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The Washington Post's Cave-In on Moussaoui **by Jacob G. Hornberger**

In a major reversal of position, it seems that the *Washington Post* has abandoned its position that the Justice Department should remove Zacarias Moussaoui from the jurisdiction of a federal district court and transfer him to the control of U.S. military authorities for trial by military tribunal. The apparent dramatic change of position comes in the wake of Judge Leonie Brinkema's imposition of sanctions on the government for willfully disobeying her order requiring the government to comply with the Bill of Rights. The sanctions prohibited prosecutors from seeking the death penalty against Moussaoui and prohibited them from introducing evidence showing that Moussaoui conspired to commit the September 11 attacks, basically reducing the prosecution's case to Moussaoui's overall involvement with al-Qaeda.

For months the *Post* has been suggesting that federal prosecutors seek a dismissal of the federal grand jury indictment against Moussaoui and then try him before a military tribunal. In fact, as recently as September 29, in an editorial entitled "[The Moussaoui Mess.](#)" the *Post* wrote, "We have urged that the government solve the immediate problem of Mr. Moussaoui's case by trying him before a military tribunal...."

However, on October 4 (less than a week after its September 29 editorial), the *Post* published a new editorial entitled "[A Way Out.](#)" in which it suggested that the government should not appeal Judge Brinkema's ruling and instead should proceed to trial in the federal court, proceeding under the constraints of Judge Brinkema's sanctions. While the *Post* didn't expressly state that it was abandoning its position favoring a military tribunal for Moussaoui, that would seem to be the logical inference to be drawn its recommendation that the government proceed to trial in Judge Brinkema's court. (Yesterday — October 7 — the government appealed Judge Brinkema's order to the Fourth Circuit Court of Appeals, thereby rejecting the *Post's* advice not to appeal the order.)

Of course, the advantage of military tribunals, from the standpoint of the government, is that prosecutors don't have to concern themselves with such constitutional niceties as the presumption of innocence, due process of law, compulsory process of witnesses, right to counsel,

right to confront witnesses, habeas corpus, or appeals. The military tribunals can quickly rush to judgment and execution without the defendant's making a "mess" of things by ardently insisting on his innocence and fervently fighting for his life. That's in fact why military tribunals are being used in Cuba, both on the Castro side and the Bush side of the island.

Thus, it's gratifying to read the *Post's* concluding paragraph in its October 4 editorial: "The government now has an opportunity to resolve the Moussaoui case under favorable terms in federal court, having suffered minimal embarrassment and having protected the national security interests it insists are vital. Zest for execution should not cause the Justice Department to pass it up."

The government's decision to appeal Judge Brinkema's ruling is beside the point. What's important is that in criminal prosecutions we require the feds to operate under the Constitution and the rule of law, which entails federal court jurisdiction, rather than military jurisdiction, over federal criminal prosecutions. If we permit the government to deliberately violate the Constitution, set up a parallel kangaroo criminal system, and knowingly disobey federal court orders, then no one in America is safe from that sort of tyranny. That's why every single American should be grateful that the Framers instituted an independent judiciary with the power to enforce the Constitution and the Bill of Rights against the executive branch. Americans should also be grateful that Judge Brinkema has had the courage to do so in the case of an extremely unpopular defendant and to resist the Justice Department's extreme pressure to abandon constitutional principles in the name of the government's "war on terrorism."

The *Post's* editorial board has obviously suffered significant confusion and perplexity over the Moussaoui case. Let's hope that the *Post* has permanently abandoned its position favoring a military tribunal for Moussaoui and now continues to stand fast for the Constitution and the American system of government.

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