T H U R S D A Y , M

The Plan to Use Tribunals on McVeigh and the Militias and How That Doctrine is Now in Place

Most people think the idea of applying the laws of war to terrorist suspects originated with the Bush Administration, in response to 9-11. That is incorrect.

The actual origin of that idea was a 1996 law review article in the Oklahoma City University Law Review called "Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism" written by two lawyers, Spencer J. Crona and Neal A. Richardson. (http://www.law.uchicago.edu/tribunals/docs/crona.pdf).

But it was not just suspected Islamic terrorists that Crona and Richardson had in mind. They urged the Clinton Administration to also apply the laws of war to Timothy McVeigh and the entire militia movement (even though McVeigh was not a militia member). Crona and Richardson argued that the Oklahoma City bombing was an "act of war," and "groups fomenting domestic insurrection, such as anti-government militia" were the equivalent of foreign enemies in wartime. They asserted that "citizenship of the accused poses no obstacle" to the application of the laws of war to such Americans, with the Bill of Rights providing no protection:

> **It is legally and intellectually disingenuous to provide [suspected]**

> **terrorists the same rights as persons accused of ordinary crimes against society. Our Bill of Rights was designed to protect individuals in society against the arbitrary exercise of government power. It is not meant to protect commando groups warring on society through arbitrary acts of mass violence. We recognize that our proposal may have an adverse impact on the Bill of Rights. Regrettable as this may be, the demonstrable risk of harm to innocent persons posed by terrorism ... comparatively outweighs the speculative risk of such an adverse impact.**

The "commando groups" Crona and Richardson had most in mind were the domestic militias formed throughout the United States in the 1990s in response to Ruby Ridge and the Waco Siege which ended in the death of 76 Americans, including 21 children.

The militias stated repeatedly that their purpose was defensive, to defend against government abuse of the people – against more Wacos. Even the FBI concluded that the vast majority of militias were purely defensive.

But Crona and Richardson insisted that all of the militias should be treated as suspected terrorists and unlawful military enemies and subjected to "an in kind response" under military rules of engagement and then tried by tribunal as war criminals merely for belonging to such organizations.

It was just such a military style shoot-on-sight rule of engagement at Ruby Ridge that resulted in Vicki Weaver being shot in the head, while holding her baby, by a sniper at

long range - a range at which the sniper was not in any danger from Vicki or any other member of her family. That rule of engagement was later determined to have been illegal. However, if Crona and Richardson had their way, such would be the perfectly legal norm, not the abhorrent exception.

The same goes for Waco, where military tactics, equipment, and rules of engagement were used. Many Americans considered that a disaster of government excess. But under the New Military Order Crona and Richardson envisioned, such methods would not only be appropriate, they would be the *only* way such situations would be handled - as all such actions, against all such people, would be "war," not "law enforcement."

What if Clinton had listened to Crona and Richardson?

We can only imagine what would have happened if the Clinton Administration had actually implemented this plan, with Clinton declaring members of militias to be "unlawful enemy combatants" and subjecting them to military trials and execution. That would have been the worst fears of the militia and patriot movement come true. The message from President Clinton would have been essentially this:

> **For you people, who oppose the federal government, who form citizen militias, the Bill of Rights is hereby forever suspended, and as "unlawful combatants" you are subject to being shot on sight wherever found, subject to indefinite military detention, under my orders, and subject to the laws of war as applied by a military commission established**

> **by me, under my authority as commander-in-chief of the armed forces. If that military commission finds you guilty, you will be executed, and any possible appeal will only be to me, as the final decider of your guilt or innocence, pursuant to my independent and co-equal Article II powers as commander-in-chief.**

However limited the initial application of such a policy, with the militia movement's worst fears now confirmed they would have considered armed resistance appropriate and even necessary. Even if at first only one or two suspected militia members were held as unlawful combatants without trial, or one or two small groups, it is very possible that a cycle of action/reaction would have begun. A group resists. The government cracks down. More groups resist. The government cracks down harder. And on it would have gone.

Thankfully, none of that happened because the absurd, dangerous proposal of Crona and Richardson to side step the Bill of Rights received little attention.

So, we can all live happily ever after, right? Wrong. After 9-11, this idea was thrust into the limelight, and the application of the laws of war to terrorist suspects has now become official U.S. policy.

Within days of September 11, 2001, the article by Crona and Richardson was noticed by John Dean, former Attorney General and legal commentator on www.findlaw.com. On Friday, September 28, 2001, Dean published his article, Appropriate Justice for Terrorists: Using Military Tribunals Rather Than Criminal Courts. In that article, Dean praises Crona and Richardson's proposal and cites heavily to their 1996 article, and then tells us this:

While I have drawn on Crona's and Richardson's scholarly analysis, and considered arguments in this column, I have not been able in this space to do it justice, and it is very much worth reading in its entirety. Indeed, I found the article so helpful that I also passed it on to a friend at the Department of Justice, requesting that he pass it on to those currently examining the potential of military tribunals.

It is probably impossible to know if their article actually formed the basis for the Bush Administration strategy, but the actions of the Bush Administration have been entirely consistent with what Crona and Richardson recommended." In the end, it does not matter whether the lawyers in the Bush Administration would have figured it out themselves (which is likely). What is important is that a very dangerous, and potentially explosive idea has now been given new life.

But surely Bush Administration lawyers had the good sense to at least draw a clear line between citizens and non-citizens, right? Wrong again. Relying on the exact same arguments as Crona and Richardson, the Bush lawyers insisted that citizenship is irrelevant and any U.S. citizen the president designates an "enemy combatant" can be held in military detention and tried by tribunal. And the Supreme Court agreed, approving of such detention of a citizen named Yaser Hamdi.

