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The Clinton Era Proposal to Use Military Tribunals on McVeigh and the Militias

How the legal foundation for that plan was never laid by Clinton, but has been fully constructed by the Bush Administration

by Stewart Rhodes

NOTE: This article is a work in progress, so check back for the latest version. This article analyzes the extent to which a 1996 law review proposal to apply the law of war to the militias has actually been fulfilled by the Bush Administration after 9-11.

I first wrote this article just before I discussed this issue on the Republic Broadcast Network o n Mark Dankof's talk show. In preparation for that show, I posted the following introduction to that topic, including the relevant links to that 1996 law review article, and to an article written within weeks after 9-11 by John Dean, praising that 1996 article as providing the answer to the question of what system of laws should be applied to terrorist suspects.

When time permits, I will expand on this article.

– Stewart Rhodes

The Plan to Use Tribunals on McVeigh and the Militias

The focus in the "war on terror" since September 11, 2001 has been on Al Qaida and other Islamic terrorist organizations and individuals. Thus, few people realize that the concept of applying the laws of war to terrorists did not originate with the Bush Administration, or only after 9-11 in response to that attack.

The actual origin of this idea of applying the laws of war to terrorists (and terrorist suspects) has its origin in a 1996 law review article called Justice for War Criminals of Invisible Armies: A New Legal and Military Approach To Terrorism. That article was written by two lawyers, Spencer J. Crona and Neal A. Richardson, and was published in the Oklahoma City University Law Review in 1996. (see summary here).

Crona and Richardson proposed applying the laws of war to Timothy McVeigh and to the entire Militia Movement, in addition to Islamic terrorists, such as those involved in the first World Trade Center Bombing. Crona and Richardson asserted that the attack on the federal building in Oklahoma City was an act of war, and that domestic militias were unlawful combatant paramilitary groups that were subject to the laws of war, and could be treated precisely the same as a foreign enemy in wartime, and thus had none of the rights under the Bill of Rights and could be tried by military tribunals, rather than in civilian criminal trials. According to Crona and Richardson:

> It is legally and intellectually disingenuous to provide 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.

This is precisely the same argument that has been used since 9-11, by the Bush Administration and its supporters. But Crona and Richardson were not talking about members of Al Qaida, or suspected members of Al Qaida, or other Middle Eastern or Muslim terrorist suspects. The "commando groups" they talk about in their law review article are the domestic, U.S. militia groups that formed throughout the United States, in nearly every state, during the 1990s in response to the excesses of the Ruby Ridge incident and the Waco Texas Branch Dividian Siege which ended in a fire that killed 76 people, including 21 children.

The militias stated again and again that their purpose was defensive, to defend against possible future federal government abuse of the people – against more Waco style incidents. Even the FBI came to the conclusion that the vast majority of militias were purely defensive, and therefore unlikely to initiate any violent confrontation with the government.

And yet, to Crona and Richardson, the militias - all of them - and even individuals of like-mind, should be treated as enemy warriors, and subjected to military rules of engagement – an "in kind response" – and then tried by tribunal as war criminals merely for

belonging to such organizations, because, according to Crona and Richardson, those involved in setting policy, as well as those involved in actual violence, are also unlawful combatants. And, just as with the current arguments of the Bush Administration, Crona and Richardson held that citizenship is irrelevant. saying:

> Citizenship of the accused poses no obstacle. What we are dealing with in the case of modern terrorists, like the saboteurs in Ex parte Quirin, are belligerent agents of either foreign powers or domestic insurrectionist groups committing war crimes.

For Crona and Richardson, citizenship and national origin mean nothing. What really counts is the viewpoint, and the self-identity of a person as belonging to such a "militia" group or merely the act of holding a similar view. That is enough to warrant their being designated as internal enemies. Once so designated, they can be treated precisely the same as an enemy soldier on a battlefield.

And how is an enemy soldier treated? Crona and Richardson did not explain the full ramifications of this doctrine. Allow me.

An enemy combatant can simply be killed on sight. This is the case with any enemy in warfare. There is no requirement that a U.S. soldier attempt to apprehend an enemy soldier. If the U.S. soldier sees an enemy, he can simply shoot that enemy on sight, whether that enemy is an immediate threat to anyone or not. That is what is known as a military rule of engagement.

It is just such a shoot-on-sight rule of engagement that lead to the tragic deaths of Sammy and Vicki Weaver in the Ruby Ridge Stand-Off. After Sammy was shot in the back while running away, Vicki Weaver was shot 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. The sniper was operating under a rule of engagement that allowed him to fire on all apparently armed individuals in the Weaver party, even if they posed no immediate threat to any officer.

