



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

fff@fff.org www.fff.org

Our Lives and Liberty Turn on Moussaoui **by Jacob G. Hornberger**

There is little difficulty, and there is often very little gain, in declaring the existence of a right to personal freedom. The true difficulty is to secure its enforcement. The Habeas Corpus Acts have achieved this end, and have done for the liberty of Englishmen more than could have been achieved by any declaration of rights. — A.C. Dicey

Accused terrorist Zacarias Moussaoui is fighting for his life in a death-penalty criminal proceeding brought against him by the federal government. The stakes are obviously high for him; but what most people unfortunately have not yet realized is that the stakes are equally high for us — the American people. Our own lives and liberty turn on what happens to Zacarias Moussaoui.

The immediate issue, as far as Moussaoui is concerned, is the application of the Sixth Amendment to the Constitution, which controls federal prosecutions of both foreigners and U.S. citizens. (Moussaoui is a French citizen.) The Sixth Amendment provides that “the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.”

What that means is that if there are witnesses who will help to establish that the accused is not guilty of the crime with which he is charged, he has the right to use the force of government (i.e., a subpoena or order commanding a witness to appear to testify) to bring those witnesses to testify on his behalf.

The reason that the issue has arisen in the Moussaoui case is that U.S. authorities have taken into custody Ramzi Binalshibh, who is reputed to be one of the principal planners of the September 11 terrorist attacks. Moussaoui wants his testimony to help establish that he (Moussaoui) is innocent of the charges that the feds have brought against him — that is, that he conspired to participate in the September 11 attacks.

The government takes the position that despite the express language of the Constitution, Moussaoui should be denied the benefit of Binalshibh's testimony because to permit him to elicit such testimony would somehow interfere with the government's "war on terrorism." The government's position is that its "national-security secrets" trump even the interests of someone who is trying to establish that he didn't commit the death-penalty offense that the government is accusing him of having committed.

Enforcing the Sixth Amendment, the presiding judge in the case, U.S. District Judge Leonie Brinkema, ordered the government to produce Binalshibh for a videotaped deposition. Moussaoui would be permitted to ask Binalshibh questions under oath and the government given the right to cross-examine the witness, just as if he were testifying at trial. Moussaoui would then be permitted to use the deposition during his trial.

The government appealed Brinkema's order, and it was that issue that was the subject of [a hearing](#) before a panel of the Fourth Circuit Court of Appeals early [in June](#).

That Sixth Amendment issue is of obvious importance to all Americans, especially innocent ones who are accused of a crime by the federal government. If a person is convicted of a crime he didn't commit because his own government would not permit him the Sixth Amendment benefit of testimony from a witness who could have helped to establish his innocence, that places the liberty and security of all us into jeopardy. Since the government's war on terrorism involves the death penalty, it also places our lives in jeopardy.

While that issue is important to us (as well as to Moussaoui), however, it's not the most critical issue. The issue on which our lives, liberty, and security turn much more directly lies with what the feds are threatening to do if Moussaoui succeeds in his attempt to have the Sixth Amendment enforced against them: dismiss the charges against him, transfer him to the control of U.S. military officials, move him to Cuba, and execute him after giving him a "trial" before a U.S. [military tribunal](#).

Why would that process threaten us in addition to Moussaoui? Let me explain.

The following describes [the situation](#) facing the American people today:

With the indefinite incarceration of Americans Jose Padilla and Yaser Hamdi, the president and the Pentagon have effectively taken the position that they have the right to seize any American (or foreigner) within the country on suspicion of being a terrorist, incarcerate him in a military brig or

concentration camp, and deny him the right of [habeas corpus](#) and the opportunity to communicate with family, friends, or even an attorney.

Since the president and the military authorities take the position that such incarceration can last for as long as the so-called war on terrorism is being waged, the military incarceration of any terrorist suspects could effectively last for the rest of their lives.

So far, the president and the Pentagon have exercised that power against only two people — Padilla and Hamdi. If the Supreme Court upholds the exercise of such power, however, then obviously it could be exercised on any number of Americans.

Keep in mind: According to the president and the Pentagon, the civilian courts cannot second-guess the government's determination of who is a terrorist. That means *every American* is at risk at being treated like Padilla and Hamdi. Keep in mind also that the government is already extending its web of suspected terrorists to include drug-law violators, claiming that the drug war and the “war on terrorism” are inextricably [linked](#).

