



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Cuban Military Tribunals Reflect Contempt for the U.S. Constitution **by Jacob G. Hornberger**

The federal government has announced that it intends to go forward with military tribunals for trials of suspected terrorists. The trials will not be held in the United States, however, but instead in Cuba, where military tribunals are also a central part of Fidel Castro's "war on terrorism."

In fact, when I [visited Cuba](#) a few years ago, I witnessed on Cuban national television a trial by military tribunal of a suspected terrorist with alleged CIA connections. I have to say that it was quite eerie seeing everybody in the courtroom, including the defense attorneys, dressed in military garb.

The U.S. chief prosecutor, Army Col. Federic L. Borch III, [has announced](#) that he expects a "no-holds-barred legal combat between the two sides, and that fair trials will be the result."

Unfortunately, Borch fails to recognize some important points regarding a fair trial or perhaps fairness, like beauty, is in the eye of the beholder.

First, the chief defense attorney, Air Force Col. Will A. Gunn, is not a private, independent criminal-defense attorney but instead an employee of the U.S. government, the entity that is prosecuting the defendants, and specifically an employee of the U.S. military, the entity that captured and incarcerated the accused terrorists. (Note: In the Cuban trial I witnessed, the defense attorneys were also military men who worked for the government.)

The government is hoping that civilian attorneys will volunteer to travel to Cuba and serve as defense counsel for the accused terrorists and so lend an aura of legitimacy to the proceedings. But the search isn't going too well, given that no one has yet submitted an application. Don Rehnkopf, co-chairman of the National Association of Criminal Defense Lawyers' military law committee [gave the reason](#) — the U.S. military's rules are so stacked against the defense that few civilian lawyers want to apply. (Note: In the Cuban criminal-justice system, the rules are also heavily stacked against the defense; in fact, although the Cuban system permits lawyers to "defend" their clients, every attorney knows that if he does so too vigorously or, even worse, if he has the audacity to question the system that does the stacking, his prospects for professional advancement will be nonexistent.)

Second, according to Eugene Fidell, president of the private National Institute of Military Justice, Gunn's clients will not have the time-honored protection of the attorney-client privilege of

confidentiality because Gunn reports to the same place to which the prosecutors report — the Pentagon’s general counsel’s office.

His words were echoed by Rehnkopf, who explained why truly independent (i.e., private) criminal-defense attorneys were not submitting their applications to participate in the government’s military-tribunal proceedings: “It would be unethical for any attorney to agree to the conditions they’ve set. You have to agree to waive the attorney-client privilege so that the government can monitor your conversations.” Fidell pointedly observed, “It’s unclear how the chief defense counsel becomes more than an administrator.” (Note: In the Cuban criminal-justice system, there is also no attorney-client privilege of confidentiality.)

Third, and perhaps most important, there won’t be a jury trial, at least not like one to which Americans are accustomed. The tribunal will be composed, not of ordinary people from all walks of life whose careers do not turn on their verdict, but of military personnel whose careers ultimately depend on the Pentagon. (Note: Castro’s military-tribunal system doesn’t use jury trials either.)

Ask yourself an important question: Why is the U.S. government holding the trials in Cuba rather than in the United States?

There’s one — and only one — reason: to [avoid the constraints](#) of our Constitution — the document that U.S. officials purportedly take an oath to support and defend. Unfortunately, when it comes to waging the “war on terrorism,” all too many U.S. officials hold our Constitution — and specifically its centuries-old Due Process of Law guarantees — in contempt and instead have much more enthusiasm for how Fidel Castro wages his “[war on terrorism](#)” than they would care to admit.

Can you appreciate more deeply the wisdom, understanding, and foresight of our Founding Fathers for enshrining the Fourth, Fifth, and Sixth Amendments into the Constitution? How would you like to be accused of being a terrorist, taken to Cuba, put on trial before a military tribunal, represented by a military lawyer who answered to the Pentagon and related everything you told him to his bosses, and deprived of the right to appeal your conviction and sentence of death to the U.S. Supreme Court?

By the way, it might not surprise you to know that the suspected terrorist with alleged CIA connections whose trial by military tribunal I saw on Cuban national television was convicted by the Cuban military tribunal and [sentenced to death](#).

Mr. Hornberger is founder and president of The Future of Freedom Foundation and holds a law degree from the University of Texas.

This article was originally published in June of 2003.