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## **When the Military Serves as Police**

**by Jacob G. Hornberger**

What happens when the military is used in a police capacity? You get a “war on terrorism,” one in which people think that the laws of war now apply to the situation. But in actuality, nothing could be further from the truth. What you actually get is a criminal-justice problem that inevitably goes horribly awry, causing the problem to escalate into a deadly and destructive horror story.

Consider the war on drugs. Most everyone concedes that drug dealing and drug possession are federal criminal offenses. Drug offenses are listed as crimes in the U.S. Code. People who are caught violating them are arrested, indicted by a federal grand jury, and prosecuted in U.S. District Court. The Bill of Rights requires the government to accord drug defendants all the rights and guarantees of the Bill of Rights, including trial by jury and due process of law. Incompetent, irrelevant, and illegally acquired evidence is excluded from the trial. The defendant is presumed innocent and must be found not guilty unless the government provides sufficient evidence to convince the jury that the defendant is guilty. Cruel and unusual punishments are prohibited. The defendant has the right to remain completely silent, before, during, and after the proceeding.

Now, consider the following scenario. In a concerted effort, a couple thousand members of powerful Latin American drug cartels cross the Mexican border into the United States. Employing automatic weapons, bombs, and grenades, they begin killing DEA agents, federal judges, and local cops and blowing up federal buildings in retaliation for U.S. military actions against drug cartels in Colombia and DEA actions in Mexico. The drug gangsters slip back into the populace, only to engage in more assaults in the following weeks.

The local cops take on the drug gangs, but they are clearly outgunned. The state governors ask the president to send the U.S. military to help them out. The president persuades Congress to suspend the posse comitatus law, and he reassigns U.S. military forces fighting the drug war in Colombia to the U.S. southern border.

Question: Does the military’s participation in the drug war automatically change the drug war into a real war, like World Wars I and II and the Vietnam War?

Answer: No. The matter continues to remain one of criminal-justice. The gangsters are violating laws against murder, mayhem, drug dealing, illegal entry, and no doubt dozens of other criminal laws on the books. But the fact that the military is being employed to assist the police doesn't mean that the matter is now governed by the laws of war. The gangsters do not become enemy combatants. They remain criminal suspects.

The military is simply being used in a police capacity, albeit one employing much more force than the cops employ. But in principle the situation remains the same: when the military is used in a police capacity, it is still subject to all the rules and processes that govern the police. When the military takes one of the drug suspects into custody, the suspect is entitled to all the rights and guarantees that drug suspects are entitled to when the police take them into custody.

Why don't we use the military to enforce the drug war and other federal crimes here in the United States? Why is there a policy against it? After all, the U.S. military is used to wage the drug war in Colombia, and the Mexican government employs its military to fight the drug war in Mexico. Why don't we do the same thing here?

The reason is that the mindset of a law-enforcement officer is completely different from that of a soldier.

The mindset of policeman is: apprehend the suspect and bring him to justice, which means a trial to determine whether he's guilty, and, in the process, do your best to ensure that innocent bystanders are not hurt.

The mindset of soldier is: kill the enemy and win the war. The killing of innocent bystanders is acceptable as collateral damage, especially if the action results in the killing of the enemy and protection of U.S. troops.

That brings us to the subject of terrorism. Like drug dealing, terrorism is a federal criminal offense. No one can deny that. It has long been listed in the U.S. Code as a crime. That's why terrorists are indicted in U.S. District Court and accorded all the rights and guarantees in the Bill of Rights, just like drug defendants. It's why such famous terrorists as Ramzi Yousef, Zacharias Moussaoui, Jose Padilla, and Timothy McVeigh, to name only a few, were indicted, tried, and convicted in federal court.

In fact, the Yousef case provides a good example for analysis. He's the man who committed the terrorist attack on the World Trade Center in 1993, an attack which, in principle, was no different from the subsequent attack on the same building 8 years later, on September 11.

