Ashcroft, Bush Administration Trash Constitutional Protections

by Edward Spannaus

The Bush Administration, with help from its allies in Congress and in the Federal courts, is systematically dismantling Constitutional protections and the limitations on domestic intelligence operations which have been built up over the past quarter-century and, in some cases, for over 50 years. Under the guise of fighting terrorism, it is building up what has been described as a "parallel legal system"—for terrorism suspects; but which is, in fact, headed toward casting a much broader net.

The draconian measures taken by Ashcroft and this Administration, including dragnet sweeps and detentions of Arabs and Muslims, and the use of military detention even for American citizens, have stunned many observers, but they should not have come as any surprise. Lyndon LaRouche warned, in testimony submitted to the Senate Judiciary Committee opposing John Ashcroft's confirmation as Attorney General, that under crisis conditions, Ashcroft would be used to force through dictatorial measures comparable to the 1933 Nazi emergency laws in Germany, the *Notverordnungen* (see *EIR*, Jan. 19, 2001). LaRouche warned that it was not just Ashcroft's role in the Justice Department that would be at issue, but his role as a leading member of the crisis-management team in the Administration as a whole.

Setback for Justice Department

There are some important countervailing pressures. The Dec. 4 ruling by a Federal judge in New York, holding that even a person detained as an "enemy combatant" is entitled to fundamental rights and due process, was a ray of light, in what seems otherwise to be a march toward the darkness of police-state rule.

In a ruling viewed as a significant setback for the Justice Department, U.S. District Judge Michael Mukasey ruled that José Padilla, the so-called "dirty bomber," does have the right to challenge his detention by means of a petition for *habeas corpus*, and that Padilla has the right to meet with his lawyers to prepare such a challenge. Mukasey also ruled that the court does have jurisdiction to determine if Padilla is properly detained as an "enemy combatant." The judge held—and, indeed, he could not have held otherwise—that the President does, in the exercise of his Constitutional powers and duties as Commander in Chief, have the power to detain enemy combatants.

Padilla had been arrested in the United States by FBI agents, and held on a material witness warrant in a Federal detention facility in New York. Just as the court was about to decide on a challenge to Padilla's detention, President Bush signed an order designating Padilla an enemy combatant, and he was removed from Federal custody to a military brig in South Carolina, where he has been held incommunicado ever since.

Early in the Summer, Padilla's lawyer filed a petition for a writ of *habeas corpus* challenging his detention by the military. "My client is a citizen," lawyer Donna Newman said. "He still has constitutional rights, the right to counsel, with the right to be charged by a grand jury. And he has not been charged."

Judge Mukasey's ruling held that the Federal *habeas corpus* statute applies to detainees, and that Padilla has the right to consult a lawyer, and to present and contest facts. Mukasey said that he will rule later whether Padilla was unlawfully detained, and whether the President has the evidence to justify the "unlawful combatant" designation.

Breaking Down the Wall

Ashcroft's new legal system is literally being built on the ruins of the old. The "wall" between domestic law enforcement and foreign intelligence—which goes back to the 1947

National Security Act—has been all but destroyed by a series of actions taken by the government since Sept. 11.

In the 1947 law—which was the product both of the experiences of the war-time clandestine intelligence services (the Office of Strategic Services), and the rivalries between the FBI, the OSS, and military intelligence—a fairly strict line of demarcation was drawn: domestic law enforcement and domestic counter-intelligence operations were to be conducted by the FBI; as opposed to foreign intelligence and clandestine operations, which were assigned to the new Central Intelligence Agency, as well as remaining in military intelligence.

In the wake of the 1970s Congressional investigations of intelligence abuses, this distinction between law enforcement and intelligence operatons was reinforced. Although little-remembered today, the first such investigations concerned *military* surveillance of U.S. citizens. The Congressional investigations and hearings which took place in 1970-73 were triggered by the revelations made by a former Captain in Army Intelligence, Christopher Pyle, who disclosed the existence of a massive database on U.S. citizens maintained by the Army. (An interview with Mr. Pyle follows this article.)