The government also takes the position that its “war on terrorism” is a real war, such as World War II, the Vietnam War, or the war on Iraq, rather than a metaphorical war, such as the “war on drugs” or the “war on crime.” Why is that important? In a real war, the prime objective is to kill the enemy, and there are few constitutional niceties that get in the way of that objective, especially on the battlefield, which, according to the government, is the entire world in the “war on terrorism.” That's in fact why the CIA [killed by missile](#) an American overseas who was suspected of being a terrorist rather than having him arrested and extradited for trial.

As bad as the situation with Padilla and Hamdi is, presumably they are still alive, which means that if the nation can pull itself out of these of these dark days, as the people of Chile and Argentina did during their governments' “wars on terrorism,” innocent people can still be liberated.

But that situation changes dramatically if U.S. government agents have the unfettered power to seize people within the United States, Americans and foreigners alike, remove them to the Pentagon's base in Cuba, and execute them. Of course, there would be the occasional acquittal by the Pentagon's military tribunals, in order to create the appearance of fairness and legitimacy, but in reality the tribunals would do nothing more than serve the same purpose those of Fidel Castro serve —to create the appearance of judicial legitimacy with respect to “terrorists” that the government wants dead.

If the Supreme Court ultimately upholds such a process, or washes its hands of it, and further holds that the Cuban military tribunals are beyond the reach of U.S. law, which is exactly what the president and the Pentagon [contend](#), then no one in the United States is safe. Once a person is taken into custody in the middle of the night and flown in a military transport plane 90 miles away to Cuba, the government would be free to do whatever it wants to that person, including torturing [torturing](#) and killing him.

There will be no judicial oversight at all at the Guantanamo [death camp](#). There would be no limits on the numbers of people who could be herded into the execution chambers — to be gassed, electrocuted, or injected with a lethal substance. Any American citizen labeled a terrorist could be arrested and exterminated, and there's nothing that any court in the land could do about it.

“But the president and the Pentagon would never falsely or mistakenly accuse someone of terrorism!”

Oh?

Then why is it that a jury of ordinary American citizens [in Detroit](#) recently acquitted two people of terrorism? Federal officials had labeled the two defendants terrorists and were convinced that they were terrorists. Yet the jury, after closely examining the government's evidence, found that government's accusation of terrorism was unsupported by the evidence and acquitted the defendants.

Unfortunately, all too many people remain convinced that the president and the Pentagon would not make such mistakes, at least not too often, especially with respect to something as important as the “war on terrorism.” Perhaps that's why they're having such a hard time coming to grips with the failure to find weapons of mass destruction in Iraq.

Moreover, let's also not ignore the fact that the Justice Department is not above knowingly, intentionally, and deliberately falsifying evidence, committing [perjury, and obstructing justice](#) in the attempt to punish innocent people who it believes are guilty.

Have we forgotten that they did all those things because they were convinced that [Randy Weaver](#) was guilty? That the federal judge in the Weaver case had to reprimand Justice Department officials for engaging in such wrongdoing in an official federal court proceeding? That a jury of ordinary Americans rejected the government's accusations against Weaver and instead acquitted him? That another jury did the same thing with respect to the Branch Davidian defendants?

Ask yourself: Would the same result have occurred if Randy Weaver and the Branch Davidians had been tried before Pentagon military tribunal, a [kangaroo-court](#) proceeding in which the rules are so [heavily stacked](#) against the accused that no self-respecting independent criminal lawyer (such as Weaver's attorney, Gerry Spence) would have agreed to represent him?

Is there a danger that the feds will remove Zacarias Moussaoui from the jurisdiction of the federal court and transfer him to the control of the military authorities? You had better believe it. The danger is real, apparent, and close.

First, the presiding judge in the Moussaoui case, Judge Brinkema, made the [suggestion](#) in a secret document that was only recently made public: "To the extent that the United States seeks a categorical, 'wartime' exception" to Moussaoui's rights, she said, "it should reconsider whether the civilian criminal courts are the appropriate fora in which to prosecute alleged terrorists captured in the context of an ongoing war."

