



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

fff@fff.org www.fff.org

Crossing the Rubicon **by Jacob G. Hornberger**

Have you noticed how many Americans get upset over the comparisons that are increasingly being made between the United States and National Socialist Germany? After all, it's not as though we're living in a police state, right?

Well, if U.S. officials could somehow assure us that the U.S. government's treatment of accused terrorists isn't moving in the same direction in which Nazi Germany treated accused traitors, maybe that would help to put those comparisons to rest.

Habeas corpus

Contrary to popular opinion, the cornerstone of a free society lies not with the freedoms enumerated in the First Amendment. They're important, but much more important is what very well could be considered to be the lynchpin of a free society — the right of habeas corpus — a right that is guaranteed within the original Constitution itself.

Assume that a government has the power to seize anyone it wants within the country and execute him the next day, without any trial whatsoever. Ask yourself: What difference would it make if people in that society had freedom of speech, freedom of the press, and freedom of religion? What difference would it make if they had the right to peaceably assemble and petition the government for redress of grievances?

Having those rights would mean nothing at all, if the government had the omnipotent power to seize any person, including people exercising those rights, and execute him the very next day. Indeed, how many people would exercise those intellectual, political, and religious freedoms without government permission after a few well-publicized executions?

That's why Thomas Macaulay, in his *History of England*, described the Habeas Corpus Act of 1679 as "the most stringent curb that ever legislation imposed on tyranny." It's why the Framers included the following language in the Constitution: "The privilege of the writ of Habeas

Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” It’s why the U.S. Supreme Court in 1969 described the writ of habeas corpus as “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”

Consider the words of the great 19th-century legal scholar A.V. Dicey:

“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.”

How does habeas corpus work? Suppose the executive branch of the federal government takes someone into custody without charging him with a crime. That person has the right to file a petition for writ of habeas corpus in a federal district court — that is, within the judicial branch of our federal government.

If the federal judge issues the writ, it is a judicial order commanding the executive branch to “produce the body” of the person it is holding and show cause why that person is being held against his will. (If he refuses to issue the writ, that order can be appealed to the federal court of appeals.) Assuming the writ is issued, a prompt hearing is scheduled, and if the executive branch is unable to provide adequate grounds for holding the person, the judge orders his immediate release. Under our system of government, the executive branch must comply with the judge’s order.

Obviously, then, the purpose of habeas corpus is to ensure that someone is not being held (and punished) for no good reason. By precluding the incarceration and punishment of an innocent person, habeas corpus provides the cornerstone for the exercise of all other freedoms, without fear of being arrested and punished for exercising them. It is one of a free society’s most powerful checks against the exercise of dictatorial and tyrannical power.

Civil liberties and due process of law

Habeas corpus, however, obviously isn’t enough to secure people’s freedom from arbitrary and tyrannical government. Suppose the government is able to provide evidence that a person has committed a criminal offense. Then the question arises: Under what circumstances and under what standards will the person be tried, convicted, and punished? That’s what civil liberties and due process of law are all about. That’s why our ancestors added the Fourth, Fifth, Sixth, and Eighth Amendments soon after the enactment of the original Constitution.

Ever since our country’s founding, it has been well established that every person who is accused of a crime by the federal government — foreigner and citizen alike — must be tried under

the principles of due process of law, which are enumerated in the Bill of Rights. Those due process principles include trial by jury, the right to counsel, the right to confront witnesses, and the right to subpoena witnesses. They stretch back centuries into British history — all the way back, in fact, to Magna Carta in the year 1215. It is those procedural guarantees that distinguish the American criminal justice system from others throughout history.

The “war on terrorism”

Ever since the September 11 terrorist attacks, however, the president and the Justice Department have effectively taken the position that in cases involving accused terrorists, the executive branch now has the authority to ignore the Bill of Rights and the due process guarantees enumerated in it. Their position is that any person accused of terrorism can be immediately handed over to the control of the military authorities in the Pentagon and held as a “prisoner of war” in the “war on terrorism” for as long as that war continues, which could be forever.

More ominously, they also take the position that they have the authority to try these accused terrorists before military tribunals, which have all the attributes of a sham or kangaroo court whose only purpose is to create an appearance of legitimacy before executing the accused. So far, the official policy is to use military tribunals for foreigners only, not Americans, but since that policy is rooted in politics, rather than any constitutional or legal principle, it can obviously be changed whenever U.S. officials wish to change it.

Here’s how the situation in our own country has degenerated: When the U.S. government invaded Afghanistan, it captured prisoners during the course of its conflict against both the Afghan government (the Taliban) and members of al-Qaeda.

