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## **Why Not Send Moussaoui to Havana and Be Done With It?**

**by Jacob G. Hornberger**

Fidel Castro recently did us the favor of showing how a communist regime wages a “war on terrorism.” Three accused hijackers were captured on the high seas attempting to escape communist tyranny and come to the United States. They were taken into custody, given a trial, and convicted; their appeal were denied, and they were executed. The entire process took about a week.

Now that’s what might be called “swift justice” for accused terrorists in Fidel Castro’s “war on terrorism”!

It’s exactly the type of “justice” that many people would like to mete out to accused terrorists in the U.S. government’s “war on terrorism,” including Zacharias Moussaoui, who is under indictment in a federal district court in Virginia for conspiring to commit the September 11 terrorist attacks.

In the midst of a crisis, it’s sometimes important for people to return to first principles, including those that distinguish America’s judicial system from those that exist in other countries, such as Cuba.

Zacharias Moussaoui is innocent of the charges that federal officials have brought against him — that he conspired to participate in the September 11 terrorist attacks. He is as innocent as you and I are of those attacks. On a scale of 1 to 10, one being innocent and 10 being guilty, Moussaoui is not an 8, not a 5, not even a 2. He is a 1. That’s what the presumption of innocence is all about. It presumes every single person that the government accuses of a crime to be 100 percent innocent. And that person remains innocent until the government provides sufficient credible evidence to convince a jury (or judge if the right to trial by a jury has been waived) beyond a reasonable doubt that the person is guilty of the offense with which he is charged.

Is the doctrine of the presumption of innocence nothing more than a “legal technicality” designed to protect people who have committed crimes, as government officials often suggest? On the contrary, it is designed to protect the innocent.

“But the federal government would never accuse an innocent person of a crime, would it?”

You'd have a difficult time convincing Tyson Foods of that, as well as the jury that recently acquitted the company of the federal charge of conspiring to hire illegal immigrants. As one juror put it, "We felt like the government didn't properly present its case. There were a lot of loopholes."

Were government prosecutors 100 percent certain that Tyson was guilty? You can bet on it. But they were wrong. And it happens all the time. That's why our Founders guaranteed that all persons accused of a crime, not just U.S. citizens, could not be deprived of the right to trial by jury, the right to confront witnesses, and the right to be represented by counsel. They understood that throughout history governments had used their massive powers to punish the innocent.

The rights guaranteed by the Fourth, Fifth, and Sixth Amendments to our Constitution did not appear out of nowhere. They are the result of centuries of struggle for liberty that stretch all the way back to Magna Carta in the year 1215.

Despite the oath that federal officials take to "protect and defend the Constitution," the truth is that all too many of them hold the Constitution in utter contempt, despising both the spirit of the document and its essential purposes.

Why else would the feds incarcerate suspected terrorists at the U.S. base in Guantanamo, Cuba? There is one — and only one — reason: to avoid to being subject to the constraints of the U.S. Constitution and the rulings of the U.S. Supreme Court.

But why Cuba, instead of another country where the U.S. military has bases, such as Germany? Because that would then subject U.S. officials and their prisoners to the law of the host country. And while not having all of the protections of due process of law that our country has, Western countries such as Germany do provide fundamental procedural guarantees for people accused of crime, including a fair trial before an independent judge.

U.S. officials know that the Cuban government under Fidel Castro maintains ultimate jurisdiction over the U.S. prisoners at Guantanamo, as the 9th Circuit Court of Appeals (<http://www.iht.com/articles/89624.html>) recently held. And as most people know, Fidel Castro hates such things as independent defense attorneys, jury trials, due process of law, the right to confront witnesses, and other such principles that U.S. officials sometimes refer to as "legal technicalities."

That's why U.S. officials chose Cuba as the place to keep their prisoners — because Fidel Castro shares the contempt that U.S. officials have for the principles of due process of law protected by the U.S. Constitution and because the Castro regime, not the U.S. Supreme Court, ultimately has jurisdiction over U.S. prisoners at Guantanamo.

