sentiments were expressed by Justice Hayne, who agreed with the extension of the defence power but joined Kirby in dissenting on the issue of the courts. "To the extent that the courts are left with no practical choice except to act upon a view proffered by the executive, the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged," he warned.

By the majority's logic, all the 40 pieces of federal terrorism legislation introduced since 2002 are valid. These include at least four forms of detention without trial, executive powers to ban organisations, semi-secret trials, revamped sedition laws and a definition of terrorism so broad that it covers many forms of political and industrial protest.

Attorney-General Philip Ruddock immediately hailed the ruling, claiming it vindicated the government's stance on terrorism. He told ABC radio: "What it does is put beyond doubt the counter-terrorism laws that we have implemented."

Further draconian measures are now being brought forward, including a Bill rushed though parliament this week to give the federal authorities expanded "sneak and peek" powers to secretly enter and bug homes without notifying the occupants, powers to intercept telecommunications without warrants and powers to conduct undercover "controlled operations"—which involve using agents provocateurs to entrap people—without warrants.

The court's decision also clears the way constitutionally for wartime-style executive detention. In a series of 2004 decisions, the court overturned previous cases to sanction the detention of asylum seekers indefinitely, even for life. Given that the "war on terror" is indefinite, according to both the Howard government and the Bush administration, detentions without trial claimed to be necessary to prevent terrorism could also last for life.

Finally, the ruling removes possible legal objections to the military call-out powers adopted in 2000 and expanded in 2006. Under this legislation, the prime minister or the chief of the Australian Defence Forces (ADF) can order troops onto the streets to deal with "domestic violence". ADF personnel called-out will have extraordinary powers, including to issue orders to civilians, interrogate people and shoot to kill, all covered by "superior orders" defence and legal immunities.

In summary, *Thomas v Mowbray* marks a major shift in the constitutional framework, toward unrestricted executive power and unprecedented military powers. With the Labor Party extending unconditional support for the terror laws, there now exists substantial consensus within the political establishment on exercising these powers.