Ashcroft and His Policies Are Hit From Many Sides

by Edward Spannaus

The police-state policies of Attorney General John Ashcroft and the Bush-Cheney Administration were slammed in a number of court rulings in mid-December, while Ashcroft himself was personally rebuked by a Federal judge in Detroit, and his campaign committees fined for illegal campaign contributions.

In the latter case, the Federal Election Commission found four violations of the Federal election laws, involving an illegal contribution of a valuable fund-raising list from Ashcroft's "Spirit of America" political action committee, to Ashcroft's (unsuccessful) 2002 Senate re-election campaign committee.

Detention of U.S. Citizen Unconstitutional

The most stunning blow to Ashcroft's and the Administration's "war on terrorism" policies was the Dec. 18 ruling of the U.S. Court of Appeals for the Second Circuit in New York, which held that the President cannot detain an American citizen, seized on U.S. soil, as an "enemy combatant." The ruling involves Jose Padilla, who was arrested at O'Hare Airport in Chicago in May 2002 amidst great fanfare by Ashcroft, who proclaimed: "We have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb." (In the months following Padilla's arrest, law enforcement and intelligence officials said that they had found no evidence of such a plot, and that Padilla was a "small fish" with almost no ties to Al-Qaeda.)

On June 9, 2002, faced with a court hearing at which prosecutors would have been compelled to state whether or not they were bringing criminal charges against Padilla, he was designated by the President as an "enemy combatant" and transferred to a military brig in South Carolina—where he has been held incommunicado ever since.

In what has been almost universally described as a "major setback" to the Administration policies, the Second Circuit ordered that Padilla be released from military custody, at which point he could be transferred back to the civilian court system.

The Appeals Court stated, contrary to the arguments put forward by Ashcroft's Justice Department, that the President does *not* have the inherent authority to detain a combatant within the United States. "The President's inherent constitutional powers do not extend to the detention as an enemy combatant of American citizens without express Congressional authorization," the ruling stated, while declaring: "Padilla will be entitled to the constitutional protections extended to other citizens."

Even the dissenting opinion in the 2-1 ruling, which said that the President does have such power, challenged the government's contention that "Mr. Padilla can be held incommunicado for 18 months with no serious opportunity to put the government to its proof." Referring to the Constitution's provision for *habeas corpus*, the dissenting judge wrote: "No one has suspended the Great Writ."

The ruling stated explicitly that it would not apply to the case of any U.S. citizen who was captured within the zone of combat in Afghanistan (which is the case with Esam Hamdi, who was picked up in Afghanistan, sent to Guantanamo, and then sent to a military brig in the United States, when it was discovered he had been born in Louisiana).

The ruling placed emphasis on a 1971 statute, the "Non-Detention Act," passed in connection with the repeal of the Emergency Detention Act of 1950. The 1971 law bars the detention of U.S. citizens without explicit Congressional authorization. The ruling noted that this was passed with specific reference to the detentions of thousands of Japanese-Americans during World War II.

A second ruling on the same day, by the San Francisco-based Ninth Circuit U.S. Court of Appeals, held that all prisoners being held in the Guatanamo Bay military prison should have access to lawyers and to the U.S. legal system. This is the first such ruling.

"Even in times of national emergency—indeed, particularly in such times—it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike," Judge Stephen Reinhardt wrote for the majority in the Ninth Circuit ruling. "We cannot simply accept the government's position," Reinhardt continued, "that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement."

The Ninth Circuit stayed its own decision, pending a ruling from the U.S. Supreme Court in two cases which the high court has already accepted for review, pertaining to 16 Middle Eastern, British, and Australian detainees at Guantanamo who were denied access to the courts by an earlier ruling of the D.C. Circuit of the U.S. Court of Appeals.

The Second Circuit ruling is considered by many observers to be the more significant of the two, both because it is a much more highly-regarded court than the somewhat maverick Ninth Circuit, and because the issue in the Ninth Circuit case is already before the Supreme Court.

Federal Judge Rebukes Ashcroft

On top of these court rulings, which constitute a serious rebuff of the policies championed by Ashcroft, the Attorney General was personally rebuked with a public admonishment in Federal court in Detroit on Dec. 16; this was in response to Ashcroft's having twice violated that court's order barring attorneys from making any public comments on an ongoing terrorist trial.