After attacking the WTC, Yousef, a foreign citizen, escaped from the United States. In 1995, Pakistani law enforcement agents learned that he was holed up in Pakistan, arrested him, and extradited him to the United States, where he stood trial for terrorism in U.S. District Court and convicted. He is now serving a life sentence without possibility of parole in a federal penitentiary.

Was Yousef's attack on the WTC an act of war? No. It was a federal criminal offense. When he was taken into custody, he wasn't taken to a prisoner of war camp. He was instead turned over to U.S. law-enforcement agents.

Let's suppose that Yousef had been located in an area of Pakistan in which he was protected by 3,000 compatriots who had conspired with him to commit the terrorist attack. Would the large size of co-conspirators convert the attack into an act of war? Again, the answer is no. It doesn't make any difference whether a criminal act has 2 co-conspirators or a thousand. It still remains a criminal act, albeit one involving a larger conspiracy.

Suppose that Yousef and his gang were armed with automatic weapons and that the Pakistani police and military were unable to take him into custody. Let's say that the Pakistani government invites the U.S. government to send in its military forces to take Yousef into custody. The U.S. military enters the country, attacks Yousef and his cohorts, and takes him into custody.

Has the matter now been converted into a war, like World Wars I and II and the Vietnam War, simply because the U.S. military is involved and doing the apprehending?

Again, the answer is no. The issue of war does not turn on whether a nation's military branch is used to subdue and apprehend a suspected criminal. Once the military took Yousef into custody, it would be required to do what the police did — turn him over to the authorities for trial. By subduing and apprehending Yousef, the military has simply functioned in a police capacity, albeit one with overwhelming force.

Consider Al Capone and his gang during Prohibition. They used machine guns against local cops and federal agent Elliot Ness and his "untouchables." Did that constitute war? Of course not. But what if it had been necessary to bring the military into the situation to overcome Capone's massive firepower? Again, the military would simply have been operating in a police capacity and, thus, subject to the rules that govern the police.

The problem though, as I mentioned earlier, is that the military, because it has a different mindset than the police, will inevitably treat the matter differently than the police. For example, the police will stake out a building for days where they suspect that a criminal suspect is holed up. That's not what the military would do. If they are reasonably certain that the suspect is in the building, they would simply drop a bomb on it. And if it turned out that the suspect was killed in the blast, the military would consider the operation to be a success, even if a several innocent bystanders were killed in the process.

All this brings us to Osama bin Laden and the military invasion of Afghanistan.

The attack on the World Trade Center on 9/11 was, in principle, no different from the attack on that same building in 1993. Again, terrorism is a federal criminal offense. As the suspected planner of the 9/11 attacks, bin Laden was in no different position from people who conspired with Ramzi Yousef to commit the 1993 attacks.

After the 9/11 attacks, President Bush demanded that the Afghan government turn over bin Laden to U.S. officials, just as Pakistan had turned over Ramzi Yousef to U.S. officials. If the Afghan government had complied with Bush's request, then U.S. law dictated that bin Laden be treated the same way as Yousef and, for that matter, 9/11 conspirator Moussaoui, were treated — that is, indicted in U.S. District Court and prosecuted for conspiring to commit a terrorist attack on the World Trade Center.

However, the Afghan government refused to unconditionally comply with Bush's demand. For one thing, there was no extradition agreement between the United States and Afghanistan. Nonetheless, the Afghan government expressed a willingness to deliver bin Laden to an independent third party for trial if the U.S. government provided evidence establishing bin Laden's complicity in the attacks, the type of evidence that would have been required in an extradition hearing.

Bush refused those conditions and emphasized that his demand for bin Laden was unconditional. The Afghan government refused. At that point, the United States attacked Afghanistan. Thus, that involved the U.S. military in two separate actions: a war against the Afghan government for refusing to comply with Bush's extradition demand and a police action to apprehend Osama bin Laden.

The action against the Afghan government constituted war, like World Wars I and II. It was a conflict between two nation states. Clearly it was an illegal war, given that it was waged without the congressional declaration of war required by the Constitution but it was a genuine war nonetheless.

