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Legal Times

November 19, 2001
Correction Appended

SECTION: NATIONAL; Pg. 01

LENGTH: 1785 words

HEADLINE: Justice During Wartime

Order on Military Trials Final Piece of Sept. 11 Response

BYLINE: By Jim Oliphant

BODY:

It is a government that detains people for the slightest violation and for indeterminate periods, one that eavesdrops on privileged communications, engages in widespread racial profiling, and tries suspects in secret military proceedings, potentially far offshore and out of reach of its courts or constitution.

It is the government of the United States, standing on what it calls a "war footing." The common question asked in the wake of the Sept. 11 attacks was what "justice" meant as a response to the murder of thousands of innocents.

Now, it seems that question has been answered.

Last week's executive order signed by President George W. Bush establishing a military tribunal to try terrorist suspects touched off a firestorm of criticism from Congress and civil libertarians. But what it was, more than anything, was the final building block in what can be described as a "shadow" criminal justice system, created specifically as a means to deal with the special problem of terrorism. The Bush administration, citing the need for increased national security, has created a method for detention and adjudication that exists almost completely within its control-starting with the arrest of more than a thousand people suspected of possible ties to the 19 al Qaeda hijackers and ending with the establishment of a military tribunal.

"We're looking like a Third World country," says James Zogby, president of the Arab American Institute. "It isn't just secret tribunals. It's secret searches, detentions without charges, no due process."

It is what Deputy Attorney General Larry Thompson calls "a new paradigm." One where a premium is placed on elicitation of information that can prevent future attacks and where constitutional rights are accommodated only where possible and where consistent with the administration's mission.

"What we have here is the attorney general setting up a second track or a dual system without checks and balances," says Ralph Neas, president of People for the American Way.

But the question remains whether debates over civil rights and constitutional protections have any relevance when suspected agents of terrorist groups such as al Qaeda may be operating domestically.

"What happened on September 11 were in fact acts of war," says George Terwilliger III, a former deputy attorney general in the first Bush administration. "We have people in our midst who want to kill us."

Step One: The Big Roundup

Almost immediately after the Sept. 11 attacks, the Federal Bureau of Investigation began detaining hundreds of foreign nationals in order to probe their possible links to the hijackers. Most of them were held on routine immigration violations such as visa overstays.

The aggressive approach has been best defined by Attorney General John Ashcroft's totemic use of former Attorney General Robert Kennedy's war against organized crime in the 1960s. Repeatedly, Ashcroft has referred to Kennedy's pledge to jail mafia figures for "spitting on the sidewalk." Ashcroft says that his Justice Department's primary weapon in preventing future terrorist attacks lies in keeping potential terrorists imprisoned as long as possible.

That policy was articulated by Assistant Attorney General Viet Dinh last week. "What we are doing is simply arresting people that happen to have violated the laws that the democratic process has created," said Dinh, a former Georgetown University law professor who serves as Ashcroft's chief policy adviser. "Yes, they are minor crimes, but that is within our prosecutorial discretion. If we suspect you of terrorist activity, we will use our prosecutorial discretion to keep you off the streets."

The Justice Department has now detained more than 1,100 people. Moreover, it has released almost no information concerning the identity of those detained or the charges on which they have been held. Advocacy groups such as the American Civil Liberties Union and the American-Arab Anti-Discrimination Committee have filed requests under the Freedom of Information Act that have gone unheeded.

"I'm not suggesting anyone gets out," says Ronald Weich, a partner at Zuckerman Spaeder who serves as an adviser to the ACLU. "But it is fair and appropriate to ask simply for an accounting."

Ashcroft last month issued a memo to all federal agencies regarding FOIA, saying, "When you carefully consider FOIA requests and decide to withhold records . . . you can

be assured that the Department of Justice will defend your decisions."

Hussein Ibish, communications director for the American-Arab Anti-Discrimination Committee, says: "It's like the administration is saying 'FOIA this.' "

Because so little information about the identity of the detainees has been made public, it is impossible to know about the racial and ethnic makeup of the group. But it is fair to assume that the overwhelming majority of them are men of Middle Eastern background-something arguably unavoidable when an enemy hails from a particular part of the world and subscribes to a particular ideology.

Recently, the Justice Department's announced intention to interview 5,000 additional men between the ages of 18 and 33 who entered the United States during the past year from a number of countries suspected of harboring terrorist cells has elevated fears about widespread racial and ethnic profiling.