When U.S. Army general and current U.S. Secretary of State Colin Powell recently condemned Fidel Castro's treatment of political dissidents, did you see him say anything critical of Castro's military-tribunal style of "justice" for the Cuban hijacker-terrorists? (Also noteworthy

is the praise that Powell has publicly heaped on Castro's socialist educational and health-care systems.)

How likely is it that a regime that arrests and executes suspected terrorists within the span of only a week is going to complain about the U.S. government's denial of due process of law to suspected terrorists on the U.S. side of the island? The most that Castro might do is demand that the feds abandon their policy of perpetual incarceration without trial in favor of Castro's system of kangaroo courts. Big deal.

So far, Zacharias Moussaoui is fortunate because he's being tried in U.S. federal district court rather than being transferred to Cuba. But only because the feds are being nice and gracious by keeping him here and not transferring him there.

There's an ancient legal principle known as the "rule of law." What it means is that a necessary prerequisite for a free society is a set of preexisting rules set forth by the government according to which people can adjust their conduct. In that way, people answer to a well-defined law rather than the arbitrary, ad hoc decrees of government officials. The "rule of law" is sometimes contrasted to the "rule of men," a system in which government officials have the arbitrary power to treat people differently.

A good example of the "rule of men" is the manner in which the U.S. government is treating criminal suspects in its so-called war on terrorism. Despite the war rhetoric, the war on terrorism is not a real war, like the war on Iraq. It's a metaphorical war, more akin to the "war on crime," "war on drugs," or "war on the Mafia." People who commit a terrorist act are committing a criminal offense, which is guided by the rules of a nation's criminal-justice system rather than by the rules of war (i.e., the Geneva Convention). That's why countries such as Spain and Germany are indicting and trying suspected terrorists in civil courts rather than taking them into custody as military prisoners of war. It's in fact why U.S. officials indicted Moussaoui — and, for that matter, other suspected terrorists — in federal court rather than treat them as military prisoners.

The "rule of law" problem, however, is that federal officials are reserving the right to do it both ways — to treat a person suspected of a terrorist act as either a criminal defendant or a prisoner of war (or an "illegal combatant" in war). Thus, while they're (correctly) trying Moussaoui in a federal district court for conspiring to commit terrorism, they're holding Jose Padilla and Yaser Esam Hamdi in a military brig for the rest of their lives and prohibiting them from ever again speaking to family, friends, or attorney, under the theory that Padilla and Hamdi are prisoners of war in the so-called war on terrorism. The problem is the same with respect to the U.S. terrorism suspects on the U.S. side of Cuba, who are being treated either as prisoners of war or as "illegal combatants" of war.

The worst part of this discretionary, ad hoc, "rule-of-men" type of system is the enormous "hammer" it provides the government in the Moussaoui case or, for that matter, any of the other

cases in which people are accused of terrorism in federal court. If the defendant doesn't behave well — if he makes too much “trouble” — if he defends himself too aggressively, he might find himself removed overnight to Guantanamo, out of the jurisdiction of a U.S. federal judge and into the jurisdiction of Fidel Castro, who is one of the most famous defenders of the “rule-of-men” type of criminal-justice system.

So Zacharias Moussaoui is fortunate, so far, to be a criminal defendant in federal district court in Virginia. But if things keep going the way they are, there is an increasing likelihood that Moussaoui will soon find himself in Cuba.

The big problem, from the government's perspective, is that Moussaoui is defending himself against the government's charges. Moreover, he is doing so aggressively. And in the eyes of government prosecutors, that's a real no-no.

There's a doctrine in U.S. criminal law called the “exculpatory-evidence rule.” What it means is this: While the government has the right before the trial to keep secret its evidence that incriminates the accused, it may not keep secret evidence that is exculpatory or favorable to the accused. The rule requires that the government reveal to the accused all the evidence it has compiled that tends to show that the accused is innocent. The idea, again, is that American law bends over backwards to make sure that innocent people are not convicted of crimes.