Not so, however, with respect to the military action intended to apprehend bin Laden. Like our examples regarding Ramzi Yousef, Al Capone, and the Latin American drug gangs, that action remained a police action, one in which the military was being used in a foreign country to employ its overwhelming force to bring a suspected criminal to justice.

The problem arose when the U.S. government made no attempt to distinguish between legitimate prisoners of war and suspected terrorist criminals. Instead, it intentionally conflated the two and then defaulted into making all them — Afghan soldiers and al-Qaeda members alike as “illegal enemy combatants.”

At the same time, of course, was the massive war-on-terrorism propaganda that the Bush administration issued after the 9/11 attacks. In the fear-laden environment of post 9/11, federal officials embarked on a big hype campaign in which they convinced people that this particular criminal offense was either a criminal offense (which is precisely why they indicted and prosecuted 9/11 co-conspirator Moussasoui in federal court) or an act of war, at the option of U.S. officials. At the same time, by conflating the prisoners of war taken captive in the war against Afghanistan with suspected members of al-Qaeda taken captive, U.S. officials succeeded in confusing the separate issues of war and criminal justice in people's minds.

Thus, we have the horribly muddled situation today, one in which some people are saying that some suspected terrorists should be treated as criminal defendants, while others are saying they should be treated as illegal warriors, while others are saying that the government should continue to have the option of treating them either way. Perhaps the most bizarre suggestion came from those who said that the Detroit bomb suspect should have been turned over to the military for torture and then returned to the Justice Department for criminal prosecution in federal court.

We now also have a warped dual-track judicial system with respect to suspected terrorists. One track involves criminal prosecution in the federal judicial system established by the Constitution, where people are presumed innocent and the Bill of Rights applies. The other track involves criminal prosecution in an alternative, competing military tribunal system established by the Pentagon, one in which people are presumed guilty of terrorism, subjected to torture and abuse, and tried in kangaroo proceedings where the Bill of Rights does not apply. The government has the arbitrary, ad hoc power to decide which track people are going to be subjected to.

I would be remiss if I didn't mention the horrific consequences of the Bush administration's decision to employ the military to apprehend bin Laden, unlike the case with Ramzi Yousef several years before.

In Yousef's case, no bombs were dropped on Pakistan. U.S. officials waited patiently for two years before he finally turned up and was taken captive, with no loss of life to innocent bystanders.

Contrast that with the horrific mess in Afghanistan. In the midst of all the anger and hatred that people all over the world now have for the United States, it's easy to forget the outpouring of sympathy and friendship that came from all over the world after 9/11, including from the Muslim community. If U.S. officials had simply waited out the situation, as they had with Yousef, bin Laden would have been isolated. That is, he could never have travelled freely and there were countless people all over the world sympathetic to the United States who would have been willing to turn him, especially for a sizable reward. His recruiting efforts would have been limited to people who were angry with U.S. foreign policy in the Middle East (e.g., unconditional support of Israel, the sanctions against Iraq, etc.)

Instead, the Bush administration sent in the military — the people with the mindset of “kill the enemy even if it kills innocent bystanders,” which produced massive death and destruction in Afghanistan, which in turn converted all that sympathy and friendship for the United States into widespread anger, hatred, and rage, which in turn greatly fueled bin Laden's recruiting efforts. And, oh, by the way, even after 8 long years of death and destruction in Afghanistan, they still haven't apprehended bin Laden.

Finally, I should also point out that the terrorism-is-war crowd has never answered a critically important question: How is the war on terrorism expected to end? That is, how do we know when all the terrorists in the world have been killed? Or, better yet, how do the terrorists

surrender? Does the president of the TAW (the Terrorist Association of the World) sit down on a U.S. ship and sign the surrender papers, just like Japanese military officials did at the conclusion of World War II? Yes, that is ridiculous, but it goes to show what the terrorism-is-war paradigm has led us to — perpetual military conflict, along with perpetual death and destruction, along with ever-increasing military expenditures, along with ever-growing infringements on civil liberties.

It's time to bring the military home and end its role as domestic and international cop.

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