Antonin Scalia and police-state rule

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On June 12 the United States Supreme Court, by a 5-to-4 vote, ruled that so-called "enemy combatants" held at Guantánamo Bay, Cuba have the right to challenge their detention in US courts.

Many of the inmates have been held for six years at Guantánamo, under barbaric conditions. None of them have been found guilty of a crime in a court of law.

The four dissenting Supreme Court justices, John Roberts, Antonin Scalia, Clarence Thomas and Joseph Alito, defend the right of the Bush administration to proceed in its "war on terror" with utter disregard for the Constitution and elementary democratic rights. They are, in essence, proponents of authoritarian rule. The savagery at Guantánamo is not a source of shame or even concern for them, but the wave of the future.

Chief Justice Roberts, in his dissenting opinion, denounced the majority view, arguing that the "political branches" (the executive and the Congress) had "crafted these procedures [for trials of detainees] amidst an ongoing military conflict, after much careful investigation and thorough debate." The former—"the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants," according to Roberts—include interrogation through coercion and torture and kangaroo courts run by the military.

Roberts, in one extraordinary passage, observes that "The majority rests its decision on abstract and hypothetical concerns." There is nothing "abstract and hypothetical" about the denial of basic rights to the Guantánamo prisoners or the character of their detention.

In December 2004, for instance, the *Washington Post* reported the allegations of an FBI agent who revealed that inmates at Guantánamo "were shackled to the floor in fetal positions for more than 24 hours at a time, left without food and water, and allowed to defecate on themselves." Other techniques included the use of growling dogs, extreme heat and cold and sexual humiliation. ACLU Executive Director Anthony D. Romero told the *Post* that the incidents described in the FBI documents "can only be described as torture."

While Roberts retains a "respectful" tone throughout most of his dissent, Antonin Scalia cannot control his anger and venom. In his dissent, this extreme right-winger writes a political diatribe. He begins by lambasting the "disastrous consequences of what the Court has done today."

Scalia then adds up the American victims of the alleged "war with radical Islamists." He goes on, "The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed."

Shamelessly, Scalia argues that had the military not been assured by Bush administration legal advisers that Guantánamo was outside the jurisdiction of the federal court system, it would not have transported the detainees there, "but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves."

He heaps scorn on the majority for refusing to bow down before Bush and Congress and declaring unconstitutional provisions of the 2006 Military Commissions Act. Scalia observes bitterly at one point that the majority "cannot resist striking a pose of faux deference to Congress and the President," when presumably they should be showing *genuine* deference to a widely despised president and a discredited Congress, responsible for an illegal, unpopular war.

The court majority in its ruling, claims Scalia, "elbows aside" not only the military, but "Congress and the Executive—*both* political branches," which "have determined that limiting the role of civilian courts in adjudicating whether prisoners captured abroad are properly detained is important to success in the war that some 190,000 of our men and women are now fighting." This is simply a right-wing, demagogic appeal, not a reasoned legal opinion.

He concludes, threateningly, "And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner. The Nation will live to regret what the Court has done today."

The media frequently refers to "the brilliant Antonin Scalia," in an attempt to endow a veneer of intellectual respectability to a legal "philosophy" that draws its inspiration from the religious obscurantism of the Inquisition and the political aims of extreme reaction. It is well known that Scalia's approach to legal issues is unprincipled and cynical. Scalia decides his cases on the basis of political convictions, which are rabidly antidemocratic, and then works backward to concoct a sophistical justification for the objective he has decided on in advance.

In calling a halt to the recount of the presidential vote in Florida in 2000 and installing George W. Bush in power, for example, Scalia and the four other majority justices insisted that their ruling set no precedent and could not be used to justify any future court decision. When it suits his purpose, as in the present case involving the Guantánamo detainees, Scalia denounces "judicial activism."

He is a thug in black robes, who talks and acts like a gangster. When asked about criticism that the 2000 election ruling was based on his personal political preferences, Scalia replied with consummate arrogance that people should "Get over it."