"Two serious transgressions committed in this case are simply one too many for the court to abide with no response," said U.S. District Judge Gerald Rosen.

In April, Ashcroft had publicly praised the government's star witness, Youssef Hmimssa, a self-described scam artist from Morocco, saying: "His testimony is, has been of value, substantial value. Such cooperation is a critical tool in our war against terrorism." Ashcroft went on to declare that this should put potential terrorists on notice that there are informants among them.

Judge Rosen responded at the time by saying, "I was distressed to see the Attorney General commenting in the middle of a trial about the credibility of a witness who had just gotten off the stand," and warning: "The Attorney General is subject to the orders of this court."

Then, in August, Judge Rosen had issued an order directing Ashcroft to explain why he had violated the court's gag order. In response, Ashcroft sent a letter to the judge stating: "I regret making those statements. . . . I made a mistake in making statements that could have been considered by the court to be a breach of the court's order." The judge declined to take the more serious step of instituting criminal contempt of court proceedings against Ashcroft.

Meanwhile, two witnesses who were in jail with Hmimssa have told the court that Hmimssa bragged that he had made up his story about the defendants in the case, four Arab immigrants, being involved in terrorism. The judge heard arguments on Dec. 12 as to whether he should throw out the convictions, because prosecutors had withheld additional evidence that Hmimssa had fabricated his story. In this instance, prosecutors failed to turn over a letter from a notorious drug dealer, Milton "Butch" Jones, who had been in jail with Hmimssa, and who said that Hmimssa had bragged about lying to the FBI and Secret Service.

Ashcroft has become notorious for hyping the importance of arrests and convictions in "terrorism" cases, and, true to form, he and the Justice Department have touted the Detroit convictions as an important victory in the war on terrorism.

Phony Statistics

Further evidence of the degree of hype around Ashcroft's "war on terrorism" comes in a newly-issued report which shows how little the Justice Department has actually accomplished as a result of its dragnets. In the two years since the 9/11 attacks, Federal investigators have recommended the prosecution of more than 6,400 people on charges related to terrorism. However, actual charges were filed against only 2,000, and of these, 879 were convicted. But, for those categorized as "international terrorists," the median prison sentence was only 14 days! Only five were sentenced to 20 years or more.

In fact, says the new report from Transactional Records Access Clearinghouse (TRAC), the number of individuals sentenced to more than five years in prison on terrorism charges actually *fell* after 2001. What has risen, is the number of individuals convicted, but sentenced to little or no prison time—meaning that people picked up on "terrorism" charges are being prosecuted for minor infractions and violations.

"This punches a huge hole in the hype the Justice Department has been engaged in," said a spokesman for the American Civil Liberties Union (ACLU). "They are calling people terrorists, on a massive scale, who aren't terrorists."

The latest example of such Justice Department overreaching, came in a Federal courtroom in Alexandria, Virginia on Dec. 19. (This is the Justice Department's favorite venue for such cases; the TRAC study showed that almost 20% of all terrorism prosecutions are brought in this court, known as the "rocket docket" for its speed and pro-prosecution bias. The next highest in ranking among the nation's 90 judicial districts, in North Carolina, had fewer than 4% of all prosecutions.)

In this case, called the "Virginia Jihad" case, prosecutors are trying to piggyback terrorist allegations on top of a garden-variety immigration-fraud case. Although the immigration violations involved would merit only a six-month sentence, prosecutors claim that because the defendant did business with "terrorists," he should be given a ten-year sentence. Judge T.S. Ellis III called the government's argument "nonsense." Ellis also criticized prosecutors for arguing that the defendant had a "social relationship" with a Hamas leader. "It's not a violation to socialize with a specially-designated terrorist," Ellis said. "It may be bad judgment and bad taste and all the rest, but it's not a violation."

And, in what is becoming a well-known pattern in "terrorism" cases, Federal prosecutors admitted that they were seeking a longer sentence to pressure the defendant into "cooperation"; i.e., giving information through which they could link others to alleged terrorists.