Claiming that its Taliban prisoners and its al-Qaeda prisoners were “illegal combatants,” the feds transferred them to its base at Guantanamo Bay, Cuba, in order to avoid the constraints of the U.S. Constitution and the Geneva Convention, and to avoid the scrutiny of the media, the Red Cross, and human-rights groups. Last March, the D.C. federal Court of Appeals ruled that the U.S. government’s prisoner camp at Guantanamo was beyond the jurisdiction of U.S. federal courts.

When it was discovered that one prisoner being held at Guantanamo was actually a U.S. citizen named Yaser Hamdi, the federal authorities transferred him from Guantanamo to a military brig inside the United States, and he has been held incommunicado ever since. This past Wednesday (July 9), in an 8 to 4 decision, the Fourth Circuit Court of Appeals upheld both the indefinite detention of Hamdi and the Bush administration’s refusal to permit him to see a lawyer. (The case was brought by attorneys retained by Hamdi’s father.) Dissenting Judge Diana Gribbon Motz correctly pointed out that the Hamdi case “marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on

the basis of the executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation."

U.S. officials then began making a series of fateful decisions leading down an increasingly tyrannical path.

They eventually took the position that anyone arrested anywhere in the world, including here in the United States, and charged with terrorism could be treated as an "illegal combatant" as part of the government's "war on terrorism" (and despite the fact that the so-called war on terrorism was being waged long before the September 11 attacks). In other words, no longer were military "justice" and Guantanamo Bay "justice" limited to Taliban or al-Qaeda members captured in the war in Afghanistan. Such "justice" was now to be extended to suspected al-Qaeda members arrested elsewhere as part of the federal government's general "war on terrorism." Later, the principles were extended to include other prisoners in the government's "war on terrorism," such as [Iraqi POWs](#) in the president's recent war on Iraq.

An arbitrary system of "justice"

Thus, when they arrested a U.S. citizen named Jose Padilla on American soil and accused him of being an al-Qaeda terrorist, instead of securing a grand jury indictment against him for terrorism, they turned him over to the control of the Pentagon and prohibited him from speaking to his family, friends, or an attorney. In no circumstances will federal officials permit Padilla to file a petition for writ of habeas corpus, despite the fact that he's being held in a military brig inside the United States against his will. And they claim the authority to keep him detained in this manner indefinitely.

(Before his transfer, however, Padilla had an attorney representing him who filed a petition for writ of habeas corpus as "next friend" for Padilla and requested the judge to permit her [the attorney] to consult with Padilla for the purpose of developing the facts necessary to show that he was being held unlawfully. The government took the position that Padilla's lawyer lacked the necessary "standing" to bring a petition for habeas corpus on his behalf and that since the government had designated Padilla as an "enemy combatant," the government had the authority to keep Padilla from speaking to his attorney. In December 2002, A U.S. District Court in New York rejected the government's positions, holding that Padilla's attorney had the requisite standing to bring the action and that the attorney had the right to consult with Padilla. The government appealed the court's decision and the matter is now pending before the Second Circuit Court of Appeals.)

That means that President Bush and Attorney General Ashcroft have effectively taken the position that they have the authority to suspend habeas corpus for any person taken into custody

in the United States for “terrorism,” despite the fact that the express wording of the Constitution does not carve out an exception of that nature.

Moreover, as the *Washington Post* [editorialized](#) last Sunday (July 6), there is obviously no standard by which federal officials are determining which accused terrorists get to receive due process and which ones are relegated to military “justice.” In fact, it would be difficult to find a clearer example of a violation of the doctrine known as “the rule of law,” which dictates that people should have to answer only to clear cut, definite laws rather than to ad hoc, arbitrary, and discretionary decrees of public officials.

Consider: the two men who are accused of terrorism in the sniper case in Washington are being accorded due process of law by being tried in the federal court system. The terrorists in the 1993 World Trade Center bombing were treated the same way. The same holds true for Timothy McVeigh, who was convicted and ultimately executed for his terrorist attack against a federal building in Oklahoma City. That’s the way the Constitution and the criminal justice system are supposed to work.

Moreover, let’s not forget that John Walker Lindh, who was captured fighting against U.S. forces in Afghanistan, was charged with criminal offenses in U.S. federal court in Alexandria, Virginia, entered into a plea bargain with Justice Department lawyers, pled guilty to “supplying services to the Taliban and carrying an explosive (a grenade) in commission of a felony,” and was ultimately sentenced to 20 years in federal prison.

Indeed, the feds even secured a federal grand jury indictment against Zacarias Moussaoui, who is accused of having conspired to commit the September 11 terrorist attacks and whose case currently resides in a U.S. District Court in Virginia. They also recently tried four people for terrorism in a U.S. District Court in Detroit.