Second, the public defender who is serving as a judge-appointed "standby attorney" for Moussaoui's interests has also [suggested](#) that if the government disobeys the judge's order regarding the videotaped deposition of Binalshibh, the judge should dismiss the case and force the government to move it to a Pentagon military tribunal. (With a defense attorney like that, who needs a prosecuting attorney? Perhaps the attorney can be forgiven, however, since he doesn't really represent Moussaoui but instead answers to the judge who appointed him as a "standby attorney." A real attorney with a real client would be fighting like the devil to save his client's life, including attempting to secure a court injunction barring such a transfer of his client to Cuba — before the dirty deed is done and Moussaoui is removed beyond the jurisdiction of injunctive relief.)

Third, in two separate editorials the *Washington Post*, which is arguably the most influential newspaper in the nation's capital, has [lamented](#) the fierce legal fight that Moussaoui is putting up in the defense of his life and [suggested](#) that society might be better off if his case were transferred to a military tribunal.

One can only wonder whether all three — the federal judge, the "standby attorney," and the *Washington Post* editorial board — have become so jaded as to forget that everyone is presumed innocent until proven guilty and that, like Randy Weaver, the Branch Davidians, and the Detroit defendants, Moussaoui might truly be not guilty. All three also might have forgotten that the judicial principles they apply to an unpopular defendant such as Zacarias Moussaoui could ultimately be applied to the rest of us.

(Moussaoui is representing himself but unfortunately he was barred from appearing at the recent Court of Appeals hearing as well as various hearings at the trial court level. Since the hearings supposedly involve government “secrets” and since Moussaoui is an accused terrorist, he can’t get the security clearance that would enable him to defend himself at such hearings. The “standby attorney” concept, which creates the false appearance that Moussaoui is being represented at those secret hearings, performs the useful function of creating an aura of legitimacy for this legal charade.)

There’s still hope, of course, that the U.S. Supreme Court will put a stop to all this and also hold that the Constitution applies to the federal government’s prosecution of suspected terrorists at its base in Cuba. A recent [UPI release](#) reported,

U.S. Supreme Court Justice Stephen Breyer said Monday that the courts, not the government, will decide whether judges have jurisdiction over detainees held in terror investigations.... Breyer said the federal courts should learn from mistakes made in the past. Those mistakes included, he said, “the speech-censoring Alien and Sedition Acts ... during the Republic’s early years [and] President (Abraham) Lincoln’s suspension of the writ of habeas corpus during the Civil War. As a result, Union generals imprisoned 13,000 to 18,000 people — all without benefit of judicial process.” The mistakes also included the internment of Japanese-Americans during World War II, “when the federal government removed 110,000 individuals of Japanese origin, two-thirds of whom were American citizens, from their homes in California, sending them to camps ... in Mountain and Midwestern states.” The Supreme Court, in 1944’s *Korematsu vs. the United States*, “a decision that we now recognize as shameful, held that the Constitution permitted it.”

The problem, however, is twofold: First, given the president’s and Pentagon’s treatment of Padilla and Hamdi (prohibiting them from securing an attorney and defending themselves) and their position that what they do in Cuba is beyond the reach of the Constitution and U.S. law, there’s no assurance that they would permit a person convicted by a military tribunal to appeal the conviction through the federal judicial system before they execute him.

Second, even if the Supreme Court ruled against the president and the Pentagon, there is no assurance that they wouldn’t do exactly what President Lincoln did when he was faced with an adverse judgment of the Supreme Court: ignore it and, even worse, order the arrest of Supreme Court justices, as [Lincoln did](#) with Chief Justice Taney in the case of *Ex Parte Merryman*.

One thing should be clear: If the president and the military authorities had the unfettered power to seize Americans and others living in this country, ignore the nation’s judicial system that was created by our Constitution, exempt themselves from all constitutional limitations, including due

process of law and habeas corpus, and transfer prisoners to Cuba for execution, beyond the reach of the Constitution and the Supreme Court, no American could any longer be considered free, safe, or secure.

Dictatorship would be complete. Freedom of speech, freedom of the press, the right to dissent, and other rights would continue to exist but in name only, given that the government would have the unfettered power to seize and execute any person it labeled a terrorist.

That's why, like it or not, the lives and liberty of the American people ultimately depend on what happens to Zacarias Moussaoui.

Jacob Hornberger is founder and president of The Future of Freedom Foundation and holds a law degree from the University of Texas. Send him [email](#).

This article was originally published in June of 2003.