

High Court Jams Cheney, Bush Imperial Presidency

by Edward Spannaus

In rulings which took many, including the Defense and Justice Departments, by surprise, the U.S. Supreme Court on June 28 rejected the Bush Administration's claim—most forcefully advocated by Vice President Dick Cheney—that it has unlimited war-time powers, against which the Federal courts can say or do nothing.

Ever since the post-Watergate period of the 1970s, when Dick Cheney was in the Ford White House, he has endeavored to restore the “imperial presidency” doctrine of the Nixon era, which relegates the Legislative and Judicial branches of government to being mere bystanders, especially when the President is exercising his powers as Commander-in-Chief. Cheney also asserts the same argument with respect to Executive secrecy under the guise of the notion of “Executive Privilege,” as he did in the case on his Energy Task Force just decided by the Supreme Court. (In that case, the Supreme Court rejected Cheney's argument that he was categorically exempt from any court-ordered discovery, and instead, sent the case back to the lower court to narrow what it considered overly-broad requests for information and documents.)

This doctrine of unfettered Presidential power was most starkly expressed in the torture memos produced by the Justice Department's Office of Legal Counsel (see *EIR*, July 2), which asserted that Congress could not place any restrictions on the President's direction of the interrogation of enemy combatants, nor could a future Justice Department prosecute anyone under the Anti-Torture Statute, if that person was acting “pursuant to an exercise of the President's constitutional power.”

The June 27 *Washington Post* provided some new elaboration on the role of Cheney's counsel David Addington in the development of the torture memos, which had been first reported by *EIR*. The *Post* reported that not only was the Office of Legal Counsel's infamous August 2002 opinion vetted by lawyers in both the NSC and in the Vice President's office, but Addington had told Justice Department lawyers he was particularly concerned “that the opinion include a clear-cut section on the President's authority.”

Questions on Torture

A number of experts consulted by *EIR* believe that the decisive factor in the Supreme Court's deliberations on these

cases, was the revelations on Abu Ghraib and the subsequent leaking of the DOJ torture memos. Oral arguments in both the Padilla and Hamdi cases were held on April 28, during which the Deputy U.S. Solicitor General, Paul Clement, was explicitly asked by Justices Ginsburg and Stevens, what would prevent the government from torturing detainees during interrogation. Clement's response was that the United States is bound by treaty obligations not to torture detainees, and he went on to admonish the court that that this is something in which you don't want “judicial micromanagement.”

Clement's further advice to the Court, was that “You have to recognize that in situations where there is a war—where the government is on a war footing—you have to trust the Executive to make the kind of quintessential military judgments that are involved.”

The Administration's timing could not have been worse. Shortly before the oral arguments commenced that morning, the Iraqi Coalition Provisional Authority briefing in Baghdad had taken place, in which Gen. Mark Kimmitt announced that six U.S. military personnel had been charged with criminal offenses for abuse of prisoners at Abu Ghraib. Kimmitt stated that this was the result of an investigation first announced in January. Worse, Kimmitt acknowledged that CBS had obtained photographs of prisoner abuses, which would be shown on CBS's “60 Minutes II” that evening.

And indeed, CBS did air the photos that night, including the now-famous one of a hooded prisoner forced to stand on a box with electrodes attached to him. Another showed naked prisoners stacked in a pyramid. Quickly, more details of torture at Abu Ghraib, based on the Army's Taguba Report, began spilling out, and soon after that came the leaks of internal Bush Administration memoranda, in which the Office of Legal Counsel had opined that the President can ignore the Geneva Conventions, as well as the international Convention Against Torture, and U.S. laws criminalizing torture and war crimes.

It doesn't take much imagination to figure out what the impact of this would have been on the Supreme Court, which had just been told by the Administration, that it must “trust us” about interrogations and torture.

Consequently, the rulings issued on June 28, can be summed up in Justice O'Connor's statement in the Hamdi case: “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”

Guantánamo

In opposing a number of challenges to its indefinite detention of “enemy combatants” held incommunicado at Guantánamo Bay, the Bush Administration had arrogantly asserted that the courts had no jurisdiction whatsoever over these detainees, and that continued detention *and interrogation* of prisoners was an essential element of its war on terrorism, in

which the courts could not interfere.

By a 6-3 margin, the Supreme Court flatly rejected the government's argument. The Court ruled that even foreign nationals, who are subject to potentially indefinite detention within territory under U.S. court jurisdiction, are entitled to seek a Writ of Habeas Corpus in the U.S. Federal courts. The decision left unclear the question of whether this might apply to other areas of U.S. military operations overseas, such as Afghanistan and Iraq; critics of the ruling say that it might apply elsewhere.

