

A Coup Against the American Constitution

An interview with Professor Francis A. Boyle

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Dennis Bernstein: You're listening to Flashpoints on KPFA, this is Dennis Bernstein.

George W. Bush declared an extraordinary emergency yesterday that empowers him to order military trials for suspected international terrorists and their collaborators, bypassing the American criminal justice system, its rules of evidence and its Constitutional guarantees. The Presidential Directive signed by Bush as Commander-In-Chief applies to non-U.S. citizens arrested in the United States or abroad.

Joining us to talk about this extraordinary measure is Professor Francis Boyle. He is a Professor of International Law at the University of Illinois at Urbana-Champaign, College of Law. I want to thank you for joining us against on Flashpoints.

Francis Boyle: Thank you Dennis. I'm always happy to be on your show and your station, and I hope things go well in your meetings with Pacifica. It's a great station here. It needs to be kept on the air and going the way its going.

Bernstein: Thank you very much.

Now: secret courts, military tribunals -- give us, first of all, your sense of what the implication is of this and describe what you understand can happen.

Boyle: First, this executive order must be considered within the context of the massive assault that we have seen inflicted on the United States Constitution by the Bush Administration and its Federalist Society lawyers -- such as Ashcroft, Gonzales and their staff -- and I believe we have discussed the Federalist Society on your station before.

Since September 11th, we've seen one blow against the Constitution after another, after another. Recently [we've had] Ashcroft saying that he had unilaterally instituted monitoring attorney-client communications without even informing anyone -- he simply went ahead and did it. This despite the Fourth Amendment ban on unreasonable searches and seizures without a warrant and the Sixth Amendment right to representation by counsel.

I won't go through all the [recently promulgated] measures here. But this is one of the more outrageous and dangerous. As you correctly point out, it applies both to alleged terrorist suspects here in the United States, who are not U.S. citizens and, also, abroad. We have to consider that separately. As for those here in the United States, clearly aliens here are entitled to the protections of the Due Process clause of the Fifth Amendment to the United States Constitution, as well as the Article III (Section 2, Clause 3) protection on basic constitutional rights in criminal cases including indictment, trial before a Federal District judge or jury, [rights relating to] venue and things of that nature. It would take me an entire law review article to go through all the problems with this executive order.

Moreover, there is the International Covenant on Civil and Political Rights to which the United States Government is a party. This is a treaty that, again, affords basic due process protections to *everyone* here in the United States, irrespective of their citizenship.

As for the applicability to alleged al Qaeda members, or even former al Qaeda members, over in Afghanistan [there is] an even more serious problem there. The Third and Fourth Geneva Conventions of 1949 clearly apply to our conflict now with Afghanistan. These alleged al Qaeda members would be protected either by the Third Geneva Convention (if they are fighters incorporated into the army in Afghanistan) or the Fourth Geneva Convention (if they are deemed to be civilians).

Both conventions have very extensive procedural protections on trials that must be adhered to. This is not to say that a trial cannot happen. It can happen, but there are very extensive rules and protections. Basic requirements of due process of law set forth in both of these treaties must be applied under these circumstances. [Failures] to apply these treaties would constitute war crimes.

Second is the question of reprisals. This executive order is *extremely dangerous*, because what it is basically saying to the Taliban Government and to al Qaeda, is "We are not going to give you the protections of either the Third or the Fourth Geneva Conventions' guarantees on trials." What that then means is that they could engage in reprisals against captured members of United States Armed Forces.

As you know, we have soldiers on the ground now -- Special Forces -- in Afghanistan and we also have pilots flying over Afghanistan. Any one of them could be captured by the Taliban Government, by al Qaeda. If a U.S. military [person] were to be captured, clearly he or she would be entitled to all the benefits and protections of the Third Geneva Convention on prisoners of war.

But the problem is now President Bush has basically said, openly, publically and officially that we are *not* going to give prisoner-of-war benefits or Fourth Geneva Convention civilian benefits to al Qaeda members, to former al Qaeda members, or those who have sheltered, harbored or assisted them. That opens

us up for reprisals. It opens up our own Armed Forces to be *denied* prisoner-of-war treatment. So what we're doing here is exposing them to the similar type of treatment, which would be a summary trial, in secret, subject to the death penalty.