Ominous Precedents: U.S. Citizens Declared Enemy Combatants

According to the Supreme Court majority in the 2004 *Hamdi v. Rumsfeld* decision, "there is no bar to this Nation's holding one of its own citizens as an enemy combatant." Yasir Hamdi was a U.S. citizen captured in Afghanistan and suspected of fighting with

the Taliban. Sure, Hamdi was a Muslim, but the Court did not rule that only Muslim-Americans can be detained indefinitely by the military and tried by tribunal. There is no legal distinction between Muslim and Christian.

And sure, Hamdi was captured abroad, but the *Hamdi* Court relied on another case, *Ex Parte Quirin* (1942), concerning a German saboteur captured here in the U.S. who claimed U.S. citizenship. In *Quirin*, the same liberal Court that gave us the New Deal ruled, for the first time in American history, that the citizenship of the accused was irrelevant, and all that mattered was that he was accused of violating the laws of war. So the very same precedent the *Hamdi* Court relied on to find that citizenship does not matter held that location does not matter.

Scalia Got It Right!

In *Hamdi*, only Justice Scalia, in his dissent joined by Stevens, stood firm on the clear constitutional line between citizen and non-citizen. Scalia's dissent is worth your time and we urge you to read it (just do a google search for Hamdi Scalia dissent). Scalia pointed out that the proper trial remedy for a citizen accused of making war against his own nation or of aiding the enemy was not a miliary tribunal, but instead was a trial for treason, in a civilian court, by a jury of his peers, as stated by the Article III Treason Clause.

As for detention, Scalia also pointed out that no citizen can be detained without indictment unless Congress has suspended habeas corpus in time of insurrection or invasion, and no such suspension had been enacted by Congress. Scalia followed the Constitution. The rest of the Court just did whatever they thought best, in what Scalia

called a "Mr. Fix-it" approach. As Scalia noted, the Court did not defend the Bill of Rights for citizens, but instead merely defended its own turf, by asserting that it would play a key roll in creating some new system of "due process" rather than simply following the Constitution which was designed by the Founders to deal with emergency and war. If you are declared an enemy combatant, what due process will you get? Whatever the Court thinks is "due," and the *Hamdi* majority said that a military tribunal may satisfy that minimal due process requirement.

When it comes to keeping this country from eventually becoming a police state, the crucial battle line was at citizenship, and once the Court decreed that citizenship is irrelevant, why would it matter where you are? And once that door was opened, once that line was crossed, nothing but raw politics stops that war power from being used on you. Your being a God-fearing, Christian, flag waiving, patriotic "real American" living here in the U.S. does not matter a hoot to the Supreme Court majority, which believes that you and your children can all be treated precisely the same as suspected al-Qaeda captured abroad.

In *Hamdi*, all the liberals on the Court argued about was separations of powers - whether the courts could review enemy combatant designations involving citizens and whether Congress had given authorization (which the *Hamdi* majority ruled Congress had, in the Authorization of Use of Military Force of 2001) - not whether a citizen could ever be tried by military tribunal. The political left is so enamored with equality that they ignore the need for a clear line on applying the laws of war to only foreigners abroad in wartime, not citizens and legal residents at home.

And the so-called conservative lawyers in the Bush Administration also consistently argued that citizenship of the accused is irrelevant, and with the exception of Scalia, sitting conservative judges have agreed. Not only did the Bush Administration detain citizen Hamdi in military custody, but also Jose Padilla, another U.S. citizen, who was "captured" at Chicago's O'Hare International Airport and designated an "unlawful enemy combatant" by President Bush.

And while the Bush Administration ducked Supreme Court review by eventually charging Padilla with a crime, that did not happen until after a Fourth Circuit Court of Appeals decision sided entirely with the Administration, ruling that any U.S. citizen, wherever found, can be designated as an "unlawful enemy combatant" on the say-so of the President - any president, even a future President Obama, Clinton, or Pelosi - and detained without charges for the duration of the war on terrorism and tried by a military tribunal.

Years before the *Hamdi* decision, back in 2002 while I (Stewart) was a student at Yale Law School, I stood alone in my procedure class, pointing to the Treason Clause and the Habeas Suspension Clause, insisting that no U.S. citizen could be treated like a foreign enemy and tried by military tribunal. Just by reading the Constitution I could clearly see what Scalia would later point out in his *Hamdi* dissent. My arguments fell on deaf ears. The liberal professor, all the liberal students, and all the conservative students, agreed that citizenship did not matter.

The political elites from both the left and the right have abandoned the Constitution and are united in agreement that they can strip

you and your children of the protections of the Bill of Rights merely by labeling you an "unlawful enemy combatant." Rank-and-file Conservatives, in their zeal to free the hands of a Republican president to go after Muslim terrorists, have not paid sufficient attention to this destruction of the very foundations of our Constitutional Republic. They are finally beginning to wake up, and listen to real conservatives such as Judge Napolitano, now that it is President Obama who holds that nearly unlimited power over their lives and liberty.

The legal foundations for what Crona and Richardson only dreamed of in 1996 are now nearly completely in place. What keeps you from being declared an "enemy combatant"? Surely not the Bill of Rights, according to the Supreme Court. Now, it's just a matter of politics, and who happens to be president.

The Obama Administration, with the imprudent and rabidly anti-gun Rahm Emanuel as the "second most powerful man in America," just may be foolish enough to use that doctrine on those they consider to be the *real* terrorists and domestic enemies of their plans – American gun owners and constitutionalists. And that may be the spark of the next American Revolution.

Stewart Rhodes
Founder of Oath Keepers
"Not on Our Watch!"

POSTED BY STEWART RHODES AT 10:25 AM

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