The dissent was written by Justice Scalia, joined by Rehnquist and Thomas. Scalia charged that the ruling "springs a trap on the Executive" by subjecting Guantánamo to the jurisdiction of U.S. courts, and he denounced the ruling as "judicial adventurism of the worst sort."

Yaser Hamdi was captured in Afghanistan in late 2001 by the Northern Alliance, was handed over to the United States, and then shipped to the Guantánamo Bay prison camp. Hamdi was transferred to the Navy brig in Charleston, South Carolina after it was determined that he was born in the United States and therefore possesses American citizenship.

Eight of nine Justices disagreed with the Administration's position that it is entitled to hold Hamdi in detention on the basis of the government's "say-so," and that the Federal courts can do nothing about it. All eight agreed that Hamdi is entitled to file a Writ of Habeas Corpus, and that he should have the opportunity to present evidence to challenge the government's claim. Only Clarence Thomas disagreed.

Four Justices—O'Connor, joined by Rehnquist, Kennedy, and Breyer—said that the President has the power to order detention of an enemy combatant, and that the Congressional authorization for the use of force in Afghanistan is sufficient authority for this. (This is what the Administration claims as its victory.) But they disagreed with the government's contention that once the government offers some bare minimal showing that the detainee is an enemy combatant, the courts can go no further. In this case, the "showing" was a two-page declaration by a Pentagon neo-con bureaucrat (Michael Mobbs, recently of Halliburton fame), which the lower court termed "hearsay," since all Mobbs had done was to review Hamdi's file. The government insisted that Hamdi had no right whatsoever to factually challenge the Mobbs Declaration.

Four other Justices went further, and said that Hamdi's detention is not authorized at all, and that he should be released, unless the government were to bring criminal charges against him. Justice Souter, joined by Ginsburg, disagreed that Hamdi's detention is justified by the Congressional authorization for the use of force in Afghanistan; they said that Hamdi's detention violates the Anti-Detention Act passed by Congress in 1971.

Justice Scalia, joined by Stevens, said that the government has no right under the Constitution to detain Hamdi,

unless Congress were to declare a suspension of Habeas Corpus. The only way to hold him would be to file criminal charges against him, such as had been done in the John Lindh case.

Padilla

The third case in which the Supreme Court ruled was that of Jose Padilla, a U.S. citizen arrested on U.S. soil on the basis of "evidence" obtained by torture of al-Qaeda suspects captured in Afghanistan; he was later transferred out of the Federal court system into military custody. His lawyer petitioned for a Writ of Habeas Corpus in New York, where she had last seen Padilla.

On strictly technical grounds, the Supreme Court ruled, 5-4, that the Federal court in Manhattan lacks jurisdiction, because Padilla is being held in South Carolina. But there is no question that when he re-files his petition for a Writ of Habeas Corpus in the proper district, it will be governed by the Hamdi ruling, and the court will have to fully hear it.

However, there are indications that the Administration will duck the issue altogether, by bringing a criminal indictment against Padilla in Federal court in Miami. But since the Justice Department has "blown it" with its press conferences about Padilla, the indictment could not be on the discredited "dirty bomb" story, or the more recent apartment-bombing allegations (see *EIR* June 11), and it will have to come up with some other charges.

The Aftermath

Not everyone was pleased with the court's rulings. In a *Wall Street Journal* op-ed, DOJ memo-writer John Yoo attacked the Supreme Court as "an imperial judiciary," which "has unwisely injected itself into military matters." Yoo admitted that the Court's decision on the Guantánamo detainees was "a clear defeat" for the Administration, with its finding that Guantánamo is subject to Federal court jurisdiction; Yoo complained that this might even apply to Iraq and Saddam Hussein. The only element of the Court's decisions he liked, was its upholding of the President's right to designate and detain illegal combatants.

The editor of the *Wall Street Journal's* OpinionJournal.com, James Taranto, declared that the court "handed Osama bin Laden a victory" by saying that terrorists at Guantánamo could sue in U.S. courts. Attorney General Ashcroft himself complained that the Court had given more rights to terrorists.

Meanwhile, the Defense Department was scrambling to come up with some means of handling the flood of anticipated *habeas* petitions. Under discussion, were the possibility of releasing many of the Guantánamo detainees, and moving the rest to a military prison in the continental United States; or setting up a special tribunal at Guantánamo; or designating one Federal district, such as the infamous Eastern District of Virginia, to hear all the Guantánamo cases.