Military Tribunals Are Dangerous In Ashcroft's Hands

by Edward Spannaus

President George Bush's military order of Nov. 13, authorizing the creation of military tribunals to try terrorist suspects, has created a firestorm of controversy inside the United States and abroad. While there is sound historical precedent for the creation and use of such tribunals, to have such a proposal originating out of Attorney General John Ashcroft's Department of Justice (DOJ) is akin to giving a loaded shotgun to a modern Torquemada and setting him loose in a crowded classroom. And make no mistake about it, the plan came from the Justice Department, not the Defense Department.

President Bush was undoubtedly convinced by his DOJ advisers, that such a tribunal is necessary in the event that Osama bin Laden, or large numbers of al-Qaeda operatives, are captured, because the U.S. criminal justice system is not capable of handling such trials. The real reasons for the avoidance of civilian criminal procedures, are doubtless more related to the fact that DOJ prosecutors do not have, and do not expect to have—for reasons we have elaborated elsewhere—sufficient evidence against bin Laden and Co. to assure a conviction for the Sept. 11 attacks, under normal criminal procedures and a civilian jury.

Senators Question DOJ

At a hearing on Nov. 28, Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) complained that, although he and others in Congress had worked closely with the DOJ to fashion an anti-terrorism bill providing additional powers to fight terrorism, the Administration had then launched several unilateral actions going far beyond the legislation, such as large-scale detentions, monitoring of attorney-client conversations, and the military tribunal order.

Leahy asked whether military tribunals "genuinely serve our national interest," and suggested that similar tribunals could be used against American citizens overseas by foreign governments. "As written, the military order does not incorporate basic notions of fairness and due process. . . . It does not specify a standard of guilt for convicting suspected terrorists. It decrees that convictions will not be subject to judicial review, a determination that appears to directly conflict with our international commitments. It allows the government to tailor rules to fit its proof against individual suspects."

"In short," Leahy said, "the military order described a type of military tribunal that has often been criticized by the United States when other nations have used them." After enumerating other potential problems arising out of the use of tribunals, Leahy warned: "There is the danger that if we rush to convict suspects in a military commission, relying on circumstantial or hearsay evidence tailored to serve the government's case, we deepen the risk of convicting the wrong people, which would leave the real terrorists at large."

Given that everyone involved is stating their (mistaken) belief that bin Laden and al-Qaeda were solely responsible for the Sept. 11 attacks, and that they would be the primary subjects of the military tribunal, this is an unusual warning.

Also significant were questions raised by Sen. Richard Durbin (D-Ill.), who contrasted the carefully worded definitions which the Senate had helped to write into the anti-terrorism bill, with the vague definitions in the President's order on military tribunals. "The anti-terrorism bill defines terrorism, goes through and catalogues the Federal laws that will be characterized as terrorism, an exhaustive list," Durbin said. "And yet when we look at the President's order, it's a much different approach as to what will be considered terrorism." Durbin said that the legal standard in Bush's order for bringing charges against a suspect is not defined. "What is terrorism?" Durbin asked. "What is the standard for the President to convene a commission or tribunal?"

The Real Corruption Of Our Legal System

The fundamental danger in the current proposal is not the tribunal itself, but the perverted conception of law which dominates our justice system today, as exemplified by the U.S. Supreme Court majority led by Associate Justice Antonin Scalia.[1] What could be an appropriate instrumentality under other circumstances, becomes a monstrosity when the dominant conception of "law" is the radical positivism typified by Scalia and Chief Justice William Rehnquist.

As German historian Prof. Friedrich A. Freiherr von der Heydte argued concerning the first Bush Administration's application of the "Thornburgh Doctrine," the radical positivism expressed in that matter by Chief Justice Rehnquist, applying the principle that "might makes right," necessarily comes into conflict with Constitutional principles and principles of international law derived from natural law. In fact, the arguments of Scalia and Rehnquist explicitly reject any legal principles superior to positive law; as Professor von der Heydte argued, the court's justifications of the Thornburgh Doctrine—the unilateral, extraterritorial application of U.S. law abroad (enunciated by Bush's Attorney General Richard Thornburgh)—"show a total absense of principled legal-ethical considerations."[2]

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1. Lyndon H. LaRouche, Jr., "Scalia And The Intent Of Law," *EIR* Jan. 1, 2001.

2. F.A. Freiherr von der Heydte, "The Thornburgh Doctrine: The End Of International Law," *EIR*, May 25, 1990.

Now, consider this as raising the deeper implications of Senator Leahy's criticisms—regardless of whether Leahy himself is conscious of this. In the context of a legal system based on radical nominalism, and devoid of standards and any devotion to truth, a military tribunal, used as an adjunct of a morally corrupt DOJ, cannot possibly function as an instrument of true justice—no matter how appropriate its use may have been in other circumstances, going back to the Revolutionary War. Worse, there is today no declaration of war, but only a vague and open-ended announcement of a "war on terrorism"—without even any definition of terrorism.