In the Moussaoui case, the government doesn't want to turn over all its exculpatory evidence because to do so will supposedly reveal government “secrets” in its so-called war on terrorism. Why, according to federal officials, the security of the entire nation might be at stake if Moussaoui has access to evidence that points to his innocence.

How many times have we heard that one? (Answer: “Lots.”) Moreover, how many times has the nation been lost because government secrets have been revealed? (Answer: “None.”) How many times was the real reason for the secrets that they revealed wrongdoing by the government? (Answer: “Lots.”)

So what the government is essentially saying in the Moussaoui case is: What matters first and foremost is the protection of our secrets, not the well-being of the (innocent) person we are accusing of a crime. So what if innocent people are convicted and executed? At least we protected our government secrets.

In fact, there is so much secrecy in the Moussaoui case that one could be forgiven for thinking that he's in smack-dab in the middle of the judicial system of the Soviet Union — or even in the middle of Castro's judicial system. Pleadings, motions, and other matters in the file that are customarily open to the public are secret because to disclose them, say Justice Department officials, would jeopardize the entire security of the nation. Hearings are conducted in secret. Just as they were in the Soviet Union. Just as they are in Cuba. Why, even the trial might be conducted in secret!

The April 21 issue of the *New York Times* reported that the Justice Department said that “much of the now-secret court file in the case against Zacharias Moussaoui could be made public but urged the trial judge to keep a handful of documents under seal because they ‘disclose confidential, sensitive details about the foreign relations of the United States’” ([www.nytimes.com/2003/04/22/international/worldspecial/22SUSP.html?ex=1052036216&ei=1&en=8f18d31703f6a971](http://www.nytimes.com/2003/04/22/international/worldspecial/22SUSP.html?ex=1052036216&ei=1&en=8f18d31703f6a971)). I’ll bet they do — and given the history of the U.S. government’s protection of secret documents, embarrassing details no doubt as well.

Lest one jump to the faulty conclusion that the U.S. government has been seized by a born-again devotion to due process of law, however, the actual reason for the opening of the files was not a sense of justice for Moussaoui but rather pressure from the news media to open the files. <http://www.guardian.co.uk/uslatest/story/0,1282,-2591271,00.html>.

Unfortunately, the government didn’t see fit to explain why national security is no longer jeopardized by the opening of the files when, the Justice Department claimed, it would have been before the news media’s pressure succeeded in getting the files opened.

Oh, did I mention that the recent trial of the suspected Cuban hijackers was conducted — yes, you guessed it — in secret?

The secrecy in the Moussaoui case has become so pervasive that even the federal judge in the case has become uneasy about it, referring to the “shroud of secrecy” that has been drawn around the case. [http://news.bbc.co.uk/1/hi/world/middle\\_east/2919517.stm](http://news.bbc.co.uk/1/hi/world/middle_east/2919517.stm)

She recently issued an order, albeit limited in scope, holding that Moussaoui’s rights must reign supreme over government secrecy. Believe it or not, even the judge’s order was kept secret until just a few days ago when the judge unsealed it. The order grants Moussaoui the right to interview captured al-Qaeda prisoner Ramzi Binalshibh as partial fulfillment of the exculpatory-evidence rule.

The feds weren’t going to stand for that. Their “war on terrorism” and “national-security secrets” must reign supreme, even if that might cost the life of a few innocent people. After all, as Lenin pointed out, in order to make an omelet, don’t you have to break a few eggs?

So the feds have appealed the judge’s order to the federal court of appeals, which has scheduled a hearing on the matter. But guess what! The hearing will be held in secret! And guess what else! It will be so secret that not even Moussaoui himself will be permitted to attend, participate, or represent his position, despite the fact that the issue before the court is of life-and-death importance to him ([www.washingtonpost.com/wp-dyn/articles/A5046-2003Apr10.html](http://www.washingtonpost.com/wp-dyn/articles/A5046-2003Apr10.html)).

Moussaoui is prohibited from attending his own hearing and defending his own positions because he lacks a “security clearance” from the FBI that would enable him to be privy to all those “secrets.”