The hearings on military surveillance were followed by investigations by the House (Pike Committee) and the Senate (Church Committee), resulting in voluminous reports detailing domestic intelligence activities and abuses by the FBI, CIA, and military agencies. The Attorney General's Guidelines for Domestic Security Investigations, first issued in 1976, and the 1978 Foreign Intelligence Surveillance Act (FISA), both created a framework with differing standards for foreign intelligence, and domestic security and criminal investigations.

A major distinction growing out the 1970s investigations and legislation, regarding the different standards for electronic surveillance (and later, break-ins or "unconsented searches"), was that there was a lower standard for foreign intelligence wiretaps. Criminal investigations were governed under what is known as "Title III" (of the Omnibus Crime Control Act of 1968), part of the criminal code. It applied already-weakened Fourth Amendment standards for search warrants (a wiretap being a form of a search), but required probable cause that a criminal act was, or was about to be, committed).

For foreign intelligence cases, a still lower standard was required; only a showing that an individual was an agent of a foreign power—not that the person was doing anything illegal. The reason for this, is that protection of the national security, not prosecution of crimes, was the purpose, and that such cases were generally not dealt with in the courts, but by expulsion, or other non-judicial means.

The distinction between foreign intelligence and criminal investigations has now been all but obliterated—with the looser standards of foreign intelligence cases now spilling over into criminal prosecutions.

First, Congress, in its passage of the so-called U.S.A./Patriot Act last year, provided for the use of national-security wiretap information in criminal cases, and also for expanded use of criminal case information for national-security purposes. Then, this was expanded in guidelines issued by Ashcroft, providing for much more information-sharing between agents involved in intelligence, and those involved in prosecutions. And finally, on Nov. 18, the FISA Court of Review, overruled the lower FISA Court (all seven judges of the FISA court, sitting *en banc*), and upheld Ashcroft's guidelines and the relevant portions of the U.S.A./Patriot Act—thus sounding the death-knell for the Fourth Amendment.

This was the only case that the FISA Review Court—composed of three semi-retired judges selected by Supreme Court Chief Justice William Rehnquist—has ever heard. These three characterized the May ruling of the FISA Court (never heretofore considered bleeding-heart liberals) as "unrealistic and confusing," and made the astounding finding that the distinction between foreign intelligence and criminal investigations—maintained for two decades by the courts and by the Justice Department—had no basis in law or in the Constitution! After suggesting that this "misunderstanding" may have contributed to the FBI missing opportunities to prevent the Sept. 11 attacks, the FISA Court of Review reassured us: "That is not to say that we should be prepared to jettison Fourth Amendment requirements in the interest of national security"—just as it did exactly that.

The Military Is Back

Another major shift has been the reinvolvement of the military in domestic matters. Steps in this direction—which implicitly violate the 1878 *Posse Comitatus* statute's prohibition of the involvement of the military in domestic law enforcement, are:

- the creation of the Northern Command, which for the first time establishes a military command over the continental United States;
- the use of military detentions, instead of the civilian court system for terrorist suspects, even—as in the cases of José Padilla and Yasir Hamdi—for U.S. citizens.
- the recent creation by the Defense Department of the "Total Information Awareness" project, headed by Iran-Contra defendant Adm. John Poindexter (ret.). This project is now in the developmental stage in the Defense Advanced Research Projects Agency (DARPA), and it will reportedly have the capability of capturing all citizen transactions such as credit-card purchases, phone calls, travel, and the like. (This is further elaborated in the Pyle interview.)

Parallel Legal System

Reviewing the dramatic changes wrought by Ashcroft and the Bush Administration since Sept. 11, 2001, *Washington Post* said on Dec. 1 that what is being created is "a parallel legal system" for terrorist suspects—one without any of the