Bernstein: Let me jump in here, Professor Boyle.

According to the presidential directive, the President himself will decide which defendants will be tried by military tribunals and Defense Secretary Donald Rumsfeld will appoint each panel and set its rules and procedures including the level of proof needed for conviction. This sounds almost like a quiet coup.

Boyle: Clearly. What we have seen since September 11, if you add up everything that Ashcroft, Bush, Gonzales and their coterie of Federalist Society lawyers have done here, is a *coup d'etat* against the United States Constitution. There is no question about it.

When you add in the Ashcroft police state bill that was passed by Congress -- and several members of Congress admitted, "We never even *read* this thing when we voted for it" -- that's really what we're seeing now, Dennis, a constitutional *coup d'etat*. There is no other word for it.

Bernstein: And what *are* the implications when the President and the Secretary of Defense decide who will be the defendants and what will be the level of proof necessary? It's hard to imagine how that will work.

Boyle: This is really like the old Star Chamber proceedings in the British Empire where someone accused of treason would be called before a chamber in quiet, in secrecy. (It was called the Star Chamber because there were stars on the [ceiling].) [There would be a] summary hearing and the person [would be] sentenced to death. And that was that.

The important point to keep in mind is that the President and the Secretary of Defense are *bound* by the Third and Fourth Geneva Conventions for *anyone* over in Afghanistan or Pakistan. They have *no discretion* there.

As for here in the United States, they are bound by the Constitution and the Bill of Rights, and they are bound by the International Covenant on Civil and Political Rights. There is no exception that the President can unilaterally announce *ipse dixit*. And yet that is exactly what this executive order -- you can read about it in today's *New York Times* -- is attempting to do.

Bernstein: It is, obviously, very concerning to Arab Americans, to people on visas, with green cards. We now have a thousand people in custody. Ashcroft is talking about five thousand more that they want to take into custody. These are all people that could be tried secretly and convicted without [any] evidence that we would [not] know anything about.

Boyle: That is correct. It is like we are becoming a banana republic here in the United States with "disappeared" people which was the phenomenon we all saw in Latin American dictatorships in the 1970s and 1980s, *with the support*, by the way, of the United States Government.

The latest figure I've read is that it is upwards now of eleven hundred aliens -- Arabs and Muslims -- who have just disappeared somewhere. We don't know where they are [or] the conditions under which they are being held. We have no idea if they have access to attorneys. We do know one of them died in highly suspicious circumstances while in custody. There have been reports he was tortured to death.

I should point out the phenomenon of disappearance now is considered to be a crime against humanity under the Rome Statute of the International Criminal Court. So this is *very* dangerous.

The critical question is: *When will the FBI, CIA, National Security Agency start to turn these powers that they have under the Ashcroft police state bill against American citizens?* Clearly that will be the next step.

Bernstein: We have been speaking with Professor Francis Boyle. He is a Professor of International Law at the University of Illinois at Urbana-Champaign, College of Law. And we thank you.

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Professor Francis Boyle obtained a J.D. degree *magna cum laude* and A.M. and Ph.D. degrees in political science from Harvard University. From 1976-78 he was a teaching fellow at Harvard and an associate at its Center for International Affairs. He has written and lectured extensively in the United States and abroad on the relationship between international law and politics. His book, *Defending Civil Resistance Under International Law*, has been used successfully in numerous foreign policy protest trials. Professor Boyle teaches public international law, international human rights law, jurisprudence, and a seminar on the constitutional law of U.S. foreign affairs.

- Professional memberships:
 - American Society of International Law
 - American Bar Association
 - American Political Science Association
 - Lieber Group on the Laws of War

- Consultant to:
 - American Friends Service Committee
 - Amnesty International
- Advisor to: Nuclear Age Peace Foundation
- Assisted Palestinian people in the declaration and development of their independent nation state.
- Author, Biological Weapons Anti-Terrorism Act of 1989, Public Law No. 101-298(1990).
- Legal Representative for Libya at the Court of the Hague for the Lockerbie tragedy.
- Defended Bosnia-Herzegovina in the International Court of Justice.

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