That use of military style rules of engagement was later determined to have been illegal. However, if Crona and Richardson had their way, such rules of engagement would be the norm, not the abhorrent exception. The same is true of the Waco Standoff, where military tactics, equipment, and rules of engagement were used. To many Americans, that was a disaster of government excesses. But under the New Military Order Crona and Richardson envision, such methods would be not only be appropriate, they would be the *only* way such situations would be handed - as all such actions, against all such people, would be "war," not "law enforcement."

And, as already noted, anyone "captured" and accused of being a domestic terrorist would be considered an unlawful combatant and would not get any process whatsoever in a civilian court . That person would have none of the protections guaranteed by the Bill of Rights– no right to a grand jury indictment, no right to know the charges against him, no constitutional right to a jury trial before a jury of his peers, no constitutional right to confront his accusers, no constitutional right to be secure from compelled self incrimination (including torture), and no constitutional right to appeal a conviction to a civilian court of appeals. A military tribunal, hand selected by the president, any president, would decide his fate. And if convicted, he could be executed by the military.

What if Clinton had listened to Crona and Richardson?

Thankfully for this nation, Crona and Richardson's proposal to use the laws of war on the militia movement went nowhere back in 1996. As far as I can tell, it was not taken seriously in the legal or political community. There is scant mention of their law review article in the legal literature until after 9-11.

We can only imagine what would have happened if the Clinton Administration had actually attempted to implement this plan. If Clinton had begun declaring members of militias to be "unlawful enemy combatants" and subjected them to military trials and execution, as Crona and Richardson recommended, such an action would have been the worst fears of the militia and patriot movement come true. In such a situation, it is very likely that the militias would have seriously considered active resistance to such a military assault on them by the government.

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 of the United States. 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.

No matter how limited the initial application of such a policy by the Clinton Administration, with the militia movement's worst fears now confirmed they would have considered armed resistance appropriate and even necessary. Thus, even if it only began with one or two people held as unlawful combatants without trial, or one or two small groups, it is very possible that a cycle of action/reaction/action/reaction would have begun. A group resists. The government cracks down harder. More groups resist. The government cracks down harder. And on it would have gone.

But it did not happen because the extreme and dangerous proposal of Crona and Richardson received little attention. However, post 9-11, this idea suddenly came back into the limelight, and the concept of applying the laws of war to terrorists and terrorist suspects has now become official U.S. policy.

The Resurrection of the Plan Post 9-11

Within days of September 11, 2001, the article by Crona and Richardson was noticed by Jo hn 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.

That's right. Dean sent an article making the case for applying military tribunals to McVeigh and the militia movement on to his friend at the Department of Justice, to give it to those considering the use of military tribunals against Islamic terrorists. Thus, whereas Crona and Richardson's arguments were not taken seriously back in the 90s, they now have been taken very seriously. 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.

The legal, political, and military foundations for what Crona and Richardson only dreamed of in 1996 are now nearly completely in place. The very same Supreme Court case, *Ex Parte Quirin*, that Crona and Richardson relied on for their "new legal and military approach to terrorism," has formed the basis for the Bush doctrine that does the same thing. And now, with the Supreme Court's 2004 *Hamdi* decision, and with the Decision of the Fourth Circuit regarding the military detention of Jose Padilla (who was "captured" on U.S. soil), *Ex Parte Quirin* has been breathed new life, and has been applied to non-state actors, in an undeclared war on a tactic - terrorism - wherein anyone on the planet may be an "enemy."

Thus, while it was a real leap for Crona and Richardson to argue from the application of the laws of war to eight German soldiers in *Quirin* (men in the armed forces of a nation with which we were in a declared war) to applying those laws to anyone accused of terrorism (to non-state actors, whether groups or individuals), that leap has now been made.

In the context of a "war on terror" against Al Qaida, the Bush Administration has applied the laws of war to non-state actors: suspected islamist terrorists, their allies, and supporters. As if following the roadmap laid out by Crona and Richardson, the Bush Administration has claimed extraordinary, inherit, commander-in-chief powers. The most extraordinary claim is that the President, pursuant to his powers under Article II of the Constitution, may designate any person on the planet he suspects of being a terrorist, including even U.S. citizens here at home, to be an "enemy combatant" (or "unlawful combatant"). Such a designation is not made pursuant to any law enforcement powers – the president's duty to see that the laws are executed - but is instead claimed to flow exclusively from the constitutional Article II powers of the president as commander in chief of the armed forces of the United States – it is an entirely military power, not a civilian power.

Once so designated, so the argument goes, that person is deemed to be utterly without rights; with no procedural rights whatsoever under our Bill of Rights, under our laws, or under any law other than what procedural "rights" the President may grant, and devoid of any right to challenge that designation in a civilian court. Further, that person can be tried by a military tribunal hand picked by the President, and if found guilty, can be executed, with the only appeal being to the President himself. This has been the consistent claim of the Bush Administration, and the battle between its supporters and its opponents has been over the degree of this power, and also over whether any other branch of government can constrain this power.