A number of observers have noted the apparent influence of reactionary German legal thinker Carl Schmitt (1888-1985) on Scalia and other right-wing judges.

A thoroughly unsavory figure, Schmitt became a professor at the University of Berlin in 1933, the same year he joined the Nazi party. Hermann Göring appointed him Prussian State Councilor and Schmitt became president of the Union of National-Socialist Jurists in November 1933. In October 1936 he put himself forward as a rabid anti-Semite, calling for German law to be cleansed of the "Jewish spirit" and all publications of Jewish scientists to be marked with a small symbol. He later had a falling out with sections of the Nazi movement, but he retained his professorship thanks to Göring.

Schmitt, a virulent anticommunist and opponent of liberalism, is closely identified with the concept of "exception," which asserted that rapid changes in the political situation rendered any legal system built on fixed legal codes unstable. He is a kind of theorist of permanent emergency powers. A well-known example of the practical implications of the theory of exception was given by Schmitt in the aftermath of the "Night of the Long Knives" on June 30, 1934, during which Hitler carried out a bloody purge of suspected dissidents within his own movement. Schmitt sanctioned the event—involving the murder of several thousand people—as the highest form of administrative justice.

Scott Horton on the *Harper's* magazine web site noted June 13 that "the notion of a state of exception ... underlies the whole architecture of Bush war on terror policies. Simply put, these policies argue that while the Executive is limited by the checks and balances of the American constitution during peacetime and at home, all those shackles fall away when war erupts and when he acts outside the nation's territory."

Horton continues: "The true roots of this notion lie in the thinking of a troubling figure, Carl Schmitt. The most important conservative legal thinker on the European continent between the wars, Schmitt felt that modern liberal democracy crafted on the Anglo-American model was too weak to cope with the social and political shockwaves that racked Europe between the wars.... For the past seven years, Americans have witnessed an effort to engineer a 'state of exception' to the American constitution."

Scalia and the other extreme right-wingers on the Supreme Court, not to beat around the bush, represent a fascistic element, who hold democratic rights in contempt and in whose theory of jurisprudence the interests of the state take precedence over everything else.

If Scalia proceeds with a peculiar arrogance and self-confidence, it is because he feels, on the one hand, that he has a definite political constituency behind him, and on the other, that his liberal opponents will wring their hands but do nothing. And in this latter conviction, he is entirely correct.

While the right wing has never shied away from slandering and calling for the removal of Supreme Court justices of which it did not approve, such as William O. Douglas and others, no one in the establishment liberal media, much less the Democratic Party, would suggest that the current filthy lot of right-wing conspirators on the high court should simply be impeached and removed.

Friday's *New York Times* editorial exemplified this impotent approach. While the *Times* recognizes that Bush "has denied the protections of justice, democracy and plain human decency to the hundreds of men that he decided to label 'unlawful enemy combatants' and throw into never-ending detention," and that the Supreme Court "turned back the most recent effort to subvert justice" only by the narrowest of margins, its editors draw no far-reaching political conclusions from these extraordinary and alarming facts.

"It was disturbing," writes the newspaper, "that four justices dissented from this eminently reasonable decision." The *Times*, as always, puts the mildest interpretation on the event and fails to investigate the socio-political significance of the fact "that habeas hangs by a single vote in the Supreme Court of the United States," i.e., that one vote separates the American political machinery from an open endorsement of police-state rule.

The editorial's punch line, of course, is that the decision is "a reminder that the composition of the court could depend on the outcome of this year's presidential election." But recent history, the *Times*' own lack of outrage, and the character of the Barack Obama campaign put the lie to this claim.

American liberalism has done nothing to prevent the wholesale assault on democratic rights over the past decade—the hijacking of a national election, the stampede to an illegal war, the ripping up of the Bill of Rights.

On the contrary, the Democrats have either stood by uselessly or joined in the assault, voting in large numbers to authorize the war against Iraq, helping to pass the Patriot Act and the Military Commissions Act and a myriad of other pieces of reactionary legislation. To rely on Obama, the *Times*, and the corpse of American liberalism to defend habeas corpus or democratic rights as a whole would be fatal.