But therein lies the rub!

The Moussaoui case and the Detroit acquittals

Moussaoui, who is representing himself, has caused tremendous legal headaches for Justice Department lawyers, primarily because he is proclaiming his innocence and fighting tooth and nail to save his life. Most recently, he has insisted on his Sixth Amendment right to subpoena a witness who is in federal custody and who Moussaoui insists will help to establish his innocence. The federal judge has sided with the Constitution, much to the deep consternation of the Justice Department, which appealed the judge’s decision to the Fourth Circuit Court of Appeals.

The Court of Appeals denied the government’s appeal on technical grounds and has since denied the government’s motion for rehearing. The government now has three options in the

Moussaoui case: (1) comply with the district judge's requirement that the government produce the witness for a deposition; (2) refuse to comply with the judge's order and appeal an order of sanctions imposed on the government, which the Court of Appeals indicated would satisfy its technical objections; or (3) remove the case entirely from the federal judiciary and transfer Moussaoui to the control of the military authorities in the Pentagon. This past Tuesday (July 8), the district judge gave prosecutors until this coming Monday (July 14) to decide whether they are going to comply with her order.

The so-called threat to "national security" that Moussaoui's fierce defense of his life supposedly has presented has motivated some people, including even the *Washington Post* editorial board, to recommend that federal officials pursue the third option. Ironically, even while criticizing the feds for failing to establish a standard by which one can determine who gets sent down the federal court route and who gets sent down the military route, and even while requesting the feds to establish such a standard, the *Post* continues to repeat the position it took several months ago with respect to Moussaoui (who, by the way, is presumed innocent under our system of justice until proven guilty beyond a reasonable doubt) — that he should be removed from the federal court system and transferred to the military. One would think that the *Post* would want to wait until the standards it requests are established before reaching a conclusion with respect to Moussaoui.

But Moussaoui isn't the only one who is making life difficult for the Justice Department. A few weeks ago, a federal jury composed of ordinary citizens in Detroit acquitted two people whom U.S. officials were accusing of being terrorists, which obviously didn't sit very well with Justice Department officials.

Crossing the Rubicon: The Marri case

Those two events — Moussaoui's fierce defense and the Detroit acquittals — were undoubtedly the critical factors that motivated President Bush and Attorney General Ashcroft to "cross the Rubicon" and commit one of the most ominous acts in our lifetime.

Until a few days ago, a foreigner named Ali S. Marri was scheduled to go to trial in federal district court later this month. A federal grand jury had indicted Marri for lying to the FBI soon after the September 11 attacks and for credit-card fraud.

In a move that many have predicted the administration would pull on Moussaoui because of the strong defense he was putting up in his case, President Bush signed a special order removing Marri from the jurisdiction of the federal district court and turning him over to military authorities in the Pentagon, where he is going to be denied a jury trial and other attributes of due process of law and also possibly be transferred to Guantanamo Bay, where he will be tried by

secret military tribunal, denied independent counsel, denied an appeal to a higher court, and subject to being executed.

Marri, however, already had an attorney representing him in the federal court proceeding. Thus, there was nothing the Justice Department could do to prevent that attorney from filing a petition for writ of habeas corpus on behalf of his client, which is exactly what he did this past Tuesday (July 8) in a federal district court in Illinois.

The Marri habeas corpus hearing might very well be the case in which the U.S. Supreme Court ultimately decides whether the powers that are being wielded by Bush, the Justice Department, and the Pentagon are consistent with the Constitution.

(Keep in mind that under the Constitution and our criminal justice system, there is no distinction between foreigners and American citizens in federal criminal proceedings. Thus, even though Marri is a citizen of Qatar, he is guaranteed the rights of habeas corpus, trial by jury, and counsel, and all the other rights enumerated in the Constitution and in the Bill of Rights and other amendments.)

The significance of the Marri order cannot be overstated. For one thing, as the *Post* [editorial](#) points out, it is a confirmation that there is no standard by which the government is deciding how to treat accused terrorists. The Marri removal-and-transfer order shows that the process is entirely ad hoc and arbitrary, which is one of the distinguishing characteristics of a dictatorial regime. That's why free nations have prized the "rule of law" so highly — because a necessary prerequisite of a free society is that people answer to a fixed law rather than to arbitrary decrees of public officials.

Accused traitors in National Socialist Germany

In Nazi Germany, the state had the power to arrest anyone and have him executed without due process of law. Oh, sometimes there were judicial formalities but for all practical purposes, the result (guilty) and the punishment (death) were preordained.