The Administration's lawyers have consistently claimed that this "war power" is essentially without limit, as it is a power stemming directly from Article II of the Constitution and therefore no other provision in the Constitution, not even the Bill of Rights, no other branch of government, and certainly no law, can impede this power. The claim is that in war, the enemy has always been subject to military jurisdiction and the laws of war. Military combatants - soldiers - are not dealt with by application of civilian courts or civilian laws, and do not have a right to all of the procedural protections that go with such courts. Instead, soldiers are under an entirely separate military system of justice. From this, the argument then asserts that in war, the president, as the commander in chief, the highest officer in the military, alone is the supreme commander of the troops, and he alone has the constitutional power to engage the enemy under the international laws of war, and not even Congress can impede the president's use of his constitutional Article II powers (which are the powers to wage war successfully).

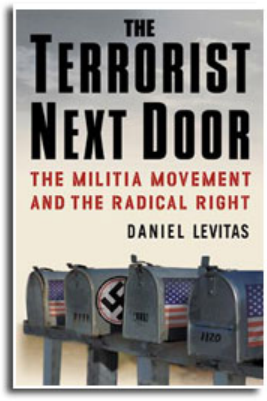
In fact, in its pure, undiluted form, the argument of the Bush Administration is that the president has an inherit and independent power to, all on his own, determine when we shall go to war, when we are at war, and thus, what is war. And, just as he has an independent power of determining when we are

in a state of war, he can also determine who is the enemy.

And, so the argument goes, the attack on 9-11 was an act of war, and we are at war with terrorists and terrorism. And so, we can and must treat terrorists as a military enemy. From this, it is a short leap of logic to state that as terrorists are the enemy in wartime, they fall under military jurisdiction and are subject to the laws of war, as military enemies always have been throughout history. And so, a suspected member of Al Qaida is the same as a Japanese or German soldier during World War II.

That suspected Al Qaida member can be placed in military detention for the duration of the armed conflict (as long as the war on terror lasts) and can be tried by a military tribunal for any violations of the laws of war. Further, as the suspected member of Al Qaida does not follow the laws of war – does not wear a uniform with an insignia recognizable at a distance, is not in a chain of command under an officer responsible for his actions, does not carry arms openly, and does not comply with the laws of war. Thus, so the argument goes, such a person is always in violation of the laws of war.

When the War on Terrorism Turns Inward



What will happen, with all of the structure in place for Crona and Richardson's plan, the next time there is a serious domestic terrorist incident, like the Oklahoma City bombing? Will a future president, say Hillary Clinton, be tempted to go all the way and apply the laws of war to suspected domestic terrorists, and to the militia movement? This is possible. In a poll taken in October of 2001, in affiliation with the Kennedy School of Government at Harvard, over 1,000 Americans were asked if they "Think a military tribunal should have been used to try Timothy McVeigh for bombing the Murrah Federal Building in Oklahoma City? 23% said yes, and 70 % said no. So, five years after Oklahoma City, and right after 9-11, nearly one in four said "yes" to military tribunals for accused domestic terrorists like Timothy McVeigh. And that was before the Bush Administration had applied the concept of enemy combatant status to U.S. citizens, and before the Supreme Court had ruled, in Hamdi, that such designations are constitutional (at least for citizens captured in Afghanistan), and this was before the 2006 Military Commissions Act, which defines an enemy combatant in extremely broad terms.

If another domestic incident like Oklahoma City occurs, it is very possible that a significant percentage of the population, when polled, will favor tribunals for the suspects. If that happens, and particularly if members of one of the militias are actually subjected to military detention and trial, we may see that cycle of violent reaction and government counter-action begin. If that happens, then God help us, because it may spiral out of control beyond what the government officials who decide such a course expect. Just as the resistance in Iraq was far stronger than anticipated, and has spiraled out of control, so too would a domestic application of the laws of war trigger a resistance that will grow, and become stronger and stronger as time goes on. And just as the Bush Administration has stubbornly refused to even acknowledge that any Iraqi resistance fighters have any legitimate reasons for resistance –and are always called "terrorists" – so too is it very possible that a future president Hillary will also stubbornly refuse to acknowledge that any militia or patriot group or activists has any legitimate reasons for resistance. She too is very likely to dismiss any and all who oppose her actions as "terrorists" or terrorist supporters, and she too is very likely to only fuel further resistance.

We must pull ourselves back from this idea of applying the laws of war to U.S. citizens (and to legal residents). If we don't we risk not only a slow slide into a military style dictatorship or police state, as others have predicted, but a far faster slide into a civil war/domestic revolt sparked by an arrogant and foolish application of the Bush doctrine of enemy combatant status to domestic groups. This is a ticking time bomb, and if it goes off, it may be impossible to control the spiral out of control.

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