The proper conception of a military tribunal, as based in natural law, was elaborated by Abraham Lincoln's Attorney General, James Speed, in his July 1865 "Opinion On The Constitutional Power Of The Military To Try And Execute The Assassins Of The President."

Speed stressed that "tribunals are constituted by the army in the interest of justice and mercy, and to the effect of mitigating the horrors of war." Speed described two categories of combatants: open, active participants in hostilities, who wear the uniform, move under the flag, and hold the appropriate commission from their government, and who are entitled to all belligerent rights; and "secret, but active participants, as spies, brigands, bushwackers, jayhawkers, war rebels, and assassins," who are subject to military tribunals, which may try, condemn, and execute them, without a breach of the Constitution.

Speed pointed out that tribunals "prevent indiscriminate slaughter; they prevent men from being punished or killed upon mere suspicion." He argued that tribunals "exert a kindly and benign influence in time of war," because without them, a commander "would become a mere butcher of men, without the power to ascertain justice, and there can be no mercy where there is no justice."

That is a fundamentally different conception of law, than one would find today in our bloodthirsty judges and prosecutors, such as a Scalia, Rehnquist, or Ashcroft.

How J. Edgar Hoover Misled FDR

The most recent example of a military tribunal, which illustrates how an instrument created with the best of intentions can be perverted by corrupt prosecutors, is that created by President Franklin D. Roosevelt in 1942, for the purpose of trying eight Nazi saboteurs.

On June 13, 1942, a team of four Nazi saboteurs came ashore off Long Island, New York, from a German submarine, followed by a second team of four who landed in Florida a few days later. The first team was intercepted by a Coast Guardsman, whom the Germans attempted to bribe, and then let go; his superiors were skeptical of the tale, and did not notify the FBI until the next day, after which the FBI went on alert. That same day, the head of the first team, George J. Dasch, a German who had once lived in the United States, called the FBI office in New York to defect, as he had planned, but, despite the alert, his call was treated as a crank call.

Dasch then went to FBI headquarters in Washington, when he was again treated as a crank, and sent from office to office, until he finally dumped $84,000 in cash on the desk of a senior FBI official. Dasch was then interrogated for eight days, during which he gave the FBI invaluable information about intended targets for sabotage (including dams, aluminum plants, and water supplies), and also information which enabled the FBI to pick up the others, including another member of Dasch's team, Ernst Burger, who also wished to defect.

Hoover and his team reportedly decided to keep the information about the two defections secret, in order to deceive the Germans into thinking that the U.S. coasts were impenetrable, and that it would be futile to send any more sabotage teams.

Hoover also lied to the President of the United States. In confidential memoranda to FDR, Hoover falsified the facts of the arrests of the eight Nazis, and concealed the fact that Dasch had defected and had provided information leading to the capture of the others. On June 27, Hoover issued a press release announcing the capture of eight German spies, and the FBI began orchestrating a campaign to have Hoover awarded the Congressional Medal of Honor.

The trial was conducted under conditions of extraordinary secrecy, at DOJ headquarters. The chief prosecutor in the case was U.S. Attorney General Francis Biddle—assisted by Hoover. No mention of Dasch's and Burger's defections and cooperation was allowed. All eight were sentenced to death; six were executed in the D.C. jail on Aug. 8, 1942. The death sentence of Dasch was reduced to 30 years at hard labor, and that of Burger to life at hard labor. Despite assurances that his sentence would be commuted within months, Dasch was imprisoned for six years. When he was released in 1948, according to some accounts, Hoover quickly had him deported so he could not challenge Hoover's account of the capture of the spies.

The extraordinary secrecy of the trial therefore probably had much to do with Hoover's cover-up of the circumstances of the apprehension of the saboteurs—a cover-up which extended to deceiving the President.

Although the U.S. Supreme Court upheld the use of the military tribunal, Chief Justice Harlan Fiske Stone was, according to a number of accounts, quite uncomfortable with the whole proceeding, and was especially irritated by the secrecy in which the trial was conducted. No more than did FDR, did the Supreme Court know that a major reason for the secrecy, was to cover up the FBI's bungling and Hoover's falsified account of events.

Therein lies a lesson for today. Ashcroft's DOJ clearly hopes that its scheme can be used to cover up the lack of actual evidence against those they intend to try. However, it is known that senior Pentagon legal officials are privately upset with the DOJ's maneuvering, and thus Ashcroft and company may be in for some surprises.