"We've got 5,000 people red-flagged," says Ibish. "And they've been identified solely on the basis of markers-gender and national origin-that are protected categories."

The Justice Department says that those interviewed will be selected by virtue of the countries from which their passport was issued-not the countries of their national origin. "These individuals were not selected in order to single out a particular ethnic or religious group, or to suggest that one ethnic or religious group is more prone to terrorism than another," Ashcroft said in a memo to U.S. attorneys last week.

"The entire thing is built on a double-standard," says Georgetown University law professor David Cole. "We are applying things to immigrants that we would never allow applied to citizens."

Step Two: Domestic Surveillance

Earlier this month, the Justice Department announced it was expanding a federal Bureau of Prisons rule that allows monitoring of lawyer and client communications while a client is held in federal custody.

The department says the measure is necessary to prevent terrorists from using their counsel as a means to order new attacks and says it applies to fewer than 20 individuals being held in the federal system.

The increased scrutiny comes at a time when the federal government has been given sweeping new powers to monitor domestic activity.

Last month's "USA Patriot Act," backed by the administration and passed by a largely pliant Congress, allows federal investigators to search residences more freely, gain access to e-mail networks, and share information with intelligence agencies. The expanded powers granted by the new law do not apply solely to terrorist activity.

"The concern I have is if the FBI returns to the kind of identity that we saw most dramatically in the 1960s," Cole says. "In the name of fighting terrorism, they engage in broad-based domestic spying."

Dinh cautioned that the Justice Department has no intention of going that far. "We were very mindful that our values would not fall victim to that attack," Dinh said. "We don't want Americans to fear their government."

Still, Dinh said, principles and theories about criminal justice and punishment have little application here. Models based on deterrence, he says, have little use for those willing to sacrifice their lives.

"We're fighting a war with zealots and ideologues," he said.

Step Three: Military Justice

The controversial military justice tribunal that the Defense Department has now been empowered to create seems to provide a final link in a chain that allows for little sunlight or constitutional protections.

Under Bush's executive order, the trials could be used against foreign nationals, whether they are taken into custody inside this country or abroad. The administration has stressed that some safeguards, such as the right to counsel, will be instituted. Others, such as the right to habeas corpus, will not. The trials could take place outside the country, perhaps on a U.S. military base or Navy aircraft carrier.

"The president's order . . . sends a message to the world that it is acceptable to hold secret trials and summary executions without the possibility of judicial review, at least when the defendant is a foreign national," Sen. Patrick Leahy (D-Vt.), the chairman of the Senate Judiciary Committee, said last week.

The proposal has been in the works almost since the day of the attacks itself. It was developed by about a dozen lawyers from the Justice, Defense, and State departments, the National Security Council, and the White House.

"The traditional processes of criminal justice were inappropriate and ineffective," says an administration official. "This is a war situation."

The official said that the delay in implementing the plan involved determining whether the state of the armed conflict was wide enough to justify the tribunals.

"It's not the conventional model of criminal justice," the official says. "This is all about dispensing military justice attendant to a military conflict."

Randy Moss, who headed the Justice Department's Office of Legal Counsel during the

Clinton administration, says that, to his knowledge, tribunals were never considered during his time in government. Instead, the department under Attorney General Janet Reno pursued terrorists like other criminals, indicting and trying them where possible in federal courts-with debatable results.

"It's a whole new conceptual world," Moss says. "We need to think long and hard when it's time to try somebody in a tribunal. There are good reasons to use the criminal justice system. It sends a signal to the world of the unimpeachable integrity of the process."

Terwilliger, however, believes the tribunals are the most prudent option.

"The idea that we could bring Osama bin Laden or his associates to New York and put them on trial is an absurdity," Terwilliger says.

But the prospect of military justice alarms others, including Gail Taylor, who heads a group seeking the release of an American woman, Lori Berenson, who was branded essentially a domestic terrorist in Peru and was tried in secret by a Peruvian military tribunal. She remains imprisoned in that country.

"It's a very scary thing," Taylor says. "We don't want to become what we criticize."

-Jonathan Ringel contributed to this report.

CORRECTION-DATE: November 26, 2001

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Corrections: In the Nov. 19 issue, in the "Inadmissible" item "Cheney's Gang" (Page 4), an editing error resulted in the misspelling of the name of the president of the American Civil Liberties Union, Nadine Strossen