Judicial Supremacists Strike Again

by Phyllis Schlafly July 19, 2006

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Who could have guessed that Osama bin Laden's driver/bodyguard would be one of the privileged few to be granted a hearing by the high and mighty U.S. Supreme Court justices! After refusing to hear appeals from thousands of Americans during the past year, the Court's liberals jumped at a chance to rule that President Bush was wrong.

It wasn't compassion for Gitmo prisoner Salim Ahmed Hamdan. It was that Hamdan v. Rumsfeld offered an opportunity to proclaim judicial supremacy over both the other two branches of government and to slap the Bush Administration in the process.

The Supreme Court had no business taking the Hamdan case. Congress had passed the Detainee Treatment Act of 2005 withdrawing jurisdiction over Guantanamo

prisoners' habeas corpus petitions from every "court, justice, or judge" except the U.S. Court of Appeals for the District of Columbia.

The Supreme Court did not, and could not, dispute Congress's power to do exactly that. The U.S. Constitution clearly grants this power to Congress.

But the Court held that pending cases were exempt from this particular withdrawal of jurisdiction even though the law did not say that. Justice John Paul Stevens' majority decision ignored what Justice Scalia's dissent called a "plain directive," and (in the words of a primary sponsor of the Detainee Act, Senator Lindsey Graham) "made legal contortions to get the result the Court wanted."

Maybe the Court was emboldened to tweak Congress's Article III power over the federal courts by Congress's pusillanimity in failing to use it in two obvious hot-button cases. In 2004 the House of Representatives passed two bills withdrawing jurisdiction over the Pledge of Allegiance and the definition of marriage.

One of Chief Justice William Rehnquist's last acts was to acknowledge, but not criticize, efforts to withdraw jurisdiction.

But Congress lost its will to rein in the Court. Not only did the Senate fail to pass those popular bills, but the House failed even to repeat its work and pass them again in the current session.

The Court heard the message: Congress is too weak or cowardly to curb judicial power. In the Hamdan case, the Court virtually dared Congress to assert its authority to define the Court's powers.

Having thumbed its nose at Congress, the Supreme Court then attempted to invade the last remaining sanctuary thought to be beyond its power: military decisions of

the Commander-in-Chief in wartime. The Court claimed final authority over international relations and military necessity by presuming to write its own version of the Geneva Conventions.

The Geneva Conventions are irrelevant to Hamdan's case because Al Qaeda is not a nation, is not a signatory to the Geneva Conventions governing the treatment of prisoners, and certainly does not abide by the rules of war that are essential to the treaty's provisions.

The Geneva Conventions are irrelevant to Hamdan himself because he is a terrorist combatant who fails to meet the Conventions' definition of a Prisoner of War and therefore is not entitled to its POW protections. Osama bin Laden's driver is not on American soil and was captured halfway around the world during our war on terror.

Determined to invoke international law anyway, the Court cited the Geneva Conventions Common Article 3, which applies only to civil wars, not international conflicts. The Court assumed that Al Qaeda is not in an international conflict, despite having committed acts in the United States, Somalia, Yemen, Kenya, Tanzania, Afghanistan, and Iraq.

Dissenting justices Antonin Scalia and Clarence Thomas agreed with Bush that the Geneva Conventions' protections for soldiers should not apply to terrorists. It is probable that Congress and the American people agree, too.

We shouldn't overstate the reach of the Court's decision because it did not command Bush to shut down Guantanamo, or to forfeit the use of military commissions with different procedures, or to release any of the Gitmo detainees, or to treat them as legal POWs, or to give them an O.J. Simpson-style trial. The Court was just asserting its extraordinary power to second-guess the Commander-in-Chief on what is "practicable" in time of war.

"I am willing to abide by the ruling of the Supreme Court," Bush said. Whatever happened to his repeated campaign statement that he will not stand for activist judges who are "legislating from the bench"?

The Supreme Court's supremacist views will continue to expand if the other branches of government continue to accept the arrogant notion that whatever a judge says is the law of the land. Congress and the President can fix the problems created by Hamdan v. Rumsfeld, but only if they have the courage to rebuke the supremacist justices.