For example, consider the case of Marinus van der Lubbe, who, along with three others, was accused by Nazi officials of firebombing the German parliament (Reichstag) building in 1933, the year Hitler was made chancellor of Germany. After being tortured by government officials, Lubbe confessed his guilt to the terrorist act and was executed.

However, when the other three defendants went to trial under Germany's judicial system and were acquitted, Hitler decreed that all future treason cases would be tried before a special "People's Court," whose judges would be specially selected members of the National Socialist German Workers' Party.

Trials before the “People’s Court” were conducted in secret, owing to “national security” concerns, and appeals to higher courts were not permitted.

One of the most famous trials before the People’s Court was that of college students Hans and Sophie Scholl and their friend Christoph Probst. Arrested and charged with treason for circulating anti-government leaflets entitled “[The White Rose](#),” they were given a secret trial before Judge Roland Freisler, chief justice of the People’s Court of the Greater German Reich, who had been sent from Berlin to Munich to preside over the case.

Since the trial was conducted in secret, Hans and Sophie’s parents were not permitted into the courtroom. When Magdalena Scholl tried to force her way into the secret proceedings, she screamed, “But I’m the mother of two of the accused,” to which the guard responded, “You should have brought them up better.”

The government permitted Hans and Sophie to have an “approved” lawyer, but he was much too frightened and intimidated to put up any kind of real defense, not that it would have done any good anyway, given that the judge, rather than a jury, was deciding their fate.

After spunky 21-year-old Sophie said to Judge Freisler, “Somebody, after all, had to make a start. What we wrote and said is also believed by many others. They just don’t dare to express themselves as we did,” Judge Freisler announced his verdict: “Guilty,” and then sentenced Hans, Sophie, and Christoph to the guillotine.

Since the defendants were not permitted to appeal to a higher court, “justice” was swift: Within four days of their arrest, German “traitors” Hans and Sophie Scholl and Christoph Probst were tried, convicted, sentenced, and executed. Christoph’s wife, who had just had their third child and was in the hospital, did not even learn about the secret trial until she received word that her husband had been executed.

Did I mention that many of the proceedings in the Moussaoui case are secret, owing to “national security” concerns? In fact, some of the Moussaoui proceedings are so secret that not even Moussaoui himself is permitted to attend them, despite the fact that he is representing himself.

Did I also mention that in those military-tribunal cases, the accused cannot retain a defense attorney who has not been pre-approved by U.S. military officials, that compulsory process of witnesses will not be permitted, that a government official must participate in all conversations between the defense attorney and his client, that jury trials are prohibited, and that the judges will be military officials?

Did I also mention that people who are convicted in those secret military tribunals and sentenced to death have no right to appeal to a higher court, ensuring that “justice” will be swift?

Did I also mention that the D.C. Court of Appeals unanimously held that U.S. courts do not have jurisdiction over anything U.S. military authorities do in Guantanamo?

Did I also mention that there have been numerous reports of [torture](#) being used on accused terrorists by U.S. military officials?

The U.S. Supreme Court

Of course, the last word on all this lies with the U.S. Supreme Court, which has yet to rule on the omnipotent and dictatorial powers that Bush, Ashcroft, and the Pentagon have assumed and are now exercising. The Framers obviously understood the dangers that we would face from people such as Bush and Ashcroft and from a standing army, which is why they enacted Constitution and the Bill of Rights to protect us.

But every single American should refrain from holding his head down and pretending that all this is not happening, as many Germans did in the early 1930s before everything degenerated into total chaos and tyranny.

Given the powers that Bush, Ashcroft, and the Pentagon are wielding, it is impossible to overstate the magnitude of the danger Americans now face from the executive branch of their own government.

If the Supreme Court ultimately permits such powers to stand — or if the president, attorney general, and Pentagon refuse to comply with a ruling of the Supreme Court against them — federal officials will be free to wield those powers not only against the likes of Padilla, Hamdi, Moussaoui, and Marri, but against anyone and everyone.

In that event, genuine freedom in America will have disappeared, for there would no longer be any barriers standing in the way of sedition laws, concentration camps, disappearances, gas chambers, and gurneys, not only at Guantanamo Bay but here at home as well.

That's why the time to stop tyranny is at its inception, not later. Just ask any German.

*Mr. Hornberger is founder and president of The Future of Freedom Foundation and holds a law degree from the University of Texas in Austin. (Thanks to James Bovard, author of the forthcoming book **Terrorism and Tyranny: Trampling Freedom, Justice, and Peace to Rid the World of Evil** [St. Martin's Press, September 2003] for the quotes on habeas corpus.)*

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