How do you like that? They accuse a man of being a terrorist and then deny him access to the evidence that could exculpate him because they won't grant him a "security clearance" because he's an accused terrorist.

Welcome to a judicial world that combines Franz Kafka's *The Trial* with George Orwell's *1984*.

You see, Moussaoui is representing himself in this case, which he has every right to do. It isn't the wisest thing to do ("A person who represents himself has a fool for a client"), but it is the right of any person to serve as his own attorney.

Rather than permit him to appear and argue his own position, however, the court of appeals is apparently going to permit his "standby attorneys" to appear on his behalf.

What in the world is a "standby attorney"? Good question! He's an attorney who doesn't have a client but claims to represent the best interests of a person who is not his client. Most important, unlike a regular attorney, he answers to the judge who appointed him rather than to the person whose interests he claims to be representing.

In the Moussaoui case, the "standby attorneys" apparently include lawyers whom the judge had initially appointed to represent Moussaoui but whom Moussaoui rejected. So, the lawyers whom Moussaoui rejected and who aren't representing him but instead are serving as the judge's appointed "standby attorneys," answerable to her, will apparently be permitted to attend and participate in the appellate hearing, while the actual person representing the accused — Moussaoui himself — will be excluded.

How's that for a nice legal charade?

Undoubtedly feeling a bit uncomfortable about the charade, the Court of Appeals has ordered that the Justice Department and Moussaoui try to strike a compromise deal before its June 3 hearing, which would relieve the Court of Appeals from having its secret hearing at which the accused (Moussaoui) and his true attorney (himself) will be barred from attending and participating in.

Pursuant to that order, the Justice Department has now submitted an alternative plan to the district judge. But guess what! Yep, you guessed right — disclosing the alternative plan, says the government, would jeopardize the entire security of the nation if it is made public, and so the government has submitted it in secret to the judge. The judge, however, apparently believing that the accused should have the opportunity to consider the government's alternative plan, has ordered ([http://news.bbc.co.uk/1/hi/world/middle\\_east/2974485.stm](http://news.bbc.co.uk/1/hi/world/middle_east/2974485.stm)) that it be made public. (Go re-stock up on your Y2K supplies because surely the nation will collapse when the order is made public, assuming the government decides to obey the judge's order.)

Why did Moussaoui reject the lawyers whom the federal judge appointed to represent him? In many foreign countries, criminal-defense lawyers are nothing more than what might be

called “officers of the government.” What that means is that while such lawyers might put up a show of representing their clients, that’s all it is — a show.

Consider, for example, the recent trial in Cuba of the men who were accused of hijacking the ferry in an attempt to escape communist tyranny and come to the United States. While they presumably had lawyers to represent them, Cuban attorneys know that they’re not supposed to make too many waves and are supposed to go along with the preordained result — “Guilty as charged!”

Thus, what came across loud and clear at the pretrial hearing ([www.washingtonpost.com/wp-srv/nation/transcripts/moussaoui061302.htm](http://www.washingtonpost.com/wp-srv/nation/transcripts/moussaoui061302.htm)) at which the matter of legal representation took place is that Moussaoui rejected his court-appointed attorneys because, quite simply, he doesn’t trust them. He believes that since the lawyers are appointed by the judge (who works for the judicial branch of the government) they’ll sell him down the river. Thus, in his mind, he’s better off representing himself despite his obvious lack of legal competence ([www.nctimes.net/news/2002/20020626/60105.html](http://www.nctimes.net/news/2002/20020626/60105.html)).

Of course, Moussaoui has the right to retain counsel, assuming he has the funds to do so. But I would be remiss if I failed to note what appears to be a very disturbing comment that the presiding judge made to him during that pretrial hearing. Referring to Moussaoui’s retaining an attorney of his own choice, the judge said to him, “Well, the reality of it is, though, that he’s going to have to pass at least the preliminary FBI background to be able to interact with you.”

Say what? If that means what I think it means, the judge is saying that before Moussaoui’s lawyer (or prospective lawyer) can consult with Moussaoui, the lawyer must secure the approval of the FBI, the very agency that is working to help convict Moussaoui.

What’s wrong with that, you say?

Well, just that it flies in the face of the adversarial process that has always distinguished America’s criminal-justice system. The search for truth in our system of justice has always been based on lawyers’ fighting each other tooth and nail. While there might be areas that require cooperation, such as the sharing of witness lists or evidence, the two sides are adversaries in every sense of the word. And while attorneys oftentimes remain personal friends outside the courtroom, such is not always the case. Personal animosities between attorneys based on courtroom battles sometimes last a lifetime.

Permit me to share with you an example from personal experience.

My father was an attorney in Laredo, Texas. When I was a kid, he was hired to represent an enlisted man who was serving at the local Air Force base. The charge: possession of marijuana on the base.

What had happened was that the guy had gone into Nuevo Laredo, Mexico, over the weekend, gotten drunk, purchased the marijuana, and brought it back to his quarters. The next morning, he regretted what he had done, poured the marijuana into the toilet, and flushed it

down. His roommate saw him do this and turned him in to the military police. The military police entered his room, confiscated the vial in which the marijuana had been, ran tests on it, and confirmed the residue was in fact marijuana. The military prosecutors charged him with possession of the marijuana residue still remaining inside the vial.

At that time (I assume the situation is still the same), Judge Advocate General (JAG) lawyers worked together in the same office and took turns serving as prosecutor and defense attorney. The enlisted man had the right to the services of a JAG lawyer and those legal services would have been free. But he simply didn't trust them to fight like the devil on his behalf. So the man hired my father, who did have that reputation in the community.

Just before the trial, my father approached the JAG prosecuting attorney to attempt to negotiate a plea bargain. The prosecutor said to my father, "You have done nothing to cooperate with me and my office, and therefore I'm not going to do you any favors."

I was standing there, and I'll never forget my father staring that guy straight in the face and saying, "Captain, let me set you straight right away. My job is not to cooperate with you and I don't intend to cooperate with you. Do you understand that? My job is to represent my client. I shall see you in court."

At the trial, the prosecutor presented the testimony of the roommate establishing that the defendant had brought the marijuana into the room and then the testimony of a chemist establishing that the residue in the vial was in fact marijuana.

Open and shut case, right? Well, not exactly. My father pointed out to the jury that his client was not charged with possession of the marijuana that he imported from Mexico and which he flushed down the toilet. He was charged only with the residue of marijuana that was found in the vial. Since his client intended to flush all the marijuana down the toilet, my father argued, the jury could not properly convict him for possessing a drug that he did not *intend to* possess and did not *knowingly* possess.

The jury acquitted the man.

In the United States, unlike Cuba, a lawyer's job is not to cooperate or seek favor from government officials. His job is to zealously represent his client, which is exactly what Canon 7 of the attorney's Code of Professional of Professional Responsibility dictates ([http://court.nol.org/rules/Profresp\\_31.htm](http://court.nol.org/rules/Profresp_31.htm)).

How can a criminal-justice system that requires government "pre-approval" of a person's defense attorney not tend toward the selection of the type of lawyers that exist in Cuba—the type of lawyer is more an "officer of the government" than a zealous advocate fighting for his client?

Last January, the *Washington Post* published an editorial entitled "The Moussaoui Experiment" (<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A47610-2003Jan26&notFound=true>) suggesting that the Moussaoui case had turned into a "circus" and ridiculed Moussaoui's attempt to interview a

witness in government custody who might exculpate him from the September 11 terrorist attacks. The *Post* suggested that it was time for the government to consider removing Moussaoui from the jurisdiction of the federal court and transferring him to the control of the Pentagon where he could be swiftly tried by a military tribunal.

Perhaps what the *Post* actually meant to say was that the feds should remove Moussaoui from the federal court's jurisdiction and transfer him to Cuba for trial, but in Havana rather than Guantanamo. The end result would be the same but a lot